Court of Appeal File No: COA-23-1355
Court File No. CV-21-00673084-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

and

PEACE BRIDGE DUTY FREE INC.

Respondent
(Appellant)

APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

BOOK OF AUTHORITIES OF THE RESPONDENT BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY

Date: 15 April 2024

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TO: THE SERVICE LIST

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TAB 1

Hydro-Québec *Appellant*

v.

Louise Matta,
Claude Ouellet,
Christiane Léveillé,
Diane Ouellet,
Patrick Léveillé,
Josée Léveillé and
Entreprises Caslon Inc. *Respondents*

and

Attorney General of Quebec and
Canadian Electricity Association *Interveners*

Hydro-Québec *Appelante*

c.

Louise Matta,
Claude Ouellet,
Christiane Léveillé,
Diane Ouellet,
Patrick Léveillé,
Josée Léveillé et
Entreprises Caslon Inc. *Intimés*

et

Procureure générale du Québec et
Association canadienne de l'électricité
Intervenantes

INDEXED AS: HYDRO-QUÉBEC *v.* MATTA

2020 SCC 37

File No.: 38254.

2019: December 10; 2020: November 13.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Martin JJ.

RÉPERTORIÉ : HYDRO-QUÉBEC *c.* MATTA

2020 CSC 37

N° du greffe : 38254.

2019 : 10 décembre; 2020 : 13 novembre.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Brown et Martin.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Property — Real rights — Servitudes — Conventional servitudes — Electrical transmission lines — Hydro-Québec project to construct new electrical transmission line — Construction of new line to be routed in part through lots on which Hydro-Québec already had servitudes established for another line — Owners of lots objecting that rights arising from established servitudes did not permit construction of new line — Whether Hydro-Québec can develop and modernize its system on basis of rights it holds under decades-old servitudes that were established for specific construction projects.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Biens — Droits réels — Servitudes — Servitudes conventionnelles — Lignes de transport d'électricité — Projet de construction par Hydro-Québec d'une nouvelle ligne de transport d'électricité — Construction de la nouvelle ligne prévue en partie sur des terrains sur lesquels Hydro-Québec possède déjà des servitudes établies pour les besoins d'une autre ligne — Objection des propriétaires des terrains portant que les droits découlant des servitudes établies ne permettent pas la construction d'une nouvelle ligne — Hydro-Québec peut-elle aménager et moderniser son réseau en s'autorisant des droits que lui confèrent des servitudes constituées depuis des décennies dans le cadre de projets de construction particuliers?

On March 13, 2015, the Régie de l'énergie du Québec authorized Hydro-Québec to construct a proposed electrical transmission line between the Chamouchouane transformer substation in Saguenay-Lac-St-Jean and the Bout-de-l'Île transformer substation in Montréal. Hydro-Québec realized

Le 13 mars 2015, la Régie de l'énergie du Québec autorise Hydro-Québec à réaliser un projet de ligne de transport d'électricité entre les postes de transformation de la Chamouchouane, au Saguenay-Lac-St-Jean, et du Bout-de-l'Île, à Montréal. Hydro-Québec constate qu'il

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that it would be easier to run the line through a corridor where it already had servitudes that had been established in the 1970s for a transmission line between the Jacques-Cartier substation near Québec and the Duvernay substation in Laval. Hydro-Québec's acquisition of those servitudes had involved two steps. Having been authorized by order in council to acquire them by expropriation, it had first served and published notices of expropriation, after which it had signed, with the then owners, notarial agreements that described the servitudes being established and provided for various indemnities that would be payable, including for any work that might be carried out on the servient land.

Hydro-Québec claimed that these servitudes authorized it to route up to three electrical transmission lines through the servient land. The current owners of the lots contested this claim; they submitted that the rights arising from the servitudes acquired when the Jacques-Cartier-Duvernay line was constructed were limited to that one line only. They denied Hydro-Québec's employees access to their lots. Hydro-Québec then applied for an injunction. The owners considered the proceedings abusive. In a cross-application, they sought damages for unauthorized use of the servitudes following a reconfiguration of the Jacques-Cartier-Duvernay line in the 1980s and for hardship and inconvenience caused by the existing infrastructure. The proceeding was split so as to have the hearing of the cross-application postponed to a later date, depending on the outcome on the issue of the scope of the servitudes.

The trial judge ruled in Hydro-Québec's favour. He found that the servitudes at issue had originally been acquired by expropriation, but that the subsequent agreements had clarified their purpose and scope. In his view, the agreements were clear: they authorized Hydro-Québec to erect three electrical transmission lines no matter what the origin or the destination of the electricity was. Having concluded that the servitudes established in favour of Hydro-Québec authorized it to place three electrical transmission lines on the owners' lots, the trial judge granted the injunction and dismissed the cross-application.

The Court of Appeal allowed the owners' appeal. It remarked that the trial judge's decision to dismiss the cross-application had been *ultra petita*, as the splitting of the proceeding meant that that matter had not been before him. In the Court of Appeal's view, the servitudes at issue had been acquired by expropriation and should be characterized as servitudes established by operation of law. Their scope therefore had to be analyzed in light

serait commode de faire passer la ligne par un couloir où elle possède déjà des servitudes établies dans les années 1970 pour les besoins d'une ligne de transport entre les postes de Jacques-Cartier, près de Québec, et de Duvernay, à Laval. Hydro-Québec avait acquis ces servitudes en procédant en deux temps. Ayant été autorisée par décret à les acquérir par voie d'expropriation, elle avait d'abord signifié et publié des avis d'expropriation, après quoi elle avait conclu avec les propriétaires de l'époque des conventions notariées décrivant les servitudes établies et prévoyant diverses indemnités payables, notamment pour les travaux susceptibles d'être réalisés sur les fonds servants.

Hydro-Québec prétend que ces servitudes l'autorisent à faire passer jusqu'à trois lignes de transport d'énergie électrique sur les fonds servants. Les propriétaires actuels des terrains contestent cette prétention; ils soutiennent que les droits découlant des servitudes acquises lors de la réalisation de la ligne Jacques-Cartier-Duvernay se limitent à cette seule ligne. Ils refusent aux employés d'Hydro-Québec l'accès à leurs terrains. Hydro-Québec intente alors un recours en injonction. Les propriétaires considèrent les procédures abusives. Dans une demande reconventionnelle, ils réclament des dommages-intérêts pour l'usage non autorisé des servitudes à la suite d'un réaménagement de la ligne Jacques-Cartier-Duvernay effectué dans les années 1980 et pour des troubles et inconvénients occasionnés par les infrastructures en place. Une scission de l'instance reporte à une date ultérieure l'audition de la demande reconventionnelle, suivant l'issue du débat sur la portée des servitudes en litige.

Le juge de première instance donne raison à Hydro-Québec. Il constate que les servitudes en litige ont d'abord été acquises par expropriation, mais que les conventions intervenues par la suite ont apporté des précisions quant à leur objet et leur portée. Selon lui, les conventions sont claires : elles autorisent Hydro-Québec à ériger trois lignes de transport d'électricité, peu importe l'origine ou la destination du courant. Ayant conclu que les servitudes établies en faveur d'Hydro-Québec l'autorisent à placer trois lignes de transport d'énergie électrique sur les terrains des propriétaires, le juge accorde l'injonction et rejette la demande reconventionnelle.

La Cour d'appel accueille le pourvoi formé par les propriétaires. Elle relève que le juge de première instance s'est prononcé *ultra petita* en rejetant la demande reconventionnelle dont il n'était pas saisi en raison de la scission de l'instance. Selon la Cour d'appel, les servitudes en litige, acquises par voie d'expropriation, se qualifient de servitudes établies par l'effet de la loi. Leur portée doit par conséquent s'analyser à la lumière des limites imposées

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of the limits imposed by the order in council that authorized them. The Court of Appeal accordingly concluded that Hydro-Québec could not rely on the servitudes in its favour for the construction of the new line and that it had to proceed by way of new expropriations or agreements.

Held: The appeal should be allowed.

All the conclusions of the trial judge's decision are restored, except the one dismissing the cross-application. The case is remanded to the Superior Court for hearing of the cross-application. The power line servitudes in favour of Hydro-Québec are not limited to the Jacques-Cartier-Duvernay Line; they authorize Hydro-Québec to route a second electrical transmission line through the owners' lots.

The trial judge was correct in characterizing the post-expropriation agreements as servitude agreements. The order in council, the notices of expropriation and the agreements are different types of documents, and it is important to distinguish them from one another. An order in council is an administrative act for the purpose of authorizing the exercise of the power to deprive a property owner of the enjoyment of the attributes of his or her right of ownership. Filing a notice of expropriation and the documents related to it is an administrative act that establishes and individualizes the servitude. As for the agreement, it relates to the ordinary exercise of civil rights and to the private law rules of contract. A servitude acquired by expropriation is, according to the classification set out in art. 1181 of the *Civil Code of Québec*, established by operation of law. This being the case, neither the law nor public order bars the expropriating party and the expropriated party from clarifying or modifying such a servitude by mutual agreement: notices of expropriation thus do not preclude parties from negotiating conventional servitudes. It must be presumed that the servitude agreement, if entered into after the notice of expropriation, contains a more faithful definition of the scope and terms for exercise of the servitude of public utility than does the notice of expropriation. Servitude agreements are subject to the rules applicable to the interpretation of contracts. If their words are clear, effect must be given to the clearly expressed intention of the parties.

In the case at bar, the agreements at issue include a complete description of the servitudes, adding some details that do not appear in the notices of expropriation. In these circumstances, the agreements are the titles to which the owners of the servient land and the dominant land must refer in exercising their respective rights. Because the agreements are clear, the scope of the servitudes must be

par le décret qui les a autorisées. La Cour d'appel conclut donc qu'Hydro-Québec ne peut s'autoriser des servitudes dont elle bénéficie pour construire la nouvelle ligne et qu'elle doit procéder par de nouvelles expropriations ou conventions.

Arrêt : Le pourvoi est accueilli.

Toutes les conclusions du jugement de première instance sont rétablies, sauf celle rejetant la demande reconventionnelle. Le dossier est retourné à la Cour supérieure pour l'audition de la demande reconventionnelle. Les servitudes de transport d'énergie électrique dont bénéficie Hydro-Québec ne sont pas restreintes à la ligne Jacques-Cartier-Duvernay; elles autorisent Hydro-Québec à faire passer une deuxième ligne de transport d'énergie électrique sur le terrain des propriétaires.

Le juge de première instance a eu raison de qualifier les conventions postérieures à l'expropriation de conventions de servitudes. Le décret, les avis d'expropriation et les conventions sont des documents de nature différente qu'il importe de bien distinguer. Le décret est un acte administratif destiné à autoriser l'exercice du pouvoir de priver un propriétaire de la jouissance des attributs de son droit de propriété sur un bien. Le dépôt d'un avis d'expropriation et des documents y afférents est un acte administratif qui constitue et individualise la servitude. Quant à la convention, elle se rattache à l'exercice ordinaire des droits civils et aux règles contractuelles propres au droit privé. La servitude acquise par expropriation est établie par l'effet de la loi suivant la classification énoncée à l'art. 1181 du *Code civil du Québec*. Cela étant, ni la loi ni l'ordre public ne s'opposent à ce que l'expropriant et l'exproprié précisent ou modifient, par un accord de gré à gré, la servitude ainsi constituée : les avis d'expropriation n'empêchent donc pas les parties de négocier des servitudes conventionnelles. On doit présumer que la convention de servitude, si elle est postérieure à l'avis d'expropriation, définit plus fidèlement la portée et les modalités d'exercice de la servitude établie pour l'utilité publique que ne le fait cet avis d'expropriation. Les conventions de servitude sont soumises aux règles applicables à l'interprétation des contrats. Leurs termes, s'ils sont clairs, imposent le respect de la volonté manifeste des parties.

En l'espèce, les conventions en litige décrivent les servitudes de façon complète en y apportant des précisions qui ne figuraient pas dans les avis d'expropriation. Dans ces circonstances, les conventions sont les titres auxquels les propriétaires des fonds servants et dominants doivent se reporter pour l'exercice de leurs droits respectifs. Les conventions étant claires, on doit s'en remettre à leur

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determined in light of their words. The agreements do not mention any restrictions regarding the origin or destination of the electricity. The servitudes are therefore not limited to the line between the Jacques-Cartier and Duvernay substations. The servitudes on the owners' lots authorize Hydro-Québec to construct the Chamouchouane-Bout-de-l'Île line.

Furthermore, the servitudes concern the lines crossing the servient land, not the substations located at either end of those lines. There is nothing in the words of the agreements that would explicitly or implicitly prevent Hydro-Québec from redirecting one of its lines toward another substation. The right to operate electrical transmission lines includes the right to make modifications such as the one that was made in the reconfiguration of the Jacques-Cartier-Duvernay line.

Hydro-Québec's proceedings are not abusive. It sought to use the servitudes that had been granted to it by the owners' predecessors in title and had been published in the land register. The owners were presumed to be aware of the rights granted by these servitudes. They nonetheless blocked construction of the new electrical transmission line and forced Hydro-Québec to seek injunction orders. It is not up to Hydro-Québec to pay for the steps they took.

Cases Cited

Approved: *Michaud et Simard Inc. v. Commission hydro-électrique de Québec*, [1982] C.A. 169; **referred to:** *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729; *J.G. v. Nadeau*, 2016 QCCA 167; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478; *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28, [2019] 2 S.C.R. 406; *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59; *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101; *Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35, [2018] 2 S.C.R. 577; *Domaine de la rivière inc. v. Aluminium du Canada ltée*, [1996] R.D.I. 6; *Sani Sport inc. v. Hydro-Québec*, 2008 QCCA 2498, [2009] R.J.Q. 26; *Centre de distribution intégré (CDI) inc. v. Développements Olymbec inc.*, 2015 QCCA 1463,

libellé pour déterminer la portée des servitudes. Elles ne font mention d'aucune restriction quant à la provenance ou à la destination du courant électrique. Dès lors, la portée des servitudes n'est pas limitée à la ligne entre les postes de transformation Jacques-Cartier – Duvernay. Les servitudes grevant les lots des propriétaires autorisent Hydro-Québec à construire la ligne Chamouchouane-Bout-de-l'Île.

Par ailleurs, les servitudes portent sur les lignes qui traversent les fonds servants et non sur les postes de transformation situés aux extrémités de ces lignes. Il n'y a rien dans le texte des conventions qui empêcherait explicitement ou implicitement Hydro-Québec de rediriger l'une de ses lignes vers un autre poste de transformation. Le droit d'exploiter des lignes de transport d'énergie électrique comprend celui d'y apporter des modifications, comme celle survenue lors du réaménagement de la ligne Jacques-Cartier-Duvernay.

Les procédures entreprises par Hydro-Québec ne sont pas abusives. Cette dernière a cherché à faire usage des servitudes que lui avaient consenties les auteurs des propriétaires et qui avaient été publiées au registre foncier. Les propriétaires étaient présumés connaître les droits conférés par ces servitudes. Ils ont néanmoins fait obstacle à la construction de la nouvelle ligne de transport d'électricité et contraint Hydro-Québec à solliciter des ordonnances d'injonction. Il n'appartient pas à Hydro-Québec de faire les frais de leurs démarches.

Jurisprudence

Arrêt approuvé : *Michaud et Simard Inc. c. Commission hydro-électrique de Québec*, [1982] C.A. 169; **arrêts mentionnés :** *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Benhaim c. St-Germain*, 2016 CSC 48, [2016] 2 R.C.S. 352; *H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401; *Salomon c. Matte-Thompson*, 2019 CSC 14, [2019] 1 R.C.S. 729; *J.G. c. Nadeau*, 2016 QCCA 167; *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Québec (Directeur des poursuites criminelles et pénales) c. Jodoin*, 2017 CSC 26, [2017] 1 R.C.S. 478; *Modern Concept d'entretien inc. c. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 CSC 28, [2019] 2 R.C.S. 406; *Uniprix inc. c. Gestion Gosselin et Bérubé inc.*, 2017 CSC 43, [2017] 2 R.C.S. 59; *Churchill Falls (Labrador) Corp. c. Hydro-Québec*, 2018 CSC 46, [2018] 3 R.C.S. 101; *Lorraine (Ville) c. 2646-8926 Québec inc.*, 2018 CSC 35, [2018] 2 R.C.S. 577; *Domaine de la rivière inc. c. Aluminium du Canada ltée*, [1996] R.D.I. 6; *Sani Sport inc. c. Hydro-Québec*, 2008 QCCA 2498, [2009] R.J.Q. 26; *Centre de distribution intégré (CDI) inc. c. Développements Olymbec inc.*, 2015

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59 R.P.R. (5th) 1; *151692 Canada inc. v. Centre de loisirs de Pierrefonds enr.*, 2005 QCCA 376, [2005] R.D.I. 237.

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Claude Marseille and *Ariane Bisaillon*, for the appellant.

Vincent Karim and *Ricardo Hrtschan*, for the respondents.

Stéphane Rochette, for the intervener the Attorney General of Quebec.

David Outerbridge and *Stacey Reisman*, for the intervener the Canadian Electricity Association.

English version of the judgment of the Court delivered by

CÔTÉ J. —

I. Overview

[1] Electricity is increasingly ubiquitous in our lives today . . . and in our land registers.

[2] The appellant operates the largest electrical power system in North America, with more than 34,000 km of transmission lines. The benefits to Quebecers are many, and the acts of servitude that form the legal framework for this system are just as numerous. There are reportedly 37,405 such servitudes in total, including many that were established a long time ago. Can the appellant develop and modernize its system on the basis of rights it holds under decades-old servitudes that were established for specific construction projects? That is the question raised by this appeal.

[3] In a context in which Quebecers' energy needs are growing and the sources of electricity generation are changing, the appellant must adapt its system to ensure that its service remains reliable and safe. The 1998 ice storm was particularly revealing: major load centres can be especially vulnerable, hence the need for more and more lines and interconnections.

Claude Marseille et *Ariane Bisaillon*, pour l'appelante.

Vincent Karim et *Ricardo Hrtschan*, pour les intimés.

Stéphane Rochette, pour l'intervenante la procureure générale du Québec.

David Outerbridge et *Stacey Reisman*, pour l'intervenante l'Association canadienne de l'électricité.

Le jugement de la Cour a été rendu par

LA JUGE CÔTÉ —

I. Aperçu

[1] L'électricité est de plus en plus omniprésente dans nos vies modernes . . . et dans nos registres fonciers.

[2] L'appelante exploite le plus vaste réseau électrique en Amérique du Nord, qui comprend plus de 34 000 km de lignes de transport d'électricité. Les bénéfices qu'en retire la population québécoise sont nombreux; les actes de servitude qui en forment l'armature juridique le sont tout autant. Il en existerait au total 37 405, dont plusieurs ont été établis il y a longtemps. L'appelante peut-elle aménager et moderniser son réseau en s'autorisant des droits que lui confèrent des servitudes constituées depuis des décennies dans le cadre de projets de construction particuliers? C'est la question soulevée par le présent pourvoi.

[3] Dans un contexte marqué par l'accroissement des besoins énergétiques de la population québécoise et par l'évolution des sources de production d'électricité, l'appelante doit adapter son réseau afin d'en maintenir la fiabilité et la sécurité. La crise du verglas de 1998 fut particulièrement révélatrice : les grands centres de consommation peuvent s'avérer particulièrement vulnérables, d'où la nécessité de multiplier les lignes et les interconnexions.

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[4] In recent years, the appellant designed a proposed electrical transmission line that would make it possible to reinforce the power supply to the metropolitan loop of Greater Montréal and address a significant increase in demand in Terrebonne. This line was originally supposed to run from the Chamouchouane transformer substation in the Saguenay-Lac-Saint-Jean region to the Bout-de-l'Île transformer substation in Montréal. But it was subsequently decided that the line would be routed to the Judith-Jasmin substation in Terrebonne and that a link would be constructed between that substation and the Bout-de-l'Île substation. The estimated cost of the project is $1.34 billion.

[5] In planning the route to be taken by the Chamouchouane-Bout-de-l'Île line, the appellant realized that it would be easier to run the line through a corridor in the southern part of the province where it already had servitudes. These servitudes had been established in the 1970s for a transmission line between the Jacques-Cartier substation near Québec and the Duvernay substation in Laval. The land making up this corridor included lots belonging to the respondents.

[6] The appellant held public information sessions and notified the affected individuals in writing of what its project would entail. Its employees went to the respondents' lots in order to conduct surveying and clearing work, but were denied access to them. The appellant then applied for an injunction, the merits of which the respondents have challenged, arguing, among other things, that the servitudes established in the 1970s are valid only for the Jacques-Cartier-Duvernay line and do not permit the construction of a new line.

II. The Parties

A. *The Appellant*

[7] The appellant operates a public enterprise constituted under the *Hydro-Québec Act*, CQLR, c. H-5, that is engaged in the generation, transmission and distribution of electricity. The *transmission* component of its undertaking consists in sending power produced in its hydroelectric power plants to

[4] Au cours des dernières années, l'appelante a conçu le projet d'une ligne de transport d'électricité qui permettrait de renforcer l'alimentation de la boucle métropolitaine du Grand Montréal et de répondre à la croissance importante de la demande en provenance de Terrebonne. À l'origine, cette ligne devait partir du poste de transformation de la Chamouchouane, au Saguenay-Lac-Saint-Jean, pour se rendre au poste de transformation du Bout-de-l'Île, à Montréal. Il a toutefois été décidé de la diriger vers le poste Judith-Jasmin, à Terrebonne, et de construire un lien entre ce poste et celui du Bout-de-l'Île. Le coût de la réalisation du projet est estimé à 1,34 milliard de dollars.

[5] En préparant le tracé de la ligne Chamouchouane-Bout-de-l'Île, l'appelante constate qu'il serait commode de la faire passer par un couloir du sud de la province où elle possède déjà des servitudes. Celles-ci ont été établies dans les années 1970 pour les besoins d'une ligne de transport entre les postes de Jacques-Cartier, près de Québec, et de Duvernay, à Laval. Parmi les terrains qui font partie de ce couloir se trouvent ceux des intimés.

[6] L'appelante tient des séances d'information publiques et avise par écrit les principaux intéressés de la teneur de son projet. Ses employés, s'étant rendus chez les intimés pour y réaliser des travaux d'arpentage et de déboisement, se voient refuser l'accès aux terrains. L'appelante intente alors un recours en injonction, dont les intimés contestent le bien-fondé en prétendant notamment que les servitudes établies dans les années 1970 ne valent que pour la ligne Jacques-Cartier-Duvernay et ne permettent pas la construction d'une nouvelle ligne.

II. Les parties

A. *L'appelante*

[7] L'appelante exploite une entreprise publique de production, de transport et de distribution d'énergie électrique constituée en vertu de la *Loi sur Hydro-Québec*, RLRQ, c. H-5. Le volet *transport* de son entreprise consiste à acheminer l'énergie produite dans ses centrales hydroélectriques à des postes de

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transformer substations through high-voltage lines. At the substations, voltage is "stepped down" so that the electricity can be distributed to places where it will be consumed: this is the *distribution* component.

[8] As a mandatary of the government, the appellant is required to supply power and to supply Quebecers with heritage pool electricity:[1] *Hydro-Québec Act*, ss. 3.1.1 and 22. It has, besides the special rights and powers conferred upon it by law, all those pertaining to legal persons in general, such as the capacity to enter into contracts and to possess property: *Hydro-Québec Act*, ss. 3 and 3.1.2; *Civil Code of Québec* ("*C.C.Q.*"), arts. 298 to 303. It may construct, purchase or lease any immovables required in order to transmit or distribute power: *Hydro-Québec Act*, s. 29 paras. 1 and 2.[2] It may also, with the authorization of the government, acquire by expropriation any immovable or servitude required for the generation, transmission or distribution of power, even before the execution of the proposed work is authorized: *Hydro-Québec Act*, ss. 33(3)(*b*) and 35.

B. *The Respondents*

[9] The respondents are the owners of lots on which the appellant claims to hold servitudes that authorize it to construct electrical transmission lines.

[1] Heritage pool electricity is defined as follows in the *Thésaurus de l'activité gouvernementale* on the Quebec government's web portal: [TRANSLATION] "Heritage pool electricity is the power produced by plants that were in service in 1998, in the amount of 165 TWh (terawatt-hours), for which a lower heritage rate is applied. Hydro-Québec's 'heritage' plants include those of the La Grande Complex, the Manicouagan River, the Ottawa River and the St. Lawrence River" (online).

[2] At the time the Jacques-Cartier-Duvernay line was constructed, however, the Act required that the acquisition and construction of immovables first be authorized by the Lieutenant-Governor in Council: *Hydro-Quebec Act*, R.S.Q. 1964, c. 86 ("*HQA*"), s. 29 para. 6, as amended.

transformation au moyen de lignes à haute tension. Dans les postes de transformation, la tension est réduite pour que l'électricité puisse être distribuée jusqu'aux lieux de consommation : c'est le volet *distribution*.

[8] À titre de mandataire de l'État, l'appelante a l'obligation de fournir de l'énergie et d'approvisionner la population québécoise en électricité patrimoniale[1] : *Loi sur Hydro-Québec*, art. 3.1.1 et 22. Elle possède, outre les droits et pouvoirs spéciaux qui lui sont conférés par la loi, tous ceux qui appartiennent généralement aux personnes morales, comme la capacité de contracter et de posséder des biens : *Loi sur Hydro-Québec*, art. 3 et 3.1.2; *Code civil du Québec* (« *C.c.Q.* »), art. 298 à 303. Il lui est loisible de construire, d'acheter ou de louer tous les immeubles requis pour le transport ou la distribution d'énergie : *Loi sur Hydro-Québec*, art. 29 al. 1 et 2[2]. Avec l'autorisation du gouvernement, elle peut en outre acquérir par expropriation les immeubles et les servitudes requis pour produire, transmettre ou distribuer de l'énergie, et ce même avant que l'exécution des travaux projetés n'ait été autorisée : *Loi sur Hydro-Québec*, art. 33(3)*b*) et 35.

B. *Les intimés*

[9] Les intimés sont les propriétaires de terrains sur lesquels l'appelante prétend détenir des servitudes qui l'autorisent à construire des lignes de transport d'énergie électrique.

[1] L'électricité patrimoniale est définie comme suit dans le *Thésaurus de l'activité gouvernementale* de Portail Québec : « Le bloc patrimonial d'électricité désigne l'énergie produite à partir du parc d'équipements en service en 1998, soit 165 twh (terawatt heure) et pour lequel un tarif patrimonial plus bas est appliqué. Ces centrales "patrimoniales" d'Hydro-Québec comprennent les centrales du Complexe La Grande, de la rivière Manicouagan, de la rivière des Outaouais et du fleuve St-Laurent » (en ligne).

[2] À l'époque de la construction de la ligne Jacques-Cartier-Duvernay, la loi exigeait toutefois l'autorisation préalable du lieutenant-gouverneur en conseil pour l'acquisition et la construction d'immeubles : *Loi d'Hydro-Québec*, S.R.Q. 1964, c. 86 (« *LHQ* »), art. 29 al. 6 et amendements.

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III. Background

A. *Construction of the Jacques-Cartier-Duvernay Line and Establishment of the Servitudes at Issue*

[10] The servitudes at issue were established in the 1970s in connection with the construction of the Jacques-Cartier-Duvernay line. The sequence of events surrounding their establishment involved three documents — an order in council, notices of expropriation, and agreements — large excerpts of which are reproduced below to elucidate the decisions of the courts below and the arguments raised by the parties.

(1) Order in Council 3360-72

[11] On November 8, 1972, the government issued Order in Council 3360-72, which authorizes the appellant to obtain, by mutual agreement or by expropriation, any immovable property and real rights it needs in order to construct power transmission and distribution lines between the Jacques-Cartier and Duvernay substations. The key portions of this order in council read as follows:

[TRANSLATION]

IN THE MATTER OF authorization for Hydro-Quebec to construct electrical transmission and distribution lines between the Jacques-Cartier transformer substation and the Duvernay transformer substation and to acquire the immovable property and real rights required for this purpose.

WHEREAS section 33 of the "Hydro-Quebec Act" (R.S.Q. 1964, chapter 86, as amended) provides that Hydro-Quebec may "acquire by expropriation any immoveable, servitude or construction required for the exploitation of waterpowers held by the Commission or for the generation, transmission or distribution of power";

WHEREAS Hydro-Quebec wishes to construct the electrical power transformer substations, high-voltage or other electrical power transmission and distribution lines, communications networks of any kind, access roads and buildings required for the construction and operation of

III. Contexte

A. *La construction de la ligne Jacques-Cartier-Duvernay et l'établissement des servitudes en litige*

[10] Les servitudes en litige ont été établies au cours des années 1970, dans le cadre de la construction de la ligne Jacques-Cartier-Duvernay. La séquence des événements entourant leur constitution fait intervenir trois documents — un décret, des avis d'expropriation et des conventions — dont il convient de reproduire ici de larges extraits pour bien comprendre les décisions des instances inférieures et les arguments formulés par les parties.

(1) Le Décret 3360-72

[11] Le 8 novembre 1972, le gouvernement émet l'arrêté en conseil 3360-72 (« Décret 3360-72 ») qui autorise l'appelante à obtenir, de gré à gré ou par voie d'expropriation, les immeubles et droits réels dont elle a besoin pour construire des lignes de transport et de distribution d'énergie entre les postes de transformation Jacques-Cartier et Duvernay. Pour l'essentiel, ce décret se lit ainsi :

CONCERNANT l'autorisation pour l'Hydro-Québec de construire des lignes de transport et de distribution d'énergie électrique entre le poste de transformation Jacques-Cartier et le poste de transformation Duvernay, et d'acquérir les immeubles et droits réels nécessaires à cette fin.

ATTENDU QUE, en vertu de l'article 33 de la "Loi d'Hydro Québec" (S.R.Q. 1964, chapitre 86 et amendements), l'Hydro-Québec peut "acquérir par voie d'expropriation tous immeubles, servitudes ou constructions requis pour l'exploitation des forces hydrauliques détenues par la Commission ou pour la production, la transmission ou la distribution d'énergie";

ATTENDU QUE l'Hydro-Québec désire construire des postes de transformation d'énergie électrique, des lignes de transport, de distribution d'énergie électrique à haute tension ou autres, des réseaux de communications de toutes sortes, des chemins d'accès ainsi que les édifices

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the said lines between the Jacques-Cartier transformer substation and the Duvernay transformer substation . . .

. . .

WHEREAS Hydro-Quebec asks that the Lieutenant-Governor in Council authorize it to acquire, by mutual agreement or by expropriation and prior possession, the immoveables and real rights it needs for the above-mentioned purposes,

IT IS THEREFORE ORDERED, on a proposal of the Minister of Natural Resources:

THAT Hydro-Quebec be authorized to construct electrical power transformer substations, high-voltage or other electrical transmission and distribution lines, communications networks of any kind, access roads and buildings required for the construction and operation of the said lines between the Jacques-Cartier transformer substation and the Duvernay transformer substation, and to acquire by mutual agreement, if it deems that appropriate, or by expropriation and prior possession with filing of plans at the registry office, if it deems that more appropriate, the immoveables or real rights it needs for the purposes set out above, on the land, farms or lots located in the parishes . . . .

(2) Notices of Expropriation and Documents Related to Them

[12] Having obtained the authorizations it needed by way of Order in Council 3360-72, the appellant acquired, by expropriation, the servitudes required for the construction of the Jacques-Cartier-Duvernay line. Following the procedure that applied at that time, it served on the owners — and published at the registry office — notices of expropriation and prior possession ("notices of expropriation"), plans, and overall assessment certificates for the expropriated real rights. The lots currently owned by the respondents were all affected by these expropriation procedures.

[13] The notices of expropriation were all composed similarly. They read as follows:

nécessaires à la construction et à l'exploitation desdites lignes entre le poste de transformation Jacques-Cartier et le poste de transformation Duvernay [. . .];

. . .

ATTENDU QUE l'Hydro-Québec prie le lieutenant-gouverneur en conseil de l'autoriser à acquérir de gré à gré ou par expropriation et prise de possession préalable les immeubles et droits réels dont elle a besoin pour les fins précitées.

IL EST ORDONNÉ EN CONSÉQUENCE, sur la proposition du ministre des Richesse naturelles :

QUE l'Hydro-Québec soit autorisée à construire des postes de transformation d'énergie électrique, des lignes de transport, de distribution d'énergie électrique à haute tension ou autres, des réseaux de communications de toutes sortes, des chemins d'accès ainsi que les édifices nécessaires à la construction et à l'exploitation desdites lignes entre le poste de transformation Jacques-Cartier et le poste de transformation Duvernay, et aussi à acquérir de gré à gré, si elle le juge à propos, ou par expropriation et prise de possession préalable comportant dépôt de plan au bureau d'enregistrement, si elle le croit plus approprié, les immeubles nécessaires ou droits réels dont elle a besoin aux fins précitées, sur des terres, fermes ou lots situés dans les paroisses . . .

(2) Les avis d'expropriation et les documents y afférents

[12] Ayant obtenu par le Décret 3360-72 les autorisations dont elle avait besoin, l'appelante acquiert par expropriation les servitudes requises pour la construction de la ligne Jacques-Cartier-Duvernay. Suivant la procédure applicable à l'époque, elle signifie aux propriétaires et publie au bureau de la publicité des droits les avis d'expropriation et de prise de possession préalable (« avis d'expropriation »), les plans ainsi que les certificats d'évaluation globale des droits réels expropriés. Les terrains qui appartiennent aujourd'hui aux intimés ont tous été visés par ces procédures d'expropriation.

[13] Tous les avis d'expropriation sont rédigés de la même façon. Ils prévoient ce qui suit :

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[TRANSLATION] The Quebec Hydro-Electric Commission, acting pursuant to the powers conferred upon it by the Hydro-Quebec Act (R.S.Q. 1964, chapter 86, as amended) and by the Code of Civil Procedure and duly authorized by Order in Council number 3360-72 of November 8, 1972, hereby files general plan number . . . for the purpose of obtaining the perpetual real rights of servitude it needs for the construction, operation and maintenance of one (or more) 735-kV electrical transmission line(s), JACQUES-CARTIER–DUVERNAY, together with an overall assessment certificate.

The said perpetual real rights of servitude consist of:

a) a right to place, replace, maintain and operate, on the said servient land, one or more high- or low-voltage electrical transmission line(s), and communication lines, including towers and/or poles with the necessary footings, wires, cables, counterweights, anchor rods, guy lines and any other necessary or useful accessories;

b) a right to cut, prune, remove and destroy, in any manner whatsoever and at any time, on the said servient land, any trees, shrubs, branches and bushes, and to remove any objects that may be found there;

c) a right to move about on the said servient land at any time, on foot or in a vehicle of any kind, in order to exercise any right granted to it hereunder;

d) a right to cut, prune and remove any trees located outside the said servient land that could impede or interfere with the functioning, construction, replacement or maintenance of the said line(s), and, for these purposes, to move about on the land adjacent to the said servient land; and

e) a prohibition against any person erecting any construction or structure on, above or under the said servient land, except for the erection of dividing fences and their gates, and against modifying the current elevation of this servient land.

In accordance with section 19 of the Watercourses Act (R.S.Q 1964, chapter 84, as amended), the said perpetual real rights of servitude are created in favour of the dominant land constituted by the electrical transmission line(s) to be erected on the servient land consisting of the immovables indicated in red on the above-mentioned general plan.

(A.R., at pp. 149-50)

La Commission hydroélectrique de Québec, agissant en vertu des pouvoirs qui lui sont conférés par la Loi d'Hydro-Québec (S.R.Q. 1964, chapitre 86 et amendements) et par le Code de procédure civile et dûment autorisée par l'arrêté en conseil numéro 3360-72 du 8 novembre 1972 dépose le plan général numéro [. . .] dans le but d'obtenir les droits de servitude réels et perpétuels dont elle a besoin pour la construction, l'exploitation et l'entretien de ligne(s) de transport d'énergie électrique à 735 kV, JACQUES-CARTIER-DUVERNAY, ainsi qu'un certificat d'évaluation globale.

Lesdits droits réels et perpétuels de servitude consistent :

a) En un droit de placer, remplacer, entretenir et exploiter, sur ledit fonds servant des ligne(s) de transport d'énergie électrique, à haut ou à faible voltage, et des lignes de communication, y compris des pylônes et/ou poteaux avec les empattements nécessaires, les fils, câbles, contrepoids, tiges d'ancrage, haubans et tous autres accessoires nécessaires ou utiles;

b) En un droit de couper, émonder, enlever et détruire, de quelque manière que ce soit et en tout temps, sur ledit fonds servant, tous arbres, arbustes, branches et buissons, et d'enlever tous objets qui s'y trouveraient;

c) En un droit en tout temps de circuler sur ledit fonds servant, à pieds ou en véhicule de tout genre, pour exercer tout droit qui lui est accordé par les présentes;

d) En un droit de couper, émonder et enlever tous arbres situés en dehors dudit fonds servant, qui pourraient entraver les ou nuire aux fonctionnement, construction, remplacement ou entretien de la(des) dite(s) ligne(s), et, à ces fins, de circuler sur le terrain avoisinant ledit fonds servant;

e) En une interdiction pour toute personne d'ériger quelque construction ou structure sur, au-dessus et en-dessous dudit fonds servant, sauf l'érection des clôtures de division et leurs barrières, et de modifier l'élévation actuelle de ce fonds servant.

En conformité de l'article 19 de la Loi du régime des eaux (S.R.Q. 1964, chapitre 84 tel qu'amendé) lesdits droits de servitude réels et perpétuels sont créés en faveur du fonds dominant constitué par la(les) ligne(s) de transport d'énergie électrique à être érigée(s) sur le fonds servant composé des immeubles indiqués en rouge sur le plan général ci-haut mentionné.

(d.a., p. 149-150)

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(3) Agreements

[14] After serving and publishing the notices of expropriation, the appellant signed notarial agreements ("agreements" or "agreements at issue") with the respondents' predecessors in title. Among other things, these agreements describe the servitudes established in favour of the appellant, identify the servient land and the dominant land, and fix the amounts of the indemnities payable for the acquired servitudes and for any work that might be carried out on the servient land.

[15] The agreements in question, which were also published at the registry office, differ from one another in only a few details relating, for example, to the amount of the indemnity or to dates. Only one of them says nothing about the number of lines authorized on the servient land; all the other agreements limit this number to three. Their wording conforms to the following template:

[TRANSLATION]

Before . . . notary for the Province of Quebec . . . .

APPEARED:

Mr. . . .

hereinafter called the "OWNER";

AND:

The QUEBEC HYDRO-ELECTRIC COMMISSION (HYDRO-QUEBEC), a corporation duly constituted under the "Hydro-Quebec Act" (R.S.Q. 1964, chapter 86, as amended) . . . the said Quebec Hydro-Electric Commission being duly authorized for the purposes of this agreement by order of the Lieutenant-Governor in Council number 3360-72, dated November 8, 1972.

hereinafter called the "COMMISSION";

WHICH PARTIES, prior to the acquittance and the agreements which are the subject hereof, do declare as follows:

1. The COMMISSION, acting pursuant to the powers conferred upon it by the Hydro-Quebec Act (R.S.Q.

(3) Les conventions

[14] Après avoir signifié et publié les avis d'expropriation, l'appelante conclut avec les auteurs des intimés des conventions notariées (« conventions » ou « conventions en litige ») qui prévoient, entre autres choses, la description des servitudes établies en faveur de l'appelante, l'identification des fonds servants et dominants, ainsi que le montant des indemnités payables pour les servitudes acquises et pour les travaux susceptibles d'être réalisés sur les fonds servants.

[15] Ces conventions, publiées elles aussi au bureau de la publicité des droits, ne diffèrent les unes des autres que par quelques détails portant, par exemple, sur le montant de l'indemnité ou encore sur des dates. Une seule d'entre elles demeure muette quant au nombre de lignes autorisées sur le fonds servant; toutes les autres conventions limitent ce nombre à trois. Leur libellé répond au modèle suivant :

Devant Me [. . .] notaire pour la Province de Québec . . .

COMPARAISSENT :

Monsieur . . .

ci-après nommé le "PROPRIÉTAIRE";

ET :

La COMMISSION HYDROÉLECTRIQUE DE QUÉBEC (HYDRO-QUÉBEC), corporation légalement constituée en vertu de la "Loi d'Hydro-Québec" (S.R.Q. 1964, chapitre 86 et amendements) [. . .]; ladite Commission hydroélectrique de Québec étant dûment autorisée aux fins des présentes par l'arrêté du Lieutenant-Gouverneur en conseil numéro 3360-72 en date du 8 novembre 1972.

ci-après nommée la "COMMISSION";

LESQUELS, préalablement à la quittance et aux conventions qui font l'objet des présentes, déclarent ce qui suit :

1. La COMMISSION, agissant en vertu des pouvoirs qui lui sont conférés par la Loi d'Hydro-Québec (S.R.Q.

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1964, chapter 86, as amended) and by the Code of Civil Procedure, has become the owner, by expropriation, of the perpetual real rights of servitude required for the construction, replacement, maintenance and operation, on, above and under the servient land hereinafter described belonging to the OWNER, of one (or more) electrical transmission line(s) and of communication lines, by the deposit of a plan and the other documents prescribed by the Act, in the office of the registration division of . . . .

2. The said perpetual real rights of servitude consist of:

(a) a right to place, replace, maintain and operate, on the said servient land, three (3) high- or low-voltage electrical transmission line(s), and communication lines, including towers and/or poles with the necessary footings, wires, cables, counterweights, anchor rods, guy lines and any other necessary or useful accessories;

(b) a right to cut, prune, remove and destroy, in any manner whatsoever and at any time, on the said servient land, any trees, shrubs, branches and bushes, and to remove any objects that may be found there;

(c) a right to move about on the said servient land, on foot or in a vehicle of any kind, in order to exercise any right granted to it hereunder;

(d) a right to cut, prune and remove any trees located outside the said servient land that could impede or interfere with the functioning, construction, replacement or maintenance of the said line(s), and, for these purposes, to move about on the land adjacent to the said servient land; and

(e) a prohibition against any person erecting any construction or structure on, above or under the said servient land, except for the erection of dividing fences and their gates, and changing the current elevation of this servient land.

3. In accordance with section 19 of the Watercourses Act (R.S.Q 1964, chapter 84, as amended), the dominant land in whose favour the above-mentioned rights have thus been established as a perpetual real servitude consists in the electrical transmission line(s) erected or to be erected on the said servient land.

1964, chapitre 86 et amendements) et par le Code de Procédure Civile, est devenue propriétaire par voie d'expropriation des droits réels et perpétuels de servitude nécessaires à la construction, au remplacement, à l'entretien et à l'exploitation, sur, au-dessus et en-dessous du fonds servant ci-après décrit, appartenant au PROPRIÉTAIRE, d'une (de) lignes(s) de transmission d'énergie électrique et de lignes de communication, au moyen du dépôt d'un plan et des autres documents prescrits par la Loi, au bureau de la division d'enregistrement de . . .

2. Lesdits droits réels et perpétuels de servitude consistent :

a) En un droit de placer, remplacer, entretenir et exploiter, sur ledit fonds servant trois (3) ligne(s) de transport d'énergie électrique, à haut ou faible voltage, et des lignes de communication, y compris des pylônes et/ou poteaux avec les empattements nécessaires, les fils, câbles, contrepoids, tiges d'ancrage, haubans et tous autres accessoires nécessaires ou utiles;

b) En un droit de couper, émonder, enlever et détruire, de quelque manière que ce soit et en tout temps, sur ledit fonds servant, tous arbres, arbustes, branches et buissons, et d'enlever tous objets qui s'y trouveraient;

c) En un droit en tout temps de circuler sur ledit fonds servant, à pied ou en véhicule de tout genre, pour exercer tout droit qui lui est accordé par les présentes;

d) En un droit de couper, émonder et enlever tous arbres situés en dehors dudit fonds servant, qui pourraient entraver les ou nuire aux fonctionnement, construction, remplacement ou entretien de la (des) dite(s) ligne(s), et, à ces fins, de circuler sur le terrain avoisinant ledit fonds servant;

e) En une interdiction pour toute personne d'ériger quelque construction ou structure sur, au-dessus et en-dessous dudit fonds servant, sauf l'érection des clôtures de division et leurs barrières, et de modifier l'élévation actuelle de ce fonds servant.

3. En conformité de l'article 19 de la Loi du Régime des Eaux (S.R.Q. 1964, chapitre 84 tel qu'amendé), le fonds dominant au bénéfice duquel les droits ci-dessus mentionnés ont ainsi été établis comme servitude réelle et perpétuelle, est constitué de la (des) ligne(s) de transmission d'énergie électrique érigée(s) ou à être érigée(s) sur ledit fonds servant.

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4. The servient land on which the above-mentioned rights have thus been established as a perpetual real servitude consists in the following immovable, namely:

. . .

7. The total indemnity owed to the OWNER as a result of the expropriation of the above-mentioned perpetual real rights of servitude has been fixed by mutual agreement between the parties in the amount of . . . in full and final settlement of any amounts owed for any reason whatsoever.

THESE FACTS BEING DECLARED, the parties hereto make the following declarations and agreements:

ACQUITTANCE

The OWNER hereby acknowledges that the above-mentioned perpetual real rights of servitude affecting the servient land described above have been duly expropriated by the COMMISSION and that he has today received from the latter, to his entire satisfaction, the amount of . . . representing the indemnity mutually agreed upon between the OWNER and the COMMISSION, in full and final payment of any amount owed for any reason whatsoever, by the COMMISSION, further to the aforesaid expropriation, WHEREOF FULL AND FINAL ACQUITTANCE.

As a consequence of the aforesaid payment, the parties hereto require the Registrar to mention this agreement wherever doing so is necessary.

This indemnity takes into account, among other things, the value of the above-mentioned perpetual real rights of servitude and of the depreciation of the residual part of the said immovable, and covers the value of any timber situated at any time on the said servient land, which timber may be retrieved by the OWNER, in whole or in part, at his or her own expense and risk, as and when it is cut down, provided that it has not otherwise been used by the COMMISSION or its agents for the purposes of its undertaking.

Furthermore, this indemnity takes into account zero (0) hole(s) dug and used for towers, poles, guy lines and anchor rods placed or to be placed on the said servient land, as well as the existence of such towers, poles, guy lines and anchor rods.

Should the COMMISSION place a larger number of towers, poles, guy lines and anchor rods on the said

4. Le fonds servant sur lequel les droits ci-dessus mentionnés ont ainsi été établis comme servitude réelle et perpétuelle, est constitué de l'immeuble suivant, savoir :

. . .

7. L'indemnité totale due au PROPRIÉTAIRE par suite de l'expropriation des droits réels et perpétuels de servitude ci-dessus-mentionnés, a été fixée d'un commun accord entre les parties, à la somme de [. . .] en règlement complet et final de toute somme due à quelque titre que ce soit.

CES FAITS ÉTANT DÉCLARÉS, les parties aux présentes font les déclarations et les conventions suivantes :

QUITTANCE

Le PROPRIÉTAIRE reconnaît, par les présentes, que les droits réels et perpétuels de servitude ci-haut mentionnés, affectant le fonds servant ci-dessus décrit, ont été dûment expropriés par la COMMISSION et qu'il a reçu ce jour de cette dernière, à son entière satisfaction, la somme de [. . .], représentant l'indemnité convenue d'un commun accord entre le PROPRIÉTAIRE et la COMMISSION, en paiement complet et final de toute somme due à quelque titre que ce soit, par la COMMISSION, à la suite de l'expropriation susdite, DONT ET DU TOUT QUITTANCE GÉNÉRALE ET FINALE.

En conséquence du paiement susdit, les parties aux présentes requièrent le Régistrateur de faire mention des présentes partout où besoin sera.

Cette indemnité tient compte, entre autres choses, de la valeur des droits réels et perpétuels de servitude ci-dessus mentionnés, de la dépréciation au résidu dudit immeuble et couvre la valeur du bois se trouvant à quelque moment, sur ledit fonds servant, lequel bois pourra être récupéré par le PROPRIÉTAIRE, en tout ou en partie, à ses frais, risques et périls, au fur et à mesure qu'il sera coupé, pourvu qu'il n'ait pas été autrement utilisé par la COMMISSION ou ses agents pour les fins de son entreprise.

De plus, cette indemnité tient compte de aucun (0) trou(s) creusé(s) et utilisé(s) pour des pylônes, poteaux, haubans et tiges d'ancrage, placés ou à être placés sur ledit fonds servant, ainsi que de l'existence de tels pylônes, poteaux, haubans et tiges d'ancrage.

Si la COMMISSION venait à placer un plus grand nombre de pylônes, poteaux, haubans et tiges d'ancrage,

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servient land, it shall pay, once the work has in each case been completed, to the person who is the owner of the said servient land at that time, the additional indemnity set out below, calculated as follows:

. . .

CONVEYANCE

In consideration of the said indemnity, the OWNER also hereby conveys and transfers to the COMMISSION, accepting, for all legal purposes and insofar as they may be needed, the above-mentioned perpetual real rights of servitude in the servient land described above, in favour of the dominant land described above.

CONDITION

The COMMISSION shall pay all costs related to this agreement, its registration and the necessary copies, including one copy for the OWNER.

INTERPRETIVE CLAUSES

. . .

2. All the clauses, conditions, obligations and agreements stipulated herein shall benefit and be binding on the OWNER's representatives, successors and assigns by particular or general title.

(A.R., at pp. 179-84)

[16] Having acquired the servitudes, the appellant went ahead with the construction of the Jacques-Cartier-Duvernay line.

B. *Reconfiguration of the Jacques-Cartier-Duvernay Line*

[17] In the early 1980s, the appellant reconfigured the Jacques-Cartier-Duvernay line to carry electricity from dams in northwestern Quebec southward. The electricity, which until then had come from hydroelectric power plants on the North Shore through the Jacques-Cartier substation, would from then on come from James Bay plants through the La Vérendrye substation.

sur ledit fonds servant, elle devra payer, lorsque les travaux seront en chaque cas terminés, à la personne qui sera alors propriétaire dudit fonds servant, l'indemnité additionnelle ci-après indiquée, calculée de la façon suivante :

. . .

CESSION

En considération de ladite indemnité, le PROPRIÉTAIRE, par les présentes, cède et transporte en outre à la COMMISSION, acceptant, à toutes fins que de droit et en autant que besoin peut être, les droits réels et perpétuels de servitude ci-haut mentionnés sur le fonds servant ci-dessus décrit, au bénéfice du fonds dominant ci-dessus décrit.

CONDITION

La COMMISSION paiera le coût des présentes, de leur enregistrement et des copies nécessaires, dont une pour le PROPRIÉTAIRE.

CLAUSES INTERPRÉTATIVES

. . .

2. Toutes les clauses, conditions, obligations et conventions stipulées dans les présentes profiteront aux et lieront les représentants, successeurs et ayants droit à titre particulier ou universel du PROPRIÉTAIRE.

(d.a., p. 179-184)

[16] Les servitudes ayant été acquises, l'appelante procède à la construction de la ligne Jacques-Cartier-Duvernay.

B. *Le réaménagement de la ligne Jacques-Cartier-Duvernay*

[17] Au début des années 1980, l'appelante réaménage la ligne Jacques-Cartier-Duvernay afin de transporter vers le sud l'électricité produite par les barrages situés dans le nord-ouest du Québec. Le courant, qui provenait jusque-là des centrales hydroélectriques de la Côte-Nord via le poste de transformation Jacques-Cartier, provient dorénavant des centrales de la Baie-James via le poste de transformation La Vérendrye.

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[18] The Quebec government authorized new expropriations by Order in Council 899-80 of March 26, 1980. These measures did not affect the respondents' lots. No changes were made to the existing infrastructure. Only the origin of the electrons changed. The transmission line passing through the respondents' lots was no longer the Jacques-Cartier-Duvernay line, but the La Vérendrye-Duvernay line. Up until the time of the trial, the respondents were unaware that a reconfiguration had taken place.

C. *Construction of the Chamouchouane-Bout-de-l'Île Line*

[19] On March 13, 2015, the Régie de l'énergie du Québec authorized a proposed electrical transmission line between the Chamouchouane and Bout-de-l'Île substations. This time, the construction of the new line had obvious, tangible repercussions on the respondents' lots. It involved routing a second electrical transmission line through them.

[20] By Order in Council 720-2016, (2016) 148 G.O. 35, 4927, of August 9, 2016, the government authorized the appellant to go ahead with the required expropriations. The respondents' lots were excluded from the scope of the order in council. According to the appellant, the servitudes granted in the 1970s allowed it to route up to three lines through the respondents' lots, which meant that the project did not require any new expropriations there. The respondents disagreed with this interpretation, taking the view that the rights arising from the servitudes established when the Jacques-Cartier-Duvernay line was constructed were limited to that one line only.

[21] The appellant then applied for an injunction and obtained a safeguard order as well as interlocutory injunctions, to remain in force pending judgment in its application for a permanent injunction. In a cross-application, the respondents sought damages for unauthorized use of the servitudes following the reconfiguration of the Jacques-Cartier-Duvernay line and for hardship and inconvenience caused by the existing infrastructure. On November 17, 2016, the parties had the proceeding split so as to have the hearing of the cross-application postponed to a

[18] Par le Décret 899-80 du 26 mars 1980, le gouvernement du Québec autorise de nouvelles expropriations. Ces mesures ne touchent pas les terrains des intimés. Aucune modification n'est apportée aux infrastructures en place. Seule la provenance de l'électron change. La ligne de transport qui passe par les terrains des intimés n'est plus la ligne Jacques-Cartier-Duvernay, mais la ligne La Vérendrye-Duvernay. Jusqu'au moment du procès, les intimés ignoraient qu'un réaménagement avait eu lieu.

C. *La construction de la ligne Chamouchouane-Bout-de-l'Île*

[19] Le 13 mars 2015, la Régie de l'énergie du Québec autorise la réalisation d'un projet de ligne de transport d'électricité entre les postes de transformation de la Chamouchouane et du Bout-de-l'Île. La construction de cette nouvelle ligne entraîne cette fois-ci des répercussions concrètes évidentes sur les terrains des intimés. Il s'agit en effet d'y faire passer une deuxième ligne de transport d'énergie électrique.

[20] Par le Décret 720-2016, (2016) 148 G.O. 35, 4927, du 9 août 2016, le gouvernement autorise l'appelante à procéder aux expropriations requises. Les terrains des intimés sont exclus de la portée du décret. Selon l'appelante, les servitudes consenties dans les années 1970 lui permettent de faire passer jusqu'à trois lignes, de telle sorte que la réalisation du projet ne requiert pas de nouvelles expropriations sur les terrains des intimés. Ces derniers sont en désaccord avec cette interprétation et se disent d'avis que les droits découlant des servitudes établies lors de la réalisation de la ligne Jacques-Cartier-Duvernay se limitent à cette seule ligne.

[21] L'appelante intente alors un recours en injonction et obtient une ordonnance de sauvegarde ainsi que des injonctions interlocutoires pour valoir jusqu'au jugement sur la demande d'injonction permanente. Dans une demande reconventionnelle, les intimés réclament des dommages-intérêts pour l'usage non autorisé des servitudes à la suite du réaménagement de la ligne Jacques-Cartier-Duvernay et pour des troubles et inconvénients occasionnés par les infrastructures en place. Le 17 novembre 2016, les parties obtiennent une scission de l'instance pour

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later date, depending on the outcome on the issue of the scope of the servitudes: see 2018 QCCA 838, at para. 5 (CanLII).

IV. Judicial History

A. *Quebec Superior Court (Sansfaçon J.), 2017 QCCS 2347*

[22] At trial, Sansfaçon J. ruled in favour of the appellant. He found that the servitudes at issue had originally been acquired by expropriation (para. 24 (CanLII)), but that the subsequent agreements had clarified their purpose and scope while also recording the amounts of the indemnities that were paid and the fact that acquittances had been given: paras. 6-7 and 38.

[23] In the trial judge's opinion, the solution to the dispute could be found in the description of the servitudes set out in the notices of expropriation and the agreements, and there was nothing in that description that limited the appellant's rights to the Jacques-Cartier-Duvernay line (paras. 28-29 and 38). He found that the reference to the construction of that line in the preamble to the notices of expropriation had no impact on the scope of the servitudes: paras. 34 and 36. In his view, the agreements were clear and left no room for doubt in this regard: they authorized the appellant to erect three electrical transmission lines (or more, in some cases) and did not mention the origin or the destination of the electricity (para. 38).

[24] Sansfaçon J. rejected the argument regarding unauthorized use of the servitudes following the reconfiguration of the Jacques-Cartier-Duvernay line on the basis that the notices of expropriation and the agreements contained no restrictions in this regard: paras. 41-43. He noted in passing that this work had in no way affected the respondents' lots or the servitudes at issue: paras. 41-42.

[25] Having concluded that the appellant benefited from servitudes authorizing it to place three electrical transmission lines on the respondents' lots, and therefore to proceed with the construction of the

reporter à une date ultérieure l'audition de la demande reconventionnelle, suivant l'issue du débat sur la portée des servitudes en litige : voir 2018 QCCA 838, par. 5 (CanLII).

IV. Historique judiciaire

A. *Cour supérieure du Québec (le juge Sansfaçon), 2017 QCCS 2347*

[22] En première instance, le juge Sansfaçon donne raison à l'appelante. Il constate que les servitudes en litige ont d'abord été acquises par expropriation (par. 24 (CanLII)), mais que les conventions intervenues par la suite ont apporté des précisions quant à leur objet et leur portée, tout en consignant le montant des indemnités versées et le fait que des quittances ont été consenties : par. 6-7 et 38.

[23] De l'avis du juge, la solution au litige ressort du texte des servitudes tel qu'il figure dans les avis d'expropriation et les conventions : nulle part il n'y est question de limiter les droits de l'appelante à la ligne Jacques-Cartier-Duvernay (par. 28-29 et 38). Il estime que la mention de la construction de cette ligne dans le préambule des avis d'expropriation n'a aucune incidence sur la portée des servitudes : par. 34 et 36. Selon lui, les conventions sont claires et écartent toute forme de doute à cet égard : elles autorisent l'appelante à ériger trois lignes de transport d'électricité (ou plus, dans certains cas) sans faire mention de l'origine ou de la destination du courant (par. 38).

[24] L'argument relatif à l'usage non autorisé des servitudes à la suite du réaménagement de la ligne Jacques-Cartier-Duvernay est rejeté au motif que les avis d'expropriation et les conventions ne contiennent aucune restriction à cet égard : par. 41-43. Au passage, le juge Sansfaçon souligne que ces travaux n'ont affecté en rien les terrains des intimés ou les servitudes en litige : par. 41-42.

[25] Ayant conclu que l'appelante bénéficie de servitudes qui l'autorisent à placer trois lignes de transport d'énergie électrique sur les terrains des intimés, et donc à procéder à la construction de la ligne

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Chamouchouane-Bout-de-l'Île line, he granted the injunction and dismissed the cross-application.

B. *Quebec Court of Appeal (Morissette, Healy and Roy JJ.A.), 2018 QCCA 838*

[26] The Court of Appeal allowed the respondents' appeal. It remarked at the outset that Sansfaçon J.'s decision to dismiss the cross-application had been *ultra petita*, as the splitting of the proceeding meant that that matter had no longer been before him: paras. 2, 5-6 and 38.

[27] In the Court of Appeal's view, the servitudes at issue had been acquired by expropriation and should therefore be characterized as servitudes established by operation of law: paras. 17-18. This led the Court of Appeal to find that the agreements should be analyzed in light of the limits imposed by Order in Council 3360-72 and that the scope of the servitudes did not extend beyond what had been authorized by that order in council: para. 18. Noting that the existence of a notice of expropriation does not preclude the negotiation of conventional servitudes, the court stated that the agreements entered into in this case should not be characterized in that way, given that they referred to servitudes that had been acquired by expropriation: para. 21.

[28] The Court of Appeal expressed the opinion that the appellant could not rely on the servitudes in its favour for the construction of the new Chamouchouane-Bout-de-l'Île line, because [TRANSLATION] "Order in Council 3360-72, the plan, the notices of expropriation and prior possession, the agreements and the acquittances all refer to servitudes for the construction of transmission lines between Jacques-Cartier and Duvernay": para. 22. Having found that Order in Council 720-2016 of August 9, 2016 empowered the appellant to acquire servitudes by expropriation, the court invited the appellant to proceed by way of new expropriations or agreements: para. 24.

[29] The Court of Appeal rejected the respondents' argument that the reconfiguration of the Jacques-Cartier-Duvernay line had resulted in a substitution for the dominant land: para. 29. It nonetheless

Chamouchouane-Bout-de-l'Île, il accorde l'injonction et rejette la demande reconventionnelle.

B. *Cour d'appel du Québec (les juges Morissette, Healy et Roy), 2018 QCCA 838*

[26] La Cour d'appel accueille le pourvoi formé par les intimés. D'emblée, elle relève que le juge Sansfaçon s'est prononcé *ultra petita* en rejetant la demande reconventionnelle dont il n'était plus saisi en raison de la scission de l'instance : par. 2, 5-6 et 38.

[27] Les servitudes en litige, ayant été acquises par voie d'expropriation, se qualifient selon elle de servitudes établies par l'effet de la loi : par. 17-18. Cela l'amène à considérer que les conventions s'analysent à la lumière des limites imposées par le Décret 3360-72 et que la portée des servitudes ne s'étend pas au-delà de ce qui a été autorisé par ce décret : par. 18. Ayant rappelé que l'existence d'un avis d'expropriation n'empêche pas la négociation de servitudes conventionnelles, elle affirme que les conventions intervenues en l'espèce ne devraient pas être qualifiées ainsi puisqu'elles font référence à des servitudes acquises par expropriation : par. 21.

[28] La Cour d'appel se dit d'avis que l'appelante ne peut s'autoriser des servitudes dont elle bénéficie pour construire la nouvelle ligne Chamouchouane-Bout-de-l'Île, car « l'arrêté en conseil 3360-72, le plan, les avis d'expropriation et de prise de possession, les conventions et les quittances réfèrent tous à des servitudes pour construire des lignes de transmission entre Jacques-Cartier et Duvernay » : par. 22. Ayant conclu que le Décret 720-2016 du 9 août 2016 l'habilite à acquérir des servitudes par expropriation, elle invite l'appelante à procéder par de nouvelles expropriations ou convention : par. 24.

[29] L'argument des intimés portant que le réaménagement de la ligne Jacques-Cartier-Duvernay aurait entraîné la substitution du fonds dominant est rejeté : par. 29. La Cour d'appel estime néanmoins

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determined that, since the reconfiguration, the appellant had been using the servitudes in its favour for a purpose other than the one provided for in the acts establishing them: para. 37. The court referred the matter of monetary compensation to the judge who would be hearing the cross-application.

que, depuis ce réaménagement, l'appelante utilise les servitudes dont elle bénéficie pour une fin autre que celle prévue aux actes constitutifs : par. 37. Elle renvoie la question de la compensation monétaire au juge qui sera saisi de la demande reconventionnelle.

C. *Quebec Court of Appeal (Savard J.A.), 2018 QCCA 1189*

C. *Cour d'appel du Québec (la juge Savard), 2018 QCCA 1189*

[30] The appellant announced that it intended to appeal to this Court, and applied for a stay of the Court of Appeal's judgment. The respondents pointed out that their proceedings were intended not to prevent the Chamouchouane-Bout-de-l'Île line from being completed, but to obtain financial compensation. Savard J.A. ordered a stay, noting that other owners in the same situation were relying on the Court of Appeal's judgment to prevent the appellant from going ahead with its work.

[30] L'appelante dénonce son intention de se pourvoir devant notre Cour et demande un sursis d'exécution de l'arrêt de la Cour d'appel. Les intimés rappellent que leurs démarches ne visent pas à empêcher la réalisation de la ligne Chamouchouane-Bout-de-l'Île, mais à obtenir une compensation financière. Prenant note du fait que d'autres propriétaires dans la même situation invoquent l'arrêt de la Cour d'appel pour empêcher l'appelante de procéder à ses travaux, la juge Savard ordonne le sursis d'exécution.

V. Issues

V. Questions en litige

[31] This appeal raises the following issues:

[31] Le présent appel soulève les questions suivantes :

A. Did the Quebec Court of Appeal err by reassessing the evidence?

B. Are the power line servitudes in favour of the appellant limited to the Jacques-Cartier-Duvernay line?

C. Was the appellant's reconfiguration of the Jacques-Cartier-Duvernay line in the 1980s incompatible with the servitudes?

D. Are the appellant's proceedings abusive?

A. La Cour d'appel du Québec s'est-elle livrée à tort à une nouvelle analyse de la preuve?

B. Les servitudes de transport d'énergie électrique dont bénéficie l'appelante sont-elles restreintes à la ligne Jacques-Cartier-Duvernay?

C. L'appelante a-t-elle contrevenu aux servitudes lorsqu'elle a réaménagé la ligne Jacques-Cartier-Duvernay au cours des années 1980?

D. Les procédures entreprises par l'appelante sont-elles abusives?

VI. Analysis

VI. Analyse

A. *Did the Quebec Court of Appeal Err by Reassessing the Evidence?*

A. *La Cour d'appel du Québec s'est-elle livrée à tort à une nouvelle analyse de la preuve?*

[32] The appellant submits that the Court of Appeal reassessed the evidence in the absence of a palpable and overriding error in concluding at para. 22 that [TRANSLATION] "the agreements and the acquittances

[32] L'appelante prétend que la Cour d'appel s'est livrée à une nouvelle analyse de la preuve en l'absence d'erreur manifeste et déterminante lorsqu'elle a conclu, au par. 22, que « les conventions

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. . . refer to servitudes for the construction of transmission lines between Jacques-Cartier and Duvernay" (emphasis added). The appellant also claims that the court conducted its own research regarding Order in Council 720-2016 of August 9, 2016 after the conclusion of oral argument. The respondents' position on this point is not entirely clear. After acknowledging that the Court of Appeal [TRANSLATION] "conducted a full, in-depth analysis of all the evidence" (R.F., at para. 29), they submit that it did not reconsider any questions of fact and that its intervention in the trial judge's findings presupposed the existence of a reviewable error.

[33] Absent a palpable and overriding error, an appellate court must refrain from interfering with findings of fact and findings of mixed fact and law made by the trial judge: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10-37; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352. An error is *palpable* if it is plainly seen and if all the evidence need not be reconsidered in order to identify it, and is *overriding* if it has affected the result: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 55-56 and 69-70; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33. As Morissette J.A. so eloquently put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions": quoted in *Benhaim*, at para. 39. The beam in the eye metaphor not only illustrates the obviousness of a reviewable error, but also connotes a misreading of the case whose impact on the decision is plain to see.

[34] The respondents submit that in itself the intervention of a court of appeal with regard to findings of fact or of mixed fact and law presupposes, at least implicitly, that the court first identified a palpable and overriding error. I disagree. The appellate court must point to a palpable and overriding error before such an intervention; otherwise, this Court, if it does not identify a reviewable error,

et les quittances réfèrent [. . .] à des servitudes pour construire des lignes de transmission entre Jacques-Cartier et Duvernay » (je souligne). Elle lui reproche par ailleurs d'avoir effectué ses propres recherches sur le Décret 720-2016 du 9 août 2016 après l'audition des plaidoiries. La position des intimés à cet égard n'est pas des plus limpides. Ayant reconnu que la Cour d'appel a « fait une analyse complète et approfondie de l'ensemble de la preuve » (m.i., par. 29), ils soutiennent qu'elle n'a pas procédé à une analyse *de novo* de questions de fait et que son intervention à l'égard des conclusions du juge de première instance présupposait l'existence d'une erreur révisable.

[33] En l'absence d'une erreur manifeste et déterminante, une cour d'appel doit se garder de modifier les conclusions de fait et les conclusions mixtes de fait et de droit tirées par le juge de première instance : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 10-37; *Benhaim c. St-Germain*, 2016 CSC 48, [2016] 2 R.C.S. 352. Une erreur est *manifeste* lorsqu'elle relève de l'évidence et qu'il n'est pas nécessaire de réexaminer toute la preuve pour s'en apercevoir; elle est *déterminante* lorsqu'elle a influencé la décision : *H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401, par. 55-56 et 69-70; *Salomon c. Matte-Thompson*, 2019 CSC 14, [2019] 1 R.C.S. 729, par. 33. Pour reprendre la formule éloquente du juge Morissette dans l'arrêt *J.G. c. Nadeau*, 2016 QCCA 167, par. 77 (CanLII), « une erreur manifeste et dominante tient, non pas de l'aiguille dans une botte de foin, mais de la poutre dans l'œil. Et il est impossible de confondre ces deux dernières notions » : cité dans *Benhaim*, par. 39. La métaphore de la poutre dans l'œil illustre non seulement le caractère flagrant de l'erreur révisable; elle connote aussi une lecture faussée de l'affaire dont les répercussions sur la décision se constatent aisément.

[34] Les intimés soutiennent qu'à elle seule, l'intervention d'une cour d'appel à l'égard de conclusions de fait ou de conclusions mixtes de fait et de droit suppose, au moins implicitement, que la cour a identifié au préalable une erreur manifeste et déterminante. Je ne partage pas cet avis. La juridiction d'appel doit cibler une erreur manifeste et déterminante avant de procéder à de telles interventions;

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must restore the trial judge's decision: *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 36; *H.L.*, at paras. 56 and 70; *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478, at para. 51; *Salomon*, at paras. 109-10, per Côté J., dissenting, but not on this point; *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28, [2019] 2 S.C.R. 406, at para. 71, per Côté, Brown and Rowe JJ., dissenting, but not on this point. The role of this deferential standard of review would not be fulfilled if every intervention for which no justification was given had to be assumed to be implicitly consistent with it. It would be desirable for an appellate court to precisely identify the palpable and overriding errors in respect of which it is intervening; but in every case, it must be clear from the court's reasons that it has applied the appropriate standard of review.

[35] In the case at bar, the Court of Appeal made the two errors it is purported to have made.

[36] First, it substituted its own opinion for that of the trial judge regarding a question of fact in reaching, I would add, a conclusion that was clearly contrary to the evidence. At para. 22 of its reasons, it wrote:

> [TRANSLATION] Because Order in Council 3360-72, the plan, the notices of expropriation and prior possession, the agreements and the acquittances all refer to servitudes for the construction of transmission lines between Jacques-Cartier and Duvernay, Hydro-Québec cannot rely on these servitudes for the construction of the new Chamouchouane–Bout-de-l'Île line. [Emphasis added.]

This statement is incorrect. One need only read the words of the agreements and the acquittances to realize that they do not contain even the most obscure allusion to a line between the Jacques-Cartier and Duvernay substations. The error is especially significant given that it is intimately linked to the findings on the main issue in the case: the scope of the servitudes established in favour of the appellant.

autrement, il incombera à notre Cour, si elle n'identifie pas d'erreur révisable, de rétablir la décision de première instance : *Schwartz c. Canada*, [1996] 1 R.C.S. 254, par. 36; *H.L.*, par. 56 et 70; *Québec (Directeur des poursuites criminelles et pénales) c. Jodoin*, 2017 CSC 26, [2017] 1 R.C.S. 478, par. 51; *Salomon*, par. 109-110, la juge Côté, dissidente, mais non sur ce point; *Modern Concept d'entretien inc. c. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 CSC 28, [2019] 2 R.C.S. 406, par. 71, les juges Côté, Brown et Rowe, dissidents, mais non sur ce point. Cette norme de contrôle marquée au coin de la déférence et de la retenue ne remplirait pas son rôle si l'on devait tenir pour acquis que chaque intervention non motivée la respecte implicitement. Il serait souhaitable qu'une cour d'appel identifie de façon précise les erreurs manifestes et déterminantes à l'égard desquelles elle intervient; mais dans tous les cas, il doit ressortir clairement de ses motifs qu'elle a respecté la norme de contrôle applicable.

[35] En l'espèce, la Cour d'appel a commis les deux erreurs qui lui sont reprochées.

[36] Premièrement, elle a substitué son opinion à celle du juge de première instance sur une question de fait en parvenant, au surplus, à une conclusion carrément contraire à la preuve. Au par. 22 de sa décision, elle écrit :

> Comme l'arrêté en conseil 3360-72, le plan, les avis d'expropriation et de prise de possession, les conventions et les quittances réfèrent tous à des servitudes pour construire des lignes de transmission entre Jacques-Cartier et Duvernay, Hydro-Québec ne peut s'autoriser de ces servitudes pour construire la nouvelle ligne Chamouchouane-Bout-de-l'Île. [Je souligne.]

Cette affirmation est inexacte. Il suffit de lire le libellé des conventions et des quittances pour constater que celui-ci ne renferme pas la moindre allusion à une ligne entre les postes de Jacques-Cartier et de Duvernay. L'erreur s'avère d'autant plus significative qu'elle est intimement liée aux conclusions sur la principale question en litige, à savoir la portée des servitudes établies en faveur de l'appelante.

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[37] Second, the Court of Appeal compromised the fairness of the proceeding by drawing conclusions regarding the application of Order in Council 720-2016, of which it took judicial notice after the hearing without notifying the parties. The court wrote:

> [TRANSLATION] On August [9], 2016, after the proceedings began, the government issued another order in council to enable Hydro-Québec to acquire the necessary servitudes for the construction of the Chamouchouane-Bout-de-l'Île line. Hydro-Québec therefore has the authority to acquire servitudes for the construction of the new line, but must follow the appropriate procedure, that is, either proceed by expropriation or obtain conventional servitudes. [Emphasis added; footnote omitted; para 24.]

[38] This order in council with respect to expropriation has never been raised by the parties. It was not formally filed in the trial record, nor did it appear in the appeal record. It was touched on in passing at trial, and counsel for the respondents confirmed that the 2016 order in council did *not* cover his clients' lots. It did not come up at all in oral argument in the Court of Appeal.

[39] In all likelihood, the Court of Appeal conducted its own research after the conclusion of oral argument. Because the order in council had been published in the *Gazette officielle du Québec*, the court could take judicial notice of it: art. 2807 *C.C.Q.* But the court did much more than that: it decided the case on the basis of the order in council without giving the parties the opportunity to be heard on this subject. However, the scope of Order in Council 720-2016 is not clear from its words. It authorizes Hydro-Québec

> [TRANSLATION] to acquire, by expropriation, the immovables or servitudes required for the construction and operation of the 735-kV Chamouchouane-Bout-de-l'Île project, as well as the related infrastructure and equipment on the land hereinafter defined in accordance with the plans prepared by Éric Deschamps, Land Surveyor, on March 10, 2016, under number 10838 of his minutes, and by Richard Lamontagne, Land Surveyor, on March 15, 2016, under number 236 of his minutes . . . .

[37] Deuxièmement, la Cour d'appel a compromis l'équité de la procédure en tirant des conclusions sur l'application du Décret 720-2016, dont elle a pris connaissance d'office après l'audition et sans en aviser les parties. En effet, elle écrit :

> Le [9] août 2016, le gouvernement, après le début des procédures, a adopté un autre décret pour permettre à Hydro-Québec d'acquérir les servitudes nécessaires pour la construction de la ligne Chamouchouane-Bout-de-l'Île. Celle-ci est donc habilitée à procéder à l'acquisition de servitudes pour la construction de la nouvelle ligne, mais elle doit suivre la procédure appropriée, c'est-à-dire soit procéder par expropriation, soit obtenir des servitudes conventionnelles. [Je souligne; note en bas de page omise; par. 24.]

[38] Le décret d'expropriation en question n'a jamais été allégué par les parties. Il n'avait pas été formellement produit au dossier de première instance, et ne figurait pas non plus au dossier d'appel. Il a été furtivement évoqué en première instance, et l'avocat des intimés a confirmé que le décret de 2016 *ne* couvrait *pas* les lots de ses clients. Il n'en a pas du tout été question lors des plaidoiries en appel.

[39] Selon toute vraisemblance, la Cour d'appel a mené ses propres recherches après l'audition des plaidoiries. Le décret ayant été publié dans la *Gazette officielle du Québec*, elle pouvait en prendre connaissance d'office : art. 2807 *C.c.Q.* Mais elle a fait bien plus : elle y a trouvé une solution au litige, et ce sans fournir aux parties l'occasion d'être entendues à cet égard. Or, la portée du Décret 720-2016 ne ressort pas de son libellé même. En effet, celui-ci autorise Hydro-Québec

> à acquérir, par voie d'expropriation, les immeubles ou les servitudes requis pour la construction et l'exploitation du projet à 735 kV de la Chamouchouane-Bout-de-l'Île, ainsi que les infrastructures et les équipements connexes sur les territoires ci-après définis, selon les plans préparés par monsieur Éric Deschamps, arpenteur-géomètre, le 10 mars 2016, sous le numéro 10838 de ses minutes, et par monsieur Richard Lamontagne, arpenteur-géomètre, le 15 mars 2016, sous le numéro 236 de ses minutes . . .

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[40] It is therefore necessary to refer to the plans in question in order to determine whether the appellant's expropriation powers under Order in Council 720-2016 extend to the respondents' lots. Those plans were not published in the *Gazette officielle du Québec*, nor were they filed in evidence or even alleged or argued by the parties. This could mean one of two things: either the Court of Appeal considered plans that were not in evidence and drew erroneous conclusions from them, or it assumed, without verifying, that the respondents' lots appeared on the land surveyors' plans. Whichever is the case, the approach taken raises serious concerns relating to procedural fairness, as the appellant never had the opportunity to make representations regarding this non-viable solution which has been imposed on it, and which could not have been foreseen given what was actually discussed in the course of the litigation.

[41] On November 22, 2019, my colleague Brown J. granted the appellant leave to adduce new evidence for the purpose of establishing that Order in Council 720-2016 does *not* authorize the expropriation proceedings on the respondents' lots. It in fact appears that the section of the Chamouchouane-Bout-de-l'Île line where those lots are located was excluded from the plans to which the order in council refers. The appellant explains that it did not ask the government for authorization to expropriate the lots in question, because it believed it already had the real rights it needed to carry out its project. It cannot therefore be said that the appellant is authorized to acquire, by expropriation, new servitudes on the respondents' lots for the construction of the Chamouchouane-Bout-de-l'Île line: C.A. reasons, at para. 24. Indeed, it has no such authorization.

[42] The two errors discussed above are significant enough to persuade me to allow this appeal. However, given the circumstances of this case, I think it is necessary to reconsider the Court of Appeal's conclusions regarding the scope and exercise of the servitudes established in favour of the appellant.

[40] Ainsi, pour décider si les pouvoirs d'expropriation conférés à l'appelante par le Décret 720-2016 s'étendent ou non aux lots des intimés, il est nécessaire de se reporter aux plans en question. Ceux-ci n'ont pas été publiés à la *Gazette officielle du Québec*; ils n'ont pas non plus été produits en preuve, ni même allégués ou invoqués par les parties. De deux choses l'une, donc. Ou bien la Cour d'appel a considéré des plans qui n'étaient pas en preuve et en a inféré des conclusions erronées; ou bien elle a tenu pour acquis, sans faire de vérification, que les lots des intimés figuraient sur les plans des arpenteurs-géomètres. Dans les deux cas, la démarche soulève de sérieuses préoccupations en matière d'équité procédurale, car l'appelante n'a jamais eu l'occasion de présenter des observations au sujet de cette solution non viable qui lui est imposée et que les paramètres du débat ne permettaient pas d'anticiper.

[41] Le 22 novembre 2019, mon collègue le juge Brown accordait à l'appelante la permission de déposer une preuve nouvelle destinée à établir que le Décret 720-2016 *n'*autorise *pas* les procédures d'expropriation sur les lots appartenant aux intimés. De fait, il appert que la section de la ligne Chamouchouane-Bout-de-l'Île où se situent les lots des intimés a été exclue des plans auxquels renvoie le décret. L'appelante explique s'être abstenue de demander au gouvernement l'autorisation d'exproprier ces lots, puisqu'elle estimait déjà posséder les droits réels pour mener à bien son projet. Dès lors, on ne saurait affirmer que l'appelante est habilitée à procéder par expropriation à l'acquisition de nouvelles servitudes sur les lots des intimés pour la construction de la ligne Chamouchouane-Bout-de-l'Île : motifs de la C.A., par. 24. En vérité, elle ne détient aucune habilitation à cet égard.

[42] Les deux erreurs relevées plus haut sont suffisamment importantes pour me convaincre d'accueillir le présent pourvoi. Toutefois, considérant les circonstances de la présente affaire, il m'apparaît nécessaire de revenir sur les conclusions de la Cour d'appel quant à la portée et à l'exercice des servitudes établies en faveur de l'appelante.

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B. *Are the Power Line Servitudes in Favour of the Appellant Limited to the Jacques-Cartier-Duvernay Line?*

[43] In this Court, the appellant submits that the servitudes should be characterized as conventional servitudes given that they were negotiated with the respondents' predecessors in title after the notices of expropriation were published. The agreements, which alone define the object and scope of the servitudes, should therefore prevail over the notices of expropriation. It would be inappropriate to interpret the servitudes having regard to an external document such as Order in Council 3360-72 which, moreover, does not appear in the land register. Under the agreements, the appellant can construct three electrical transmission lines regardless of the origin or destination of the electricity they carry.

[44] The respondents counter that the servitudes were acquired by expropriation and that the agreements concern only the indemnity that was payable. In oral argument, their counsel essentially maintained that the agreements on which the appellant relies have two parts. The first part begins with the following words:

> [TRANSLATION] WHICH PARTIES [i.e., the parties to the act], prior to the acquittance and the agreements which are the subject hereof, do declare as follows . . . .

The second begins as follows:

> THESE FACTS BEING DECLARED, the parties hereto make the following declarations and agreements . . . .

(A.R., at pp. 180 and 182)

In the respondents' view, this structure suggests that the first part of the agreements, in which the real rights flowing from the servitudes are enumerated, plays the role of a mere declaratory preamble, while the content of the agreement proper is limited to the indemnities and the acquittance stipulated in the second part. Accordingly, the servitudes, having been established by operation of law, should be interpreted in light of Order in Council 3360-72 and

B. *Les servitudes de transport d'énergie électrique dont bénéficie l'appelante sont-elles restreintes à la ligne Jacques-Cartier-Duvernay?*

[43] Devant notre Cour, l'appelante prétend que les servitudes se qualifient de conventionnelles, puisqu'elles ont été négociées avec les auteurs des intimés après la publication des avis d'expropriation. Ces avis devraient donc céder devant les conventions, dont le texte seul déterminerait l'objet et la portée des servitudes. Il n'y aurait pas lieu d'interpréter ces servitudes en se reportant à un document externe comme le Décret 3360-72 qui, du reste, n'apparaît pas au registre foncier. Conformément aux conventions, l'appelante pourrait construire trois lignes de transport d'électricité sans égard à l'origine ou à la destination du courant qui les traverse.

[44] Les intimés répondent que les servitudes ont été acquises par expropriation et que les conventions ne portent que sur l'indemnité payable. Dans sa plaidoirie, leur avocat soutient essentiellement que les conventions sur lesquelles s'appuie l'appelante sont structurées en deux parties. La première est celle qui commence par les mots :

> LESQUELS [c'est-à-dire les parties à l'acte], préalablement à la quittance et aux conventions qui font l'objet des présentes, déclarent ce qui suit . . .

Et la seconde, par :

> CES FAITS ÉTANT DÉCLARÉS, les parties aux présentes font les déclarations et les conventions suivantes . . .

(d.a., p. 180 et 182)

D'après les intimés, il découlerait de cette structure que la première partie des conventions, où sont énumérés les droits réels conférés par les servitudes, jouerait le rôle d'un simple préambule déclaratif, tandis que le contenu de l'entente proprement dite se limiterait aux indemnités et à la quittance stipulées dans la deuxième partie. Par conséquent les servitudes, ayant été établies par l'effet de la loi, devraient s'interpréter en fonction du Décret 3360-72 et des

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the documents subsequent to it — namely the notices of expropriation and the plans — which prevail over the declaratory provisions in the first part of the notarial agreements. Because the order, the notices of expropriation and the plans refer to the Jacques-Cartier-Duvernay line, it follows, they submit, that the servitudes only permit the construction or operation of lines between those two substations.

documents qui en découlent, à savoir les avis d'expropriation et les plans. Ceux-ci auraient préséance sur les dispositions déclaratives contenues dans la première partie des conventions notariées. Puisque le décret, les avis d'expropriation et les plans font allusion à la ligne Jacques-Cartier-Duvernay, il s'ensuivrait que les servitudes autoriseraient seulement la construction ou l'exploitation de lignes entre ces deux postes.

(1) Characterization of the Post-Expropriation Agreements

(1) La qualification des conventions postérieures à l'expropriation

[45] The disagreement between the courts below with regard to the characterization of the servitudes at issue essentially rests on the characterization of the post-expropriation agreements. The Court of Appeal recognized that publishing a notice of expropriation does not bar the expropriating party and the expropriated party from subsequently negotiating conventional servitudes, but it concluded that the appellant and the respondents' predecessors in title had negotiated nothing of the sort, given that their agreements referred to servitudes acquired by expropriation and that such references would preclude the servitudes being characterized as conventional servitudes: para. 21.

[45] Le désaccord entre les cours d'instances inférieures au sujet de la qualification des servitudes en litige repose essentiellement sur la qualification des conventions postérieures à l'expropriation. La Cour d'appel reconnaît que la publication d'un avis d'expropriation n'empêche pas l'expropriant et l'exproprié de négocier par la suite des servitudes conventionnelles; elle conclut cependant que l'appelante et les auteurs des intimés n'ont rien négocié de tel, au motif que leurs conventions se réfèrent à des servitudes acquises par expropriation et que de telles références feraient obstacle à leur qualification de servitudes conventionnelles : par. 21.

[46] The characterization of the agreements at issue is so intimately linked to the assessment of the facts that I see this more as a question of mixed fact and law than as a pure question of law: *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59, at paras. 38 and 42; *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101, at para. 49. With respect, I find that the Court of Appeal erred in interfering with the trial judge's conclusions in the absence of a palpable and overriding error. There is no such error in Sansfaçon J.'s conclusion, which is perfectly justifiable in light of the evidence.

[46] La qualification des conventions en litige est si intimement liée à l'appréciation des faits que j'y vois plutôt une question mixte qu'une question de droit : *Uniprix inc. c. Gestion Gosselin et Bérubé inc.*, 2017 CSC 43, [2017] 2 R.C.S. 59, par. 38 et 42; *Churchill Falls (Labrador) Corp. c. Hydro-Québec*, 2018 CSC 46, [2018] 3 R.C.S. 101, par. 49. Avec égards, j'estime que la Cour d'appel a eu tort de modifier les conclusions du juge de première instance en l'absence d'une erreur manifeste et déterminante. Aucune erreur de ce type n'entache la conclusion du juge Sansfaçon, laquelle s'avère parfaitement justifiable au regard de la preuve.

[47] First, the agreements contain a clause entitled "*Cession*" (Conveyance), by which:

[47] Premièrement, le texte des conventions contient une clause intitulée « Cession » par laquelle :

[TRANSLATION] . . . the OWNER . . . conveys and transfers to the COMMISSION, accepting, for all legal purposes

. . . le PROPRIÉTAIRE [. . .] cède et transporte [. . .] à la COMMISSION, acceptant, à toutes fins que de droit et en

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and insofar as they may be needed, the above-mentioned perpetual real rights of servitude in the servient land . . . in favour of the dominant land . . . .

This clause appears after the acquittance, that is, in the part of the agreement that opens with the phrase "THESE FACTS BEING DECLARED, the parties hereto make the following declarations and agreements". It is thus, according to the respondents' argument, at the core of the agreement proper. It explicitly states that the owner of the servient land grants the owner of the dominant land the servitudes described in para. 2 of the preceding part. This is confirmed by the use of the word "*cession*" in the heading of the clause in question. At the time the agreements at issue were signed, leading French dictionaries defined this word as follows:

[TRANSLATION] **[Conveyance].** . . . The action of conveying, transferring to another that which one owns.

(*Dictionnaire de l'Académie française* (8th ed. 1932), vol. 1, at p. 212)

[TRANSLATION] **[C]onveyance** . . . 1. The action of abandoning to another person a right which one holds or owns . . . . 2. The action of conveying to another person property in one's possession . . . .

(*Grand Larousse de la langue française* (1971), vol. 1, at p. 652)

[TRANSLATION] [**Conveyance**] . . . *Law.* The action of conveying (a right, property). See transfer; assignment, sale.

. . .

Convey . . . 2. *Law.* To transfer ownership of a thing to another person. See grant, divest, deliver, reconvey, transfer, sell . . . .

(P. Robert, *Dictionnaire alphabétique & analogique de la langue française* (1976), at p. 250 and p. 242)

[48] Second, Sansfaçon J. found that after the notices of expropriation were published, the parties' predecessors in title had [TRANSLATION] "sign[ed] an agreement . . . in which they detailed the object

autant que besoin peut être, les droits réels et perpétuels de servitude ci-haut mentionnés sur le fonds servant [. . .], au bénéfice du fonds dominant . . .

Cette clause figure à la suite de la quittance, c'est-à-dire dans la partie de la convention qui commence par les mots « CES FAITS ÉTANT DÉCLARÉS, les parties aux présentes font les déclarations et les conventions suivantes ». Elle se trouve donc, suivant l'argument des intimés, au cœur de l'entente proprement dite. Or, elle indique en toutes lettres que le propriétaire du fonds servant consent au propriétaire du fonds dominant les servitudes décrites au par. 2 de la partie précédente. Le terme « cession » qui chapeaute cette clause le confirme. À l'époque des conventions en litige, les principaux dictionnaires en donnaient les définitions suivantes :

[**Cession**]. [. . .] Action de céder, de transférer à un autre ce dont on est propriétaire.

(*Dictionnaire de l'Académie française* (8e éd. 1932), t. 1, p. 212)

[**C**]**ession** [. . .] 1. Action d'abandonner à une autre personne un droit dont on est titulaire ou propriétaire [. . .] 2. Action de céder à une autre personne un bien que l'on possède . . .

(*Grand Larousse de la langue française* (1971), t. 1, p. 652)

[**Cession**] *Dr*. Action de céder (un droit, un bien). V. Transmission; transfert, transport, vente.

. . .

Céder [. . .] 2. *Dr*. Transporter la propriété d'une chose à une autre personne. V. Concéder, dessaisir (se), livrer, rétrocéder, transférer, vendre . . .

(P. Robert, *Dictionnaire alphabétique & analogique de la langue française* (1976), p. 250 et p. 242)

[48] Deuxièmement, le juge Sansfaçon considère qu'après la publication des avis d'expropriation, les auteurs des parties ont « sign[é] une convention [. . .] dans laquelle ils précisent l'objet de la

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of the servitude": para. 6 (emphasis added).[3] After reproducing the substantive portions of the notices of expropriation, he pointed to the provisions of the notarial agreements, which vary as regards the number of electrical transmission lines that can be placed on the servient land: paras. 5-7. Although the notices of expropriation are vague regarding the number of lines authorized by the servitudes, [TRANSLATION] "in most of the contracts at issue, this number of lines is set at three": para. 7. A discrepancy between the two instruments regarding such an important stipulation tends to confirm that negotiations with respect to the scope of the servitudes themselves were conducted after the notices of expropriation had been published.

[49] Third, I have difficulty seeing how the agreements at issue can be characterized without taking into account the real rights obtained by the appellant, focusing instead on the monetary consideration as if these were merely compensation agreements. I cannot agree with the respondents' argument that their predecessors in title *agreed* to the amount of the indemnity but only *recognized* the expropriation itself. According to the very words of the agreements, the indemnity is simply the consideration for the main prestation set out in the [TRANSLATION] "Conveyance" clause, which is reproduced above: it is "[i]n consideration of the said indemnity" that the owner of the servient land "conveys and transfers . . . accepting, for all legal purposes and insofar as they may be needed, the . . . perpetual real rights of servitude" described at the beginning of the agreements.

[50] I find that Sansfaçon J. was correct in concluding that the agreements at issue are servitude agreements. What now remains to be done is to determine their effect having regard to Order in Council 3360-72 and the notices of expropriation.

(2) Distinction Between the Agreements, the Notices of Expropriation and the Order in Council

[51] To determine the scope of the servitudes established in favour of the appellant, Sansfaçon J.

[3] The Court of Appeal repeated this finding at para. 15 of its reasons, but ascribed no legal consequences to it.

servitude » : par. 6 (je souligne)[3]. De fait, ayant reproduit l'essentiel du texte des avis d'expropriation, il souligne le texte des conventions notariées qui en diffère quant au nombre de lignes de transport d'énergie électrique susceptibles d'être placées sur le fonds servant : par. 5-7. Tandis que les avis d'expropriation demeurent imprécis sur le nombre de lignes autorisées par les servitudes, « dans la majorité des contrats en litige ce nombre de lignes est fixé à trois » : par. 7. Une divergence entre les deux textes sur une stipulation aussi importante tend à confirmer que des négociations sur la portée des servitudes elles-mêmes sont intervenues après la publication des avis d'expropriation.

[49] Troisièmement, il m'apparaît douteux de qualifier les conventions en litige en faisant abstraction des droits réels obtenus par l'appelante pour se focaliser plutôt sur leur contrepartie monétaire, comme s'il s'agissait de simples conventions d'indemnisation. Je ne puis souscrire à l'argument des intimés selon lequel leurs auteurs auraient *consenti* au montant de l'indemnité mais n'auraient fait que *reconnaître* le fait de l'expropriation. Selon le texte même des conventions, l'indemnité n'est que la contrepartie de la prestation principale énoncée dans la clause « Cession », reproduite ci-dessus. En effet, c'est « [e]n considération de ladite indemnité » que le propriétaire du fonds servant « cède et transporte [. . .], acceptant, à toutes fins que de droit et en autant que besoin peut être, les droits réels et perpétuels de servitude » décrits au début des conventions.

[50] J'estime que le juge Sansfaçon a eu raison de conclure que les conventions en litige sont des conventions de servitude. Il reste à présent à déterminer leur effet au regard du Décret 3360-72 et des avis d'expropriation.

(2) La distinction entre les conventions, les avis d'expropriation et le décret

[51] Pour déterminer la portée des servitudes établies en faveur de l'appelante, le juge Sansfaçon s'en

[3] La Cour d'appel reprend cette conclusion au par. 15 de sa décision mais n'en tire aucune conséquence juridique.

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considered the notices of expropriation and the agreements, relying on the latter to clear up any ambiguities: paras. 34-38. In the Court of Appeal's view, the appropriate approach was instead to analyze all the documents — notices of expropriation, plans, agreements and acquittances — in the context of the limits imposed by Order in Council 3360-72: paras. 18 and 22.

[52] The order in council, the notices of expropriation and the agreements are different types of documents, and it is important to distinguish them from one another. An order in council issued in accordance with s. 33(3)(*b*) *HQA*, as amended,[4] is an administrative act for the purpose of authorizing the exercise of the "power . . . to deprive a property owner of the enjoyment of the attributes of his or her right of ownership": *Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35, [2018] 2 S.C.R. 577, at para. 1. This authorization is a form of administrative tutorship exercised by the Lieutenant-Governor in Council (today one would say by the government) over the appellant's discretion with respect to expropriation: P. Issalys and D. Lemieux, *L'action gouvernementale: Précis de droit des institutions administratives* (4th ed. 2020), at pp. 173-74 and 353; P. Garant, with P. Garant and J. Garant, *Droit administratif* (7th ed. 2017), at pp. 445-51. Filing a notice of expropriation and the documents related to it is an administrative act that establishes and individualizes the servitude. As for the agreement, it relates to the ordinary exercise of civil rights and to the private law rules of contract.

[53] A servitude acquired by expropriation is, according to the classification set out in art. 1181 *C.C.Q.*, a servitude established by "operation of law": S. Normand, *Introduction au droit des biens* (3rd ed. 2020), at p. 322; D.-C. Lamontagne, *Biens et propriété* (8th ed. 2018), at No. 611; P.-C. Lafond, *Précis de droit des biens* (2nd ed. 2007), at para. 2046. This being the case, neither the law nor public order bars the expropriating party and the expropriated party from clarifying or modifying such a servitude by mutual agreement. Agreements similar to the ones at issue have come before our courts on several

[4] Today, the reference would instead be to the *Hydro-Québec Act*.

tient au texte des avis d'expropriation et des conventions, tout en s'appuyant sur ces dernières pour dissiper les ambiguïtés : par. 34-38. Pour la Cour d'appel, la démarche appropriée consiste plutôt à analyser l'ensemble des documents — avis d'expropriation, plans, conventions et quittances — à l'intérieur des paramètres fixés par le Décret 3360-72 : par. 18 et 22.

[52] Le décret, les avis d'expropriation et les conventions sont des documents de nature différente qu'il importe de bien distinguer. Le décret pris en vertu de l'art. 33(3)*b*) *LHQ* tel qu'amendé[4] est un acte administratif destiné à autoriser l'exercice du « pouvoir [. . .] de priver un propriétaire de la jouissance des attributs de son droit de propriété sur un bien » : *Lorraine (Ville) c. 2646-8926 Québec inc.*, 2018 CSC 35, [2018] 2 R.C.S. 577, par. 1. Cette autorisation relève d'une forme de tutelle administrative exercée par le lieutenant-gouverneur en conseil (on dirait aujourd'hui le gouvernement) sur le pouvoir discrétionnaire de l'appelante en matière d'expropriation : P. Issalys et D. Lemieux, *L'action gouvernementale : Précis de droit des institutions administratives* (4e éd. 2020), p. 173-174 et 353; P. Garant, avec la collaboration de P. Garant et J. Garant, *Droit administratif* (7e éd. 2017), p. 445-451. Le dépôt d'un avis d'expropriation et des documents y afférents est un acte administratif qui constitue et individualise la servitude. Quant à la convention, elle se rattache à l'exercice ordinaire des droits civils et aux règles contractuelles propres au droit privé.

[53] La servitude acquise par expropriation est une servitude établie par « l'effet de la loi » suivant la classification énoncée à l'art. 1181 *C.c.Q.* : S. Normand, *Introduction au droit des biens* (3e éd. 2020), p. 322; D.-C. Lamontagne, *Biens et propriété* (8e éd. 2018), no 611; P.-C. Lafond, *Précis de droit des biens* (2e éd. 2007), par. 2046. Cela étant, ni la loi ni l'ordre public ne s'opposent à ce que l'expropriant et l'exproprié précisent ou modifient, par un accord de gré à gré, la servitude ainsi constituée. À quelques reprises, en effet, des conventions analogues à celles en litige ont été portées à l'attention de nos

[4] Aujourd'hui, on se référerait plutôt à la *Loi sur Hydro-Québec*.

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occasions: *Michaud et Simard Inc. v. Commission hydro-électrique de Québec*, [1982] C.A. 169 (Que.); *Domaine de la rivière inc. v. Aluminium du Canada ltée*, [1996] R.D.I. 6 (C.A.); *Sani Sport inc. v. Hydro-Québec*, 2008 QCCA 2498, [2009] R.J.Q. 26; Lafond, at paras. 2046-47.

[54] *Michaud et Simard Inc.* is of particular interest in this regard. It concerned the scope of power line servitudes for which notices of expropriation had been issued and agreements had subsequently been entered into. Bisson J.A. wrote the following for a unanimous panel:

> [TRANSLATION] . . . I conclude that the conventional servitudes must prevail in this case. It is true that there were notices of expropriation, but these notices were followed by negotiations and conventional servitudes.
>
> The expropriated party attempted to draw a distinction between servitudes of public utility, which were referred to as administrative servitudes, and conventional servitudes.
>
> I find that an entity such as Hydro, which is empowered to obtain servitudes of public utility by expropriation, does not in so doing lose the capacity to acquire servitudes by agreement.
>
> Hydro, which has all the general powers of a corporation, obviously has the power to negotiate the acquisition of a servitude.
>
> From this, I conclude that the agreements subsequently entered into with the owners of the servient land must prevail over notices of expropriation R-19 of 1953 as amended in 1953 for Bersimis I and R-20 of 1957 for Bersimis II.
>
> What now remains to be seen is what rights and obligations were acquired by Hydro, on the one hand, and conveyed by the owners of the servient land, on the other hand, in each of these agreements. [Citations omitted; pp. 175-76.]

I agree with this reasoning. It must be presumed that the servitude agreement, if entered into after the notice of expropriation, contains a more faithful definition of the scope and terms for exercise of the servitude of public utility than does the notice of

tribunaux : *Michaud et Simard Inc. c. Commission hydro-électrique de Québec*, [1982] C.A. 169 (Qc); *Domaine de la rivière inc. c. Aluminium du Canada ltée*, [1996] R.D.I. 6 (C.A.); *Sani Sport inc. c. Hydro-Québec*, 2008 QCCA 2498, [2009] R.J.Q. 26; Lafond, par. 2046-2047.

[54] À cet égard, l'arrêt *Michaud et Simard Inc.* mérite une attention toute particulière. Dans cette affaire, il s'agissait de déterminer la portée de servitudes relatives au transport d'énergie électrique qui avaient fait l'objet d'avis d'expropriation, puis de conventions. Le juge Bisson, rédigeant au nom d'une formation unanime, écrit dans ses motifs :

> . . . j'en viens à la conclusion qu'en l'espèce les servitudes conventionnelles doivent primer. Certes, il y a eu des avis d'expropriation, mais ces avis furent suivis de négociations et de servitudes conventionnelles.
>
> De la part de l'expropriée, on a cherché à faire une distinction entre des servitudes d'utilité publique, qu'on a appelées servitudes administratives, et les servitudes conventionnelles.
>
> J'estime qu'un organisme comme Hydro, qui est habilité à obtenir par voie d'expropriation des servitudes d'utilité publique, ne perd pas, par le fait même, la capacité d'acquérir des servitudes par convention.
>
> Hydro, ayant tous les pouvoirs généraux d'une corporation, a certes celui de négocier l'acquisition d'une servitude.
>
> De ceci, j'en conclus que les avis d'expropriation R-19 de 1953 et amendement de 1953 pour Bersimis I et R-20 de 1957 pour Bersimis II doivent céder le pas aux conventions intervenues subséquemment avec les propriétaires des fonds servants.
>
> Il reste maintenant à voir quels étaient les droits et obligations, d'une part, acquis par Hydro et, d'autre part, cédés par les propriétaires des fonds servants lors de chacune de ces conventions. [Références omises; p. 175-176.]

Je partage ce raisonnement. On doit présumer que la convention de servitude, si elle est postérieure à l'avis d'expropriation, définit plus fidèlement la portée et les modalités d'exercice de la servitude établie pour l'utilité publique que ne le fait cet avis

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expropriation. This is particularly true in the case at bar, given that the agreements at issue include a complete description of the servitudes, adding some details that do not appear in the notices of expropriation (such as the authorized number of lines). In these circumstances, the agreements are the titles to which the owners of the servient land and the dominant land must refer in exercising their respective rights.

[55] The Court of Appeal agreed with the principle from *Michaud et Simard Inc.* that notices of expropriation do not preclude parties from negotiating conventional servitudes, but it concluded that that principle did not apply, because the agreements at issue [TRANSLATION] "refe[r] to the acquisition of servitudes by expropriation": para. 21. To me, such a distinction seems excessively formalistic. First, it is based on a textual argument that does not take into account the real content of the agreements: see paras. 47-49 of these reasons. Second, the reference to the means by which the servitudes were established becomes irrelevant when one recognizes that a servitude acquired by expropriation may be amended by agreement. Third, if it were to be accepted that two different sets of rules applied depending on whether the post-expropriation agreements *referred* to the means of establishment of the servitudes, it would become practically impossible to draw a clear line between cases in which the servitude must be analyzed on the basis of the notice of expropriation and documents related to it, and cases in which it must be analyzed on the basis of the subsequent agreement.

[56] In my view, the approach according to which the servitudes should be analyzed in light of the order in council is also wrong. An order in council issued in accordance with s. 33 of the *HQA* is concerned with the public use relied on to justify the expropriation. It expresses an administrative authorization to intrude on the owner's right to the free disposition of his or her property, but it does not in itself grant any real rights. It makes it possible to establish a servitude without the consent of the owner of the servient land, but does not establish a servitude on that land. What define the rights granted by the servitudes are the titles: *Domaine de la rivière inc.*; Normand, at

d'expropriation. Cela s'applique à plus forte raison en l'espèce, attendu que les conventions en litige décrivent les servitudes de façon complète en y apportant des précisions qui ne figuraient pas dans les avis d'expropriation (quant au nombre de lignes autorisées, par exemple). Dans ces circonstances, les conventions sont les titres auxquels les propriétaires des fonds servants et dominants doivent se reporter pour l'exercice de leurs droits respectifs.

[55] Ayant admis le principe découlant de *Michaud et Simard Inc.*, à savoir que des avis d'expropriation n'empêchent pas les parties de négocier des servitudes conventionnelles, la Cour d'appel l'a pourtant jugé inapplicable au motif que le texte des conventions en litige se « réf[è]re [. . .] à l'acquisition de servitudes par expropriation » : par. 21. Pareille distinction m'apparaît exagérément formaliste. Premièrement, elle se fonde sur un argument textuel qui ne tient pas compte de la teneur réelle des conventions intervenues : voir les par. 47-49 des présents motifs. Deuxièmement, la référence au mode d'établissement perd sa pertinence dès lors qu'on reconnaît qu'une servitude acquise par expropriation peut être modifiée conventionnellement. Troisièmement, si l'on devait admettre que deux régimes différents s'appliquent selon que les conventions postérieures aux avis d'expropriation *se réfèrent* ou non au mode d'établissement des servitudes, il deviendrait pratiquement impossible de tracer une ligne claire entre les cas où la servitude devrait s'analyser d'après l'avis d'expropriation et les documents y afférents, et les cas où elle devrait s'analyser d'après la convention subséquente.

[56] La démarche consistant à analyser les servitudes à la lumière du décret m'apparaît elle aussi mal fondée. Le décret découlant de l'art. 33 *LHQ* s'intéresse à la cause d'utilité publique invoquée au soutien de l'expropriation. Il exprime une autorisation administrative de porter atteinte au droit du propriétaire à la libre disposition de ses biens, mais il ne confère en lui-même aucun droit réel. Il rend possible la constitution d'une servitude sans le consentement du propriétaire du fonds servant, mais il ne constitue pas de servitude sur ce fonds. Or, ce sont les titres qui déterminent les droits conférés par les servitudes : *Domaine de la rivière inc.*; Normand,

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p. 320; Lafond, at para. 2050. In the instant case, the titles are the servitude agreements.

[57] Servitude agreements are subject to the rules applicable to the interpretation of contracts: *Centre de distribution intégré (CDI) inc. v. Développements Olymbec inc.*, 2015 QCCA 1463, 59 R.P.R. (5th) 1, at para. 17; *151692 Canada inc. v. Centre de loisirs de Pierrefonds enr.*, 2005 QCCA 376, [2005] R.D.I. 237, at para. 30; Normand, at p. 329; see also *Uniprix*, at paras. 34-41. If their words are clear, effect must be given to the clearly expressed intention of the parties. If, however, the agreements, read as a whole, are vague, ambiguous or incomplete, the common intention of the parties must be sought: art. 1425 *C.C.Q.*

[58] But there is no need to go to that second step in this case, as Sansfaçon J. has already found that the agreements were clear: para. 38. Whether a contract is clear or ambiguous is, in the context of an appeal, a question of mixed fact and law for which the applicable standard for intervention is palpable and overriding error: *Uniprix*, at para. 41. Because no such errors have been established, the scope of the servitudes must be determined in light of the words of the agreements at issue.

(3) Rights Under the Servitude Agreements

[59] In substance, the agreements grant the appellant:

- servitudes allowing it to place, replace, operate and maintain up to three electrical transmission lines;[5]
- servitudes for tree cutting and pruning;
- servitudes of right of way; and
- servitudes of non-construction.

[60] They do not mention any restrictions regarding the origin or destination of the electricity. The

[5] These "lines" should not be confused with the [TRANSLATION] "electrical wires" (trial reasons, at paras. 45-50).

p. 320; Lafond, par. 2050. En l'occurrence, il s'agit des conventions de servitude.

[57] Ces conventions sont soumises aux règles applicables à l'interprétation des contrats : *Centre de distribution intégré (CDI) inc. c. Développements Olymbec inc.*, 2015 QCCA 1463, 59 R.P.R. (5th) 1, par. 17; *151692 Canada inc. c. Centre de loisirs de Pierrefonds enr.*, 2005 QCCA 376, [2005] R.D.I. 237, par. 30; Normand, p. 329; voir aussi *Uniprix*, par. 34-41. Leurs termes, s'ils sont clairs, imposent le respect de la volonté manifeste des parties. Si toutefois, lues dans leur ensemble, les conventions s'avèrent obscures, ambiguës ou incomplètes, la commune intention des parties doit être recherchée : art. 1425 *C.c.Q.*

[58] Il n'y a toutefois pas lieu ici de se rendre à cette deuxième étape, le juge Sansfaçon ayant déjà conclu que les conventions étaient claires : par. 38. Le caractère clair ou ambigu d'un contrat soulève, lors d'un appel, une question mixte de fait et de droit assujettie à la norme d'intervention de l'erreur manifeste et déterminante : *Uniprix*, par. 41. Aucune erreur de ce type n'ayant été établie, on doit s'en remettre au libellé des conventions en litige pour déterminer la portée des servitudes.

(3) Les droits conférés par les conventions de servitudes

[59] Pour l'essentiel, les conventions confèrent à l'appelante :

- Des servitudes permettant de placer, de remplacer, d'exploiter et d'entretenir jusqu'à trois lignes[5] de transport d'énergie électrique;
- Des servitudes de coupe d'arbres, d'émondage et d'ébranchage;
- Des servitudes de passage;
- Des servitudes de non-construction.

[60] Elles ne font mention d'aucune restriction quant à la provenance ou à la destination du courant

[5] Ces « lignes » ne doivent pas être confondues avec les « fils électriques » : motifs de première instance, par. 45-50.

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argument that the servitudes are limited to the line between the Jacques-Cartier and Duvernay substations must therefore fail. Moreover, the respondents' suggestion that a restrictive interpretation of the powers of expropriation is required cannot be accepted either. What we must rule on here is not the exercise of a public power, but the scope of contractual agreements.

[61] The servitudes on the respondents' lots authorize the appellant to construct the Chamouchouane-Bout-de-l'Île line. As I mentioned above, there is no need to refer to the provisions of the notices of expropriation: the agreements must prevail. I wish to be clear, however, that had it been necessary to do so, my conclusion would have been the same. I agree with Sansfaçon J. that the reference in the preamble of the notices of expropriation to Order in Council 3360-72 and the Jacques-Cartier-Duvernay line has no impact on the description of the scope of the servitudes: trial reasons, at paras. 34 and 36.

C. *Was the Appellant's Reconfiguration of the Jacques-Cartier-Duvernay Line in the 1980s Incompatible With the Servitudes?*

[62] Having unduly limited the appellant's rights on the respondents' land to the Jacques-Cartier-Duvernay line, the Court of Appeal concluded that the redirection of that line to the La Vérendrye substation in the early 1980s was incompatible with the servitudes.

[63] The appellant submits that this conclusion seriously compromises the principle of stability of real rights on which the evolution of its system depends, especially given that redirecting an electrical transmission line to another substation has no effect on the situation of the servient land. As for the respondents, they see this change as a substitution for the dominant land.

[64] To identify the dominant land, the agreements at issue refer to s. 19 of the *Watercourses Act*, R.S.Q. 1964, c. 84.[6] Contrary to what the respond-

[6] Now the *Watercourses Act*, CQLR, c. R-13.

électrique. Dès lors, l'argument selon lequel la portée des servitudes se limiterait à la ligne entre les postes de transformation Jacques-Cartier-Duvernay ne saurait être retenu. Il ne saurait pas non plus se fonder sur une interprétation restrictive des pouvoirs d'expropriation, comme le suggèrent les intimés. Nous n'avons pas ici à statuer sur l'exercice d'un pouvoir public, mais sur la portée d'ententes contractuelles.

[61] Les servitudes grevant les lots des intimés autorisent l'appelante à construire la ligne Chamouchouane-Bout-de-l'Île. Comme je l'ai déjà dit, il n'y a pas lieu de s'en remettre au texte des avis d'expropriation : les conventions doivent primer. Je tiens toutefois à préciser que, dans l'hypothèse où cela se serait avéré nécessaire, ma conclusion aurait été la même. À l'instar du juge Sansfaçon, je considère que l'allusion au Décret 3360-72 et à la ligne Jacques-Cartier-Duvernay contenue dans le préambule des avis d'expropriation n'a aucune incidence sur la description de la portée des servitudes : motifs de première instance, par. 34 et 36.

C. *L'appelante a-t-elle contrevenu aux servitudes lorsqu'elle a réaménagé la ligne Jacques-Cartier-Duvernay au cours des années 1980?*

[62] Ayant indûment restreint les droits de l'appelante sur les terrains des intimés à la ligne Jacques-Cartier-Duvernay, la Cour d'appel en vient à conclure que la redirection de cette ligne vers le poste de transformation La Vérendrye survenue au début des années 1980 va à l'encontre des servitudes.

[63] L'appelante prétend que cette conclusion compromet sérieusement le principe de stabilité des droits réels sur lequel repose l'évolution de son réseau, d'autant que la redirection d'une ligne de transport d'électricité vers un autre poste de transformation n'affecte en rien la situation des fonds servants. Les intimés, eux, voient dans ce changement une substitution du fonds dominant.

[64] Les conventions en litige renvoient, pour l'identification du fonds dominant, à l'art. 19 de la *Loi du régime des eaux*, S.R.Q. 1964, c. 84[6].

[6] Aujourd'hui, la *Loi sur le régime des eaux*, RLRQ, c. R-13.

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ents suggest, the dominant land is not the transmission line between the Jacques-Cartier and Duvernay substations. Rather, it is [TRANSLATION] "the electrical transmission line(s) erected or to be erected on the said servient land": art. 3 of the agreements. On this point, I agree with the Court of Appeal that there is no new dominant land, because the transmission line is still there: C.A. reasons, at para. 29.

Contrairement à ce que suggèrent les intimés, le fonds dominant n'est pas la ligne de transmission entre les postes Jacques-Cartier et Duvernay. Il s'agit plutôt de « la (des) ligne(s) de transmission d'énergie électrique érigée(s) ou à être érigée(s) sur ledit fonds servant » : art. 3 des conventions. Sur ce point, je suis d'accord avec la Cour d'appel pour dire qu'il n'y a pas de nouveau fonds dominant, la ligne de transmission étant demeurée : motifs de la Cour d'appel, par. 29.

[65] However, I find that the Court of Appeal erred in concluding that the appellant [TRANSLATION] "is using the line for a purpose other than the one provided for in the act of servitude": para. 37. As I explained above, the servitudes at issue must be analyzed in light of the agreements subsequent to the notices of expropriation, and those agreements contain no restrictions as to the origin of the electricity. They grant the right to [TRANSLATION] "place, replace, maintain and operate, on the said servient land, three (3) high- or low-voltage electrical transmission line(s), and communication lines". The servitudes concern the lines crossing the servient land, not the substations located at either end of those lines. I see nothing in the words of the agreements that would explicitly or implicitly prevent the appellant from redirecting one of its lines toward another substation. The right to operate electrical transmission lines clearly includes the right to make modifications such as the one that was made in the early 1980s.

[65] La conclusion de la Cour d'appel selon laquelle l'appelante « fait usage de la ligne pour une fin autre que celle prévue à l'acte de servitude » (par. 37) m'apparaît toutefois erronée. Comme je l'ai déjà expliqué, les servitudes en litige doivent s'analyser à la lumière des conventions postérieures aux avis d'expropriation. Or, ces conventions ne contiennent aucune restriction quant à la provenance du courant électrique. Elles confèrent le droit de « placer, remplacer, entretenir et exploiter, sur ledit fonds servant trois (3) ligne(s) de transport d'énergie électrique, à haut ou faible voltage, et des lignes de communication ». Les servitudes portent sur les lignes qui traversent les fonds servants et non sur les postes de transformation situés aux extrémités de ces lignes. Je ne vois rien dans le texte des conventions qui empêcherait explicitement ou implicitement l'appelante de rediriger l'une de ses lignes vers un autre poste de transformation. Le droit d'exploiter des lignes de transport d'énergie électrique comprend, certes, celui d'y apporter des modifications comme celle survenue au début des années 1980.

D. *Are the Appellant's Proceedings Abusive?*

D. *Les procédures entreprises par l'appelante sont-elles abusives?*

[66] The respondents submit that the appellant is abusing its rights and that the proceedings it has undertaken are themselves abusive. They seek a substantial indemnity that, they claim, corresponds to the expenditures and costs they incurred.

[66] Les intimés soutiennent que l'appelante abuse de ses droits et que les procédures entreprises sont elles-mêmes abusives. Ils demandent le versement d'une indemnité substantielle, censée correspondre aux dépenses et aux frais engagés.

[67] No evidence has been adduced in this regard. At first glance, however, there is nothing abusive about these proceedings. The appellant sought to use the servitudes that had been granted to it by the respondents' predecessors in title and had been

[67] Aucune preuve n'a été administrée à cet égard. À première vue cependant, les procédures n'ont rien d'abusif. L'appelante a cherché à faire usage des servitudes que lui avaient consenties les auteurs des intimés et qui avaient été publiées au registre foncier.

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published in the land register. The respondents were presumed to be aware of the rights granted by these servitudes: arts. 1182 and 2941 *C.C.Q.* They nonetheless blocked construction of the new Chamouchouane-Bout-de-l'Île line, which forced the appellant to seek injunction orders. Unsuccessful at trial, the respondents appealed the case, and they now claim that the appellant must [TRANSLATION] "be found liable to [them] for all the expenditures it caused them to incur in all three (3) courts": R.F., at para. 128. With respect, it is not up to the appellant to pay for the steps they took.

VII. Conclusion

[68] For these reasons, I would allow the appeal, set aside the Court of Appeal's decision and restore all the conclusions of the trial judge's decision, except the one stated in para. 66. I would remand the case to the Superior Court for hearing of the cross-application. The appellant is entitled to its costs throughout.

Appeal allowed with costs throughout.

Solicitors for the appellant: Blake, Cassels & Graydon, Montréal.

Solicitors for the respondents: Vincent Karim & Als, Saint-Laurent; Me Hrtschan, Montréal.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitors for the intervener Canadian Electricity Association: Torys, Toronto.

Les intimés étaient présumés connaître les droits conférés par ces servitudes : art. 1182 et 2941 *C.c.Q.* Ils ont néanmoins fait obstacle à la construction de la nouvelle ligne Chamouchouane-Bout-de-l'Île, ce qui a contraint l'appelante à solliciter des ordonnances d'injonction. Déboutés en première instance, ils ont porté l'affaire en appel et prétendent aujourd'hui que l'appelante doit « être tenue responsable envers [eux] pour toutes les dépenses qu'elle [leur] a fait subir [. . .] devant les trois (3) instances » : m.i., par. 128. Avec égards, il n'appartient pas à l'appelante de faire les frais de leurs démarches.

VII. Conclusion

[68] Pour ces motifs, j'accueillerais le pourvoi, j'écarterais l'arrêt de la Cour d'appel et je rétablirais toutes les conclusions du jugement de première instance, sauf celle énoncée au par. 66. Je retournerais le dossier à la Cour supérieure pour l'audition de la demande reconventionnelle. L'appelante a droit aux dépens devant toutes les cours.

Pourvoi accueilli avec dépens devant toutes les cours.

Procureurs de l'appelant : Blake, Cassels & Graydon, Montréal.

Procureurs des intimés : Vincent Karim & Als, Saint-Laurent; Me Hrtschan, Montréal.

Procureur de l'intervenante la procureure générale du Québec : Procureure générale du Québec, Québec.

Procureurs de l'intervenante l'Association canadienne de l'électricité : Torys, Toronto.

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TAB 2

Kenneth F. Salomon and Sternthal Katznelson Montigny LLP *Appellants*

v.

Judith Matte-Thompson and 166376 Canada Inc. *Respondents*

Indexed as: Salomon *v.* Matte-Thompson

2019 SCC 14

File No.: 37537.

2018: March 19; 2019: February 28.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Law of professions — Lawyers — Professional liability — Duty to advise — Duty of loyalty — Lawyer recommending financial advisor to clients — Clients investing millions of dollars with recommended financial advisor's firm — Lawyer repeatedly endorsing advisor and encouraging clients to make and retain investments — Investments made in funds that were parts of Ponzi scheme — Millions lost in fraud — Clients claiming that lawyer and his law firm were professionally negligent — Trial judge dismissing claim — Court of Appeal allowing appeal and ordering that clients be compensated for losses — Whether Court of Appeal erred by employing notion of distorting lens in determining whether trial judge had made palpable and overriding errors — Whether Court of Appeal expanded professional obligations of lawyers who refer clients to independent advisors — Whether Court of Appeal erred by interfering with trial judge's findings relating to faults committed by lawyer and to causation.

In 2003, a lawyer introduced two clients to his financial advisor and personal friend, and recommended that they consult him. In the following four years, the clients ended up investing over $7.5 million with the recommended

Kenneth F. Salomon et Sternthal Katznelson Montigny, s.e.n.c.r.l. *Appelants*

c.

Judith Matte-Thompson et 166376 Canada Inc. *Intimées*

Répertorié : Salomon *c.* Matte-Thompson

2019 CSC 14

N^o^ du greffe : 37537.

2018 : 19 mars; 2019 : 28 février.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe et Martin.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit des professions — Avocats — Responsabilité professionnelle — Devoir de conseil — Devoir de loyauté — Recommandation par un avocat d'un conseiller financier à des clientes — Investissement par les clientes de millions de dollars auprès de la société de placements du conseiller financier recommandé — Formulation de façon répétée par l'avocat aux clientes de commentaires favorables au sujet du conseiller et d'encouragements à effectuer et à conserver leurs placements auprès de celui-ci — Placements effectués dans des fonds qui faisaient partie d'un stratagème de type Ponzi — Millions de dollars perdus par suite de la fraude — Prétentions des clientes portant que l'avocat et son cabinet ont fait preuve de négligence professionnelle — Décision de la juge de première instance rejetant l'action — Arrêt de la Cour d'appel accueillant l'appel et ordonnant que les clientes soient dédommagées de leurs pertes — La Cour d'appel a-t-elle commis une erreur en recourant à la notion du prisme déformant pour décider si la juge de première instance a commis des erreurs manifestes et déterminantes? — La Cour d'appel a-t-elle élargi la portée des obligations professionnelles des avocats qui aiguillent leurs clients vers des conseillers indépendants? — La Cour d'appel a-t-elle fait erreur en intervenant à l'égard des conclusions de la juge de première instance relativement aux fautes commises par l'avocat et au lien de causalité?

En 2003, un avocat présente à deux clientes son conseiller financier personnel et ami proche, et leur recommande de le consulter. Au cours des quatre années qui suivent, les clientes finissent par investir plus de 7,5 millions de dollars

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financial advisor's investment firm. Over the course of those four years, the lawyer repeatedly endorsed the recommended advisor as a financial advisor and encouraged his clients to make and retain investments with the investment firm. In 2007, the recommended advisor and his associate disappeared with the savings of around 100 investors, including those of the lawyer's clients. The clients instituted legal proceedings, claiming that the lawyer and his law firm were professionally negligent in two ways: first by breaching their duty to advise them and second, by disregarding their duty of loyalty to them.

dans la société de placements du conseiller financier recommandé. Durant ces quatre années, l'avocat commente favorablement et de façon répétée les services du conseiller recommandé en tant que conseiller financier, en plus d'encourager ses clientes à effectuer et à conserver leurs placements auprès de la société de placements. En 2007, le conseiller recommandé et son associé se volatilisent avec les économies d'une centaine d'investisseurs, dont celles des clientes de l'avocat. Les clientes intentent une action en justice, au motif que l'avocat et son cabinet ont fait preuve de négligence professionnelle de deux façons : premièrement, en manquant à leur devoir de conseil envers elles, et deuxièmement, en manquant à leur devoir de loyauté envers elles.

The trial judge dismissed the claim. The Court of Appeal concluded that the trial judge had made reviewable errors, and it reversed her judgment. In its opinion, the trial judge had viewed the lawyer's acts and their consequences through a distorting lens which had led her to erroneously assess the evidence in isolated silos, without the insight provided by a global analysis. The Court of Appeal ordered the lawyer and his law firm solidarily to fully compensate the clients for their losses.

La juge de première instance a rejeté l'action. La Cour d'appel a statué que la juge de première instance a commis des erreurs donnant ouverture à son intervention et elle a infirmé la décision. À son avis, la juge de première instance a analysé les agissements de l'avocat et leurs conséquences à travers un prisme déformant, qui l'a amenée à apprécier erronément la preuve de façon compartimentée, sans l'éclairage que lui aurait procuré une vision d'ensemble des événements. La Cour d'appel a condamné solidairement l'avocat et son cabinet à indemniser pleinement les clients des pertes qu'elles ont subies.

Held (Côté J. dissenting): The appeal should be dismissed.

Arrêt (la juge Côté est dissidente) : L'appel est rejeté.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ.: The Court of Appeal had a sufficient basis for intervening and reversing the trial judge's decision. It properly applied the standards of appellate review, as imposed by *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The professional liability of the lawyer and the law firm for the clients' losses has been established.

Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe et Martin : La Cour d'appel disposait d'assises suffisantes pour intervenir et pour infirmer la décision de la juge de première instance. Elle a appliqué adéquatement les normes de contrôle pertinentes en appel énoncées dans l'arrêt *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235. La responsabilité professionnelle de l'avocat et de son cabinet à l'égard des pertes subies par les clientes a été établie.

Findings with respect to fault involve questions of mixed fact and law and findings with respect to causation, questions of fact. In both situations, absent a palpable and overriding error, an appellate court must defer to the conclusions reached by the trial judge. It can only intervene if there is an obvious error in the trial decision that is determinative of the outcome of the case. The fact that an alternative factual finding could be reached based on a different ascription of weight does not mean that a palpable and overriding error has been made. An appellate court must identify a crucial flaw in the lower court's decision, and a distorting lens, that is, a lens through which a trial judge assessed the evidence and that had a distorting effect, cannot be invoked as a substitute for identifying a

L'existence ou non d'une faute est une question mixte de fait et de droit, et la détermination du lien de causalité est une question de fait. Dans les deux cas, en l'absence d'erreur manifeste et déterminante, la juridiction d'appel doit faire preuve de déférence envers les conclusions du juge de première instance. Elle ne peut intervenir que dans le cas où la décision de première instance est entachée d'une erreur évidente qui a déterminé l'issue de l'affaire. Le fait qu'une conclusion de fait différente aurait pu être tirée sur la base du poids attribué à différents éléments de preuve ne signifie pas qu'une erreur manifeste et déterminante a été commise. La juridiction d'appel doit dégager l'erreur fatale que comporte la décision de la juridiction inférieure, et l'image du prisme déformant, c'est-à-dire

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reviewable error or to mask the fact that an error identified by an appellate court does not meet the high standard imposed by *Housen*. In the case at bar, the Court of Appeal held that the distorting lens through which the trial judge has viewed the evidence — in this case a narrow, siloed approach — had led her to make precisely identified palpable and overriding errors. The notion of a distorting lens was nothing more than a metaphor the Court of Appeal used to explain why the standard of appellate review established in *Housen* was met; it was not used to mask an absence of palpable and overriding errors. The Court of Appeal did not err by employing the notion of a distorting lens in determining whether the trial judge had made palpable and overriding errors.

un prisme au moyen duquel le juge de première instance a analysé la preuve et qui a eu un effet déformant, ne peut être invoquée pour remplacer l'obligation de déceler la présence d'une erreur révisable ou masquer le fait qu'une erreur constatée par une cour d'appel ne respecte pas la norme élevée imposée par l'arrêt *Housen*. Dans la présente affaire, la Cour d'appel a conclu que le prisme déformant au moyen duquel la juge de première instance a examiné la preuve — en l'espèce, une approche étroite et compartimentée — a amené cette dernière à commettre des erreurs manifestes et déterminantes identifiées de façon précise par la cour. L'image du prisme déformant n'était rien de plus qu'une métaphore utilisée par la Cour d'appel pour expliquer en quoi la norme de contrôle applicable en appel établie dans l'arrêt *Housen* était respectée; elle n'a pas été utilisée pour masquer une absence d'erreurs manifestes et déterminantes. La Cour d'appel n'a pas commis une erreur en recourant à la notion du prisme déformant pour décider si la juge de première instance a commis des erreurs manifestes et déterminantes.

Where the first court of appeal has justifiably intervened in the trial judgment and disagreed with the trial judge, the Court will intervene only if its own disagreement stems from a clear satisfaction that an error has occurred in the first appellate court's assessment of the facts. The focal point of the analysis that the Court — as the second and final court of appeal — has to perform in applying the *Housen* standards of review is the decision of the first court of appeal, not that of the trial judge. The onus is on the appellants to demonstrate an error in the court of appeal's decision. Here, the appellants did not satisfy their onus. The Court of Appeal did not err by concluding that the trial judge had made palpable and overriding errors, by interfering with the trial judge's findings relating to the lawyer's duty to advise and duty of loyalty, nor by interfering with the trial judge's findings that the lawyer's fault had not caused the clients' losses. There is no reason for the Court to interfere with the Court of Appeal's findings.

Dans les cas où la première juridiction d'appel était justifiée d'intervenir à l'égard du jugement de première instance et a exprimé son désaccord avec le tribunal qui l'a rendu, la Cour n'interviendra que si son désaccord découle de la nette conviction qu'une erreur s'est produite dans l'appréciation des faits par la première cour d'appel. La décision de la première cour d'appel, et non celle du juge de première instance, constitue l'aspect principal de l'analyse que la Cour — en tant que seconde et ultime juridiction d'appel — doit effectuer dans le cadre de l'application des normes de contrôle établies dans *Housen*. C'est aux appelants qu'il incombe de démontrer la présence d'une erreur dans la décision de la cour d'appel. En l'espèce, les appelants ne se sont pas acquittés de ce fardeau. La Cour d'appel n'a pas commis d'erreur en concluant que la juge de première instance a commis des erreurs manifestes et déterminantes, en intervenant dans les conclusions de la juge de première instance relativement au devoir de conseil et au devoir de loyauté de l'avocat, et en intervenant dans les conclusions de la juge de première instance selon lesquelles les fautes de l'avocat n'ont pas causé les pertes des clientes. Il n'est pas justifié que la Cour modifie les conclusions de la Cour d'appel.

The relationship between lawyers and their clients can usually be characterized as a contract of mandate. Although lawyers, as mandataries, do not guarantee the services rendered by professionals or advisors to whom they refer their client, they must nevertheless act competently, prudently and diligently in making such referrals, which must be based on reasonable knowledge of the professionals or advisors in questions. Lawyers who refer

La relation avocat-client peut habituellement être qualifiée de contrat de mandat. Bien que l'avocat, en tant que mandataire, n'agisse pas comme garant des services rendus par le professionnel ou le conseiller vers lequel il dirige ses clients, il doit néanmoins faire preuve de compétence, prudence et diligence lorsqu'il formule une telle recommandation, laquelle doit être basée sur une connaissance raisonnable du professionnel ou du conseiller en

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clients to other professionals or advisors have an obligation of means, not one of result. They must be convinced that the professionals or advisors to whom they refer clients are sufficiently competent to fulfill the contemplated mandates. Referral is not a guarantee of the services rendered by the professional or advisor to whom the client is referred, but it is also not a shield against liability for other wrongful acts committed by the referring lawyer. In the instant case, the lawyer had done far more than merely make a referral. It was the entirety of his conduct that led the Court of Appeal to hold the lawyer and his law firm liable in the circumstances. The Court of Appeal's decision did not broaden the basis of liability for lawyers who refer clients to other professionals or advisors.

question. L'avocat qui aiguille des clients vers un autre professionnel ou conseiller a une obligation de moyens et non de résultat. Il doit être convaincu que la personne qu'il recommande à son client est suffisamment compétente pour s'acquitter du mandat envisagé. Le fait de recommander à un client un professionnel ou un conseiller ne saurait constituer une garantie des services rendus, mais une telle recommandation ne saurait pas non plus protéger l'avocat qui l'a formulée contre toute responsabilité pour d'autres actes répréhensibles qu'il aurait commis. En l'espèce, l'avocat est allé bien au-delà d'un simple aiguillage. C'est l'ensemble de son comportement qui a amené la Cour d'appel à conclure à la responsabilité de l'avocat et de son cabinet dans les circonstances. La décision rendue par la Cour d'appel en l'espèce n'a pas élargi les bases de la responsabilité des avocats qui aiguillent des clients vers d'autres professionnels ou d'autres conseillers.

A lawyer's duty to advise is threefold, encompassing duties to inform, to explain, and to advise in the strict sense. It is inherent in the legal profession and exists regardless of the nature of the mandate. Its exact scope depends on the circumstances, including the object of the mandate, the client's characteristics and the expertise the lawyer claims to have in the field in question. When lawyers do provide advice, they must always act in their clients' best interests and meet the standard of the competent, prudent and diligent lawyer in the same circumstances. Any advice lawyers give that exceeds their mandate may, if wrongful, engage their liability. Here, the Court of Appeal had sufficient basis to intervene and find that the lawyer had failed to advise his clients as a competent, prudent and diligent lawyer would have done. It properly and precisely identified palpable and overriding errors made by the trial judge in her assessment of the parties' relationships, which had a direct impact on her findings regarding the scope of any wrongful advice given. When properly assessed as a whole, as the Court of Appeal did, the evidence reveals that the lawyer's advice and reassurances were all part of a single continuum, and that placing them in separate silos would be artificial. The lawyer breached his duty to advise by recommending a non-diversified investment in offshore hedge funds to clients whose primary goal was to preserve the capital, by recommending financial products without performing due diligence and by repeatedly reassuring his clients that their investments gave them security of capital.

Le devoir de conseil de l'avocat comporte trois volets : informer, expliquer et conseiller au sens strict du terme. Il fait partie intégrante de la profession d'avocat et existe indépendamment de la nature du mandat. L'étendue exacte de ce devoir varie selon les circonstances, en fonction notamment de l'objet du mandat, des caractéristiques du client et de l'expertise que soutient avoir l'avocat dans le domaine en question. L'avocat qui prodigue des conseils à un client doit toujours agir dans l'intérêt supérieur de ce dernier et respecter les normes que tout avocat compétent, prudent et diligent aurait suivies dans les mêmes circonstances. Tout conseil qu'un avocat prend l'initiative de donner au-delà de son mandat peut, s'il est erroné, engager sa responsabilité. En l'espèce, la Cour d'appel disposait d'assises suffisantes pour intervenir et pour conclure que l'avocat n'a pas conseillé ses clientes comme il incombe à un avocat compétent, prudent et diligent de le faire. Elle a relevé effectivement et de façon précise la présence d'erreurs manifestes et déterminantes dans l'appréciation par la juge du procès des relations des parties, qui ont influencé directement ses conclusions quant à l'ampleur des conseils erronés donnés. Appréciée adéquatement dans son ensemble, comme l'a fait la Cour d'appel, la preuve révèle que les conseils et assurances donnés par l'avocat s'inscrivaient dans un seul et même continuum, et qu'il est artificiel de les compartimenter. L'avocat a manqué à son devoir de conseil en recommandant un placement non diversifié dans des fonds spéculatifs extraterritoriaux à des clientes dont l'objectif principal était la préservation de leur capital, en recommandant des produits financiers sans faire preuve d'aucune forme de diligence appropriée au sujet de ces produits et en rassurant de façon répétée les clientes quant au fait que leurs placements garantissent la sécurité de leur capital.

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As mandataries, lawyers also have a duty to avoid placing themselves in situations in which their personal interests are in conflict with those of their clients. The duty to avoid conflicts of interest is a salient aspect of the duty of loyalty they owe to their clients. The duty of loyalty shields the performance of the lawyer's duty to advise clients from the taint of undue interference. In the instant case, the Court of Appeal was justified in finding that the lawyer's personal and financial relationship with the recommended advisor had placed him in a conflict of interest and that he had neglected his clients' interests. The trial judge adopted an unduly restrictive approach in analyzing the principles relating to conflicts of interest, which tainted her entire analysis concerning the breach of the lawyer's duty of loyalty. A proper consideration of the evidence as a whole leads to the conclusion that this very close relationship affected the lawyer's objectivity in advising his clients. The lawyer's divided loyalties led him to neglect his clients' interests: he disregarded his duty of confidentiality regarding his communications with them and teamed up with the recommended advisor in an attempt to convince them not to withdraw their investments.

More than one fault can cause a single injury so long as each of the faults is a true cause, and not a mere condition, of the injury. A fault is a true cause of its logical, immediate and direct consequences. This characterization is largely a factual matter, which depends on all the circumstances of the case. A person who commits a fault is not liable for the consequences of a new event that the person had nothing to do with and that has no relationship to the initial fault. Two conditions must be met for the principle of *novus actus interveniens* to apply. First, the causal link between the fault and the injury must be completely broken. Second, there must be a causal link between that new event and the injury. A client's ability to rely on advice given by his or her lawyer is central to the lawyer-client relationship and a client's acceptance of a lawyer's negligent advice cannot shield the lawyer from liability. Fraud committed by a third party also does not shield from liability persons who failed to take required precautions. Where the risk of a decline in market prices or fraud by a third party materialize, and where lawyers have failed to abide by the standards of professional conduct that are meant to protect their clients against these very risks, they may be liable for their clients' investment losses. Here, the trial judge's findings regarding the extent of the faults committed by the lawyer no doubt had an impact on her causation analysis. Assessing the evidence in separate silos based on the timing of the events and the

En tant que mandataires, les avocats sont aussi tenus d'éviter de se placer dans une situation de conflit entre leurs intérêts personnels et les intérêts de leurs clients. L'obligation d'éviter les conflits d'intérêts est un des principaux aspects du devoir de loyauté des avocats envers leurs clients. Le devoir de loyauté protège l'accomplissement du devoir de conseil que les avocats doivent à leurs clients contre l'effet d'influences inappropriées. Dans le présent cas, la Cour d'appel était justifiée de conclure que les relations personnelles et financières qu'entretenait l'avocat avec le conseiller financier a placé celui-ci dans une situation de conflit d'intérêts, et qu'il a en définitive négligé les intérêts de ses clientes. La juge de première instance a adopté une approche indûment restrictive dans son analyse des principes relatifs aux conflits d'intérêts, ce qui a entaché toute son analyse relative au manquement de l'avocat à son devoir de loyauté. Il ressort d'un examen adéquat de l'ensemble de la preuve que ces liens très étroits ont eu une incidence sur l'objectivité de l'avocat lorsqu'il conseillait ses clientes. Les loyautés partagées de l'avocat l'ont amené à négliger les intérêts de ses clientes : il a négligé son obligation de protéger la confidentialité de ses communications avec elles et a fait équipe avec le conseiller recommandé pour tenter de les convaincre de ne pas retirer leurs placements.

Il peut arriver que plus d'une faute cause un seul préjudice, pour autant toutefois que chacune d'entre elles soit une véritable cause du préjudice et non une simple occasion de celui-ci. Une faute constitue une cause véritable du préjudice si celui-ci en est la suite logique, directe et immédiate. Cette détermination est dans une large mesure une question de fait et elle dépend de l'ensemble des circonstances de l'affaire. L'auteur d'une faute n'est pas responsable des conséquences d'un événement subséquent qui est indépendant de lui et qui est sans rapport avec la faute initiale. Deux conditions doivent être réunies pour que le principe appelé *novus actus interveniens* s'applique. Dans un premier temps, il faut que le lien de causalité entre la faute initiale et le préjudice subi soit complètement rompu. Dans un second temps, il doit exister un lien de causalité entre ce nouvel événement et le préjudice subi. La capacité d'un client de se fier aux conseils de son avocat est un aspect central de la relation avocat-client et le fait qu'un client accepte les conseils que lui formule de façon négligente son avocat ne saurait exonérer ce dernier de sa responsabilité. La commission d'une fraude par un tiers n'empêche pas non plus que des personnes qui ont omis de prendre les précautions requises soient tenues responsables. Lorsque le risque de baisse des prix du marché ou de fraude commise par un tiers se matérialise et que les avocats n'ont pas respecté les normes de conduite professionnelle destinées à protéger leurs clients contre ce risque

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specific funds that had been recommended was artificial. The trial judge's causation analysis was also distorted by her erroneous finding that the lawyer had not breached his duty of loyalty. Taken together, the lawyer's faults with respect to both his duty to advise and his duty of loyalty were a true cause of the losses suffered by his clients. The fraud did not break the chain of causation — no losses would have been suffered without the faults first committed by the lawyer.

précis, ils peuvent être tenus responsables des pertes subies par leurs clients au titre de leurs placements. En l'espèce, il ne fait aucun doute que les conclusions de la juge de première instance quant à l'ampleur des fautes de l'avocat ont influencé son analyse du lien de causalité. Il était artificiel d'apprécier la preuve de façon compartimentée en se fondant sur la chronologie des faits et sur les fonds précis qui avaient été recommandés. La conclusion erronée de la juge de première instance suivant laquelle l'avocat n'a pas manqué à son devoir de loyauté a également faussé son analyse de la causalité. Considérées globalement, les fautes de l'avocat relativement à son devoir de conseil et à son devoir de loyauté constituent une cause véritable des pertes subies par ses clientes. La fraude n'a pas rompu le lien de causalité; aucune perte n'aurait été subie sans les fautes commises au départ par l'avocat.

Per Côté J. (dissenting): The appeal should be allowed. The Court of Appeal should not have substituted its own view of the case for that of the trial judge as there were no palpable and overriding errors in her key findings. The Court of Appeal wrongly intervened on the basis of mere differences of opinion regarding the assessment of the evidence, which is clearly inconsistent with the role of an appellate court. When a first appellate court interferes with a trial judge's findings in the absence of reviewable errors, it is the Court's role to step in and to restore the trial judge's decision.

La juge Côté (dissidente) : L'appel devrait être accueilli. La Cour d'appel n'aurait pas dû substituer sa propre analyse du dossier à celle de la juge du procès car aucune erreur manifeste et déterminante n'entachait les conclusions clés de la juge du procès. La Cour d'appel est intervenue à tort en se fondant sur de simples différences d'opinions concernant l'appréciation de la preuve, ce qui est manifestement incompatible avec le rôle d'une juridiction d'appel. Lorsqu'une première juridiction d'appel modifie les conclusions du juge du procès en l'absence d'erreurs révisables, il appartient à la Cour d'intervenir et de rétablir la décision du juge du procès.

On questions of fact or of mixed fact and law, an appellate court cannot make its own findings and draw its own inferences unless the trial judge is shown to have committed a palpable and overriding error. As a precondition to intervening in a trial judge's decision, the appellate court must point to a specific and identifiable error that amounts to more than a divergence of opinion and that error must be shown to be determinative of the outcome of the case. The identification of a palpable and overriding error does not require a review of the evidence as a whole. The focus of the review is the trial judge's reasons and, if need be, specific pieces of evidence to which the appellant draws the attention of the appellate court to show that a given finding is unsupported by the evidence. It would be inappropriate for the appellate court to conduct its own assessment of the evidence and then to take note of points of disagreement with the trial judge's findings and hold that those findings result from palpable and overriding errors in order to justify intervening. Appellate courts are, in comparison to trial judges, ill-equipped for the task of fact-finding and must thus leave the task to trial judges.

Pour ce qui est des questions de fait ou des questions mixtes de fait et de droit, une cour d'appel ne peut tirer ses propres conclusions et inférences que s'il est établi que le juge du procès a commis une erreur manifeste et déterminante. Pour pouvoir intervenir à l'égard de la décision d'un juge du procès, la juridiction d'appel doit cibler une erreur précise et discernable qui n'équivaut pas simplement à une divergence d'opinions, et il doit aussi être démontré que l'erreur est déterminante pour l'issue de l'affaire. Identifier une erreur manifeste et déterminante n'exige pas un examen de l'ensemble de la preuve. L'examen doit être axé sur les motifs du juge du procès et, au besoin, sur des éléments de preuve précis sur lesquels l'appelant attire l'attention de la cour d'appel afin de montrer qu'une conclusion donnée n'est pas étayée par la preuve. Il serait inapproprié que la cour d'appel procède à sa propre appréciation indépendante de la preuve, pour ensuite relever les conclusions du juge du procès auxquelles elle ne souscrit pas et conclure que celles-ci découlent d'erreurs manifestes et dominantes afin de justifier son intervention. Les juridictions d'appel, en comparaison aux juges du procès, ne sont pas bien outillées pour la tâche de tirer des conclusions de fait, et doivent donc laisser cette tâche à ceux-ci.

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The distorting lens metaphor does not dispense with the requirement of identifying reviewable errors in accordance with the standards articulated in *Housen.* A "distorting lens" cannot justify a wide-ranging review of the entire record unless adopting the lens is shown to be, in itself, a reviewable error. The distorting lens metaphor may arguably be useful to illustrate how certain palpable errors taint the analysis of the evidence to the point of having an overriding effect, but a metaphor is not a full explanation. The appellate court must explain why the trial judge erred by viewing the case through the impugned "distorting lens", why that error amounts to more than a mere divergence in opinion, and precisely how it distorted the trial judge's analysis and affected the outcome of the case.

La métaphore du prisme déformant n'écarte pas l'obligation de relever la présence d'erreurs révisables conformément aux normes formulées dans *Housen*. Un « prisme déformant » ne peut justifier un examen général de l'ensemble du dossier sauf s'il est démontré que le recours à un tel prisme déformant constitue, en soi, une erreur ouvrant droit à révision. La métaphore du prisme déformant peut sans doute servir à illustrer la façon dont certaines erreurs manifestes vicient l'analyse de la preuve au point d'avoir un effet déterminant, mais une métaphore ne constitue toutefois pas une explication complète. La juridiction d'appel doit expliquer pourquoi le juge du procès a commis une erreur en analysant l'affaire sous l'angle du « prisme déformant » contesté, pourquoi cette erreur représente plus qu'une simple divergence d'opinions, et de quelle façon précise elle fausse l'analyse du juge du procès et influe sur l'issue de l'affaire.

Part of the Court's role as a second and final court of appeal is to ensure that a trial judge's findings of fact or of mixed fact and law remain undisturbed unless a palpable and overriding error is established. Although the focal point of the Court is the first appellate court's decision, not that of the trial judge, the Court must inevitably return to the trial judge's reasons in order to determine whether the first appellate court correctly identified reviewable errors. In that regard, the Court should not defer to the first appellate court with respect to the identification of reviewable errors. When the Court reviews a decision in which the first appellate court has substituted its own findings of fact or of mixed fact and law for those of the trial judge, it must first inquire into whether the first appellate court correctly identified reviewable errors. If it did not, the trial judge's findings must be restored regardless of the merits of the first appellate court's findings. If, however, the Court agrees that the intervention was warranted, it must ask whether the first appellate court has erred in making its own independent assessment of the relevant evidence. It is only at this step that the Court will show a certain deference and will therefore avoid intervening unless clearly satisfied that the first appellate court's findings are erroneous.

Il incombe à la Cour, en tant que juridiction d'appel de second et ultime ressort, de s'assurer que les conclusions de fait ou les conclusions mixtes de fait et de droit du juge du procès sont respectées, à moins que l'existence d'une erreur manifeste et déterminante ne soit établie. Bien que l'objet principal de l'examen de la Cour est la décision de la première juridiction d'appel, et non celle du juge du procès, la Cour doit nécessairement examiner les motifs du juge du procès pour déterminer si la première juridiction d'appel a correctement identifié des erreurs révisables. À cet égard, la Cour ne devrait pas faire montre de retenue à l'égard de la première juridiction d'appel en ce qui concerne l'identification des erreurs révisables. Lorsqu'elle examine une décision dans laquelle la première cour d'appel a substitué ses propres conclusions de fait, ou conclusions mixtes de fait et de droit, à celles du juge du procès, la Cour doit d'abord se demander si la première cour d'appel a correctement identifié des erreurs révisables. Dans la négative, les conclusions du juge du procès doivent être rétablies sans égard au bien-fondé des conclusions de la première cour d'appel. Cependant, si la Cour reconnaît que l'intervention était justifiée, elle doit se demander si la première cour d'appel a commis une erreur dans sa propre appréciation indépendante des éléments de preuve pertinents. Ce n'est qu'à cette étape que la Cour fera preuve d'une certaine déférence, et elle évitera donc d'intervenir sauf si elle est clairement satisfaite que les conclusions de la première cour d'appel sont erronées.

In the instant case, the trial judge did not make a palpable and overriding error with respect to fault and causation. The Court of Appeal merely preferred a different "lens" than the one used by the trial judge. Further, it relied on a broad reassessment of the evidence in order to identify the purported errors, which is at odds with *Housen* and

Dans le cas présent, la juge du procès n'a pas commis d'erreur manifeste et déterminante en ce qui concerne la faute et le lien de causalité. La Cour d'appel a simplement privilégié un « prisme » différent de celui auquel a recouru la juge du procès. De plus, elle s'est fondée sur un réexamen général de la preuve afin de déceler les erreurs dont il

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its progeny. The Court of Appeal's intervention was unwarranted and the Court must intervene to restore the trial judge's findings.

Whenever lawyers recommend other professionals, or express confidence in them, they must meet the standard of a reasonably competent, prudent and diligent lawyer in the same circumstances. Lawyers should make such inquiries as will enable them to acquire reasonable knowledge of professionals they recommend unless they already have relevant experience dealing with them. Not every professional error made in making such inquiries — or in failing to make them — will amount to a fault if the lawyer's conduct does not depart from the standard expected, and courts must be careful not to assess recommendations in light of facts discovered subsequently. Moreover, referring lawyers are not required to monitor the advice given by the professionals they recommended, as this would defeat the purpose of referral.

In the instant case, the Court of Appeal did not identify a specific reviewable error in the trial judge's reasons in relation to the lawyer's initial recommendation and later expressions of confidence. The lawyer did not commit a fault in recommending the investment firm and the financial advisor and in expressing confidence in them. While the lawyer had a duty to advise both his clients and a duty of loyalty to both of them, those duties were largely circumscribed by the very nature and scope of his mandates. The precise scope of a mandate does not always limit a lawyer's duties, but it is certainly one of the main considerations for a judge when assessing professional liability. In the present case, as the lawyer had had no specific mandate with regard to the clients' investments, it was appropriate for the trial judge to eschew an overly broad approach to liability. The lawyer's confidence in the competence and probity of the investment firm and the recommended advisor was based on reasonable knowledge. He therefore acted as a reasonably competent, prudent and diligent lawyer in the circumstances.

A lawyer's duty to advise generally includes obligations to inform the client of the relevant facts, to explain available options and their implications, and to recommend a course of action. Yet, the precise content of that duty is highly dependent on the circumstances, including the scope of the mandate, the obligations assumed by the

est question, ce qui est contraire à l'arrêt *Housen* et à ceux rendus dans sa foulée. L'intervention de la Cour d'appel n'était pas justifiée et la Cour doit intervenir pour rétablir les conclusions de la juge du procès.

Chaque fois que les avocats recommandent d'autres professionnels ou qu'ils expriment leur confiance en eux, ils doivent satisfaire à la norme de l'avocat raisonnablement compétent, prudent et diligent dans la même situation. Les avocats devraient faire des recherches sur les professionnels qu'ils recommandent afin d'en avoir une connaissance raisonnable, à moins qu'ils n'aient déjà eu une expérience de collaboration pertinente avec eux. Toutes les erreurs professionnelles relatives à ces recherches — ou à l'omission d'en faire — ne constitueront pas une faute si la conduite de l'avocat respecte la norme à laquelle il devrait se conformer, et les tribunaux doivent se garder de juger des recommandations à la lumière de faits découverts subséquemment. De plus, l'avocat n'est pas tenu de vérifier les conseils donnés par les professionnels qu'il a recommandés, vu que ce serait contraire à l'objectif de la recommandation.

Dans la présente affaire, la Cour d'appel n'a pas identifié d'erreur révisable précise dans les motifs de la juge du procès concernant la recommandation initiale de l'avocat et ses témoignages subséquents de confiance. L'avocat n'a pas commis de faute en recommandant la société de placements et le conseiller financier et en témoignant de sa confiance en eux. Bien que l'avocat avait un devoir de conseil et un devoir de loyauté envers ses deux clientes, ces devoirs étaient dans une large mesure circonscrits par la nature et l'étendue mêmes de ses mandats. Les devoirs d'un avocat ne se résument pas toujours à l'étendue précise de son mandat, mais celle-ci constitue certainement l'une des considérations principales dont le juge doit tenir compte pour évaluer la responsabilité professionnelle. En l'espèce, vu que l'avocat n'avait aucun mandat précis en ce qui concerne les placements de ses clientes, il était opportun que la juge du procès évite d'adopter une approche trop large en ce qui concerne la responsabilité. La confiance de l'avocat en la compétence et la probité de la société de placements et le conseiller recommandé reposait sur une connaissance raisonnable. Il a donc agi comme l'aurait fait un avocat raisonnablement compétent, prudent et diligent dans la situation.

Le devoir de conseil de l'avocat inclut généralement l'obligation d'informer son client des faits pertinents, celle d'expliquer les options possibles et leurs conséquences et celle de recommander une ligne de conduite. Le contenu précis de ce devoir est toutefois hautement tributaire des circonstances, à savoir l'étendue du mandat,

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lawyer and his or her areas of expertise. In this case, there is no palpable and overriding error in the trial judge's finding that the lawyer's only fault relating to his duty to advise was to recommend specific investment products. As the trial judge concluded, the lawyer failed to act as a reasonably competent, prudent and diligent lawyer in recommending specific investment products and in volunteering investment advice even though such advice fell outside of the limits of his mandates. In so doing, he breached his duty to advise. Indeed, to the extent that a lawyer does provide advice, he must meet the standard of a reasonably competent, prudent and diligent lawyer in the same circumstances irrespective of the scope of his mandate.

The Court of Appeal had some basis for concluding that the lawyer had committed the same faults in respect of both his clients, but even if this error is assumed to be palpable, it did not affect the outcome of the case. This error did not justify the Court of Appeal's conducting a broad reassessment of the evidence for the purpose of finding other potential errors.

The analysis of an alleged fault related to the duty of loyalty involves a question of mixed fact and law and, unless a pure question of law can be extricated, the appropriate standard is that of palpable and overriding error. An extricable question of law generally concerns a mischaracterization of the applicable legal test or a failure to consider a required element of that test. The analysis of an alleged conflict of interest is inherently fact-based and alleged conflicts must be assessed on a case-by-case basis. Not every potential violation of the duty of loyalty will give rise to an action in civil liability. The court must analyze the nature and the circumstances of the alleged conflict for the purpose of characterizing the violation and, if warranted, determining the appropriate remedy.

A trial judge does not have to discuss in detail every single fact alleged by the parties or every piece of evidence and declining to draw an inference falls squarely within its purview. The question is not whether the trial judge brushed aside elements that the court of appeal deemed important, but whether those omissions might have affected the conclusion. Here, the Court of Appeal erred in interfering with the trial judge's finding that the lawyer had not breached his duty of loyalty to his clients. It proceeded to revisit the issue of conflict of interests by

les obligations qu'assume l'avocat et ses domaines d'expertise. Dans la présente affaire, la juge du procès n'a commis aucune erreur manifeste et déterminante en concluant que la seule faute de l'avocat quant à son devoir de conseil a été de recommander des produits de placement précis. Comme l'a conclu la juge du procès, l'avocat a omis d'agir comme l'aurait fait un avocat raisonnablement compétent, prudent et diligent lorsqu'il a recommandé des produits de placement précis et lorsqu'il a donné de son propre chef des conseils en matière de placements même si de tels conseils ne faisaient pas partie de ses mandats. En faisant cela, il a manqué à son devoir de conseil. D'ailleurs, dans la mesure où un avocat donne des conseils, il doit respecter la norme à laquelle se conformerait un avocat raisonnablement compétent, prudent et diligent dans la même situation, quelle que soit l'étendue précise de son mandat.

La Cour d'appel disposait de certains éléments sur lesquels se fonder pour conclure que l'avocat a commis les mêmes fautes à l'égard de ses deux clientes, mais même si cette erreur est tenue pour manifeste, elle n'a pas eu d'incidence sur l'issue de l'affaire. Cette erreur ne permettait pas non plus à la Cour d'appel de procéder à un réexamen général de la preuve afin de déceler d'autres erreurs potentielles.

L'analyse d'une faute reprochée quant au devoir de loyauté soulève des questions mixtes de fait et de droit et, à moins qu'on puisse facilement isoler une pure question de droit, la norme appropriée est celle de l'erreur manifeste et déterminante. Une question de droit isolable consiste généralement en une formulation erronée du critère juridique applicable ou en l'omission de tenir compte d'un élément essentiel de ce critère. L'analyse d'un prétendu conflit d'intérêts est intrinsèquement factuelle et les prétendus conflits d'intérêts doivent être évalués au cas par cas. Ce ne sont pas tous les possibles manquements au devoir de loyauté qui donneront ouverture à une action en responsabilité civile. Le tribunal doit analyser la nature et les circonstances du prétendu conflit afin de qualifier la contravention et de déterminer, le cas échéant, la réparation qui s'impose.

Un juge de première instance n'est pas tenu de traiter en détail de chaque fait particulier allégué par les parties ou de chaque élément de preuve, et la décision de refuser de tirer une inférence relève entièrement du juge des faits. La question n'est pas de savoir si le juge du procès a écarté des éléments que la cour d'appel estime importants, mais plutôt si de telles omissions auraient pu avoir une incidence sur la conclusion. En l'espèce, la Cour d'appel a commis une erreur en infirmant la conclusion de la juge du procès selon laquelle l'avocat n'a pas manqué à son

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applying the standard of correctness, as if a question of law had been identified. Yet, the Court of Appeal has not suggested that the trial judge failed to identify the correct legal principles applicable to the alleged fault related to the duty of loyalty or that there is an error in the trial judge's characterization of the applicable legal test. The Court of Appeal failed to identify a palpable and overriding error and impermissibly reassessed the evidence as a whole on the basis of a disagreement over the weight to be given to the evidence. The fact that the Court of Appeal would have weighed the evidence differently, or drawn different inferences, does not justify its intervention. Even if the trial judge did not address certain aspects of the professional relationship between the lawyer and the recommended advisor, especially the disclosure by the former of communications with his client and the fact that he had cooperated extensively with the recommended advisor and the investment firm on at least one occasion, those omissions did not affect her conclusions. The trial judge properly considered the factors that could have cast doubt on the lawyer's undivided loyalty and commitment to his clients, that is, his friendship with the recommended advisor and their financial relationship, including the gifts or commissions he had received. The conclusion that these factors were not enough to have placed the lawyer in a position where his personal interest conflicted with that of his clients was open to her, and is entitled to deference.

A fundamental principle of civil liability is that a person is liable only for injury caused by his or her own fault. A true cause is established when the plaintiff proves that the injury is a logical, immediate and direct consequence of the fault. It does not suffice to show that the fault increased the likelihood of the injury occurring if there is no evidence that the fault directly caused the injury either in whole or in part. The analysis of causation remains a context-based exercise which does not lend itself to legal theorizing. It is up to the trier of fact to draw a line, or identify a breaking point, between the consequences that flow directly and immediately from the fault and the others. Proving breaches of a lawyer's professional duties does not suffice to establish civil liability in the absence of a causal link to an injury.

In the instant case, the Court of Appeal should not have completely reassessed the evidence and interfered with the trial judge's conclusions regarding causation of the

devoir de loyauté envers ses clientes. Elle a procédé au réexamen de la question du conflit d'intérêts en appliquant la norme de la décision correcte, comme si une question de droit avait été relevée. Cependant, la Cour d'appel n'a pas laissé entendre que la juge du procès avait omis de cerner les bons principes juridiques applicables à la faute reprochée liée au devoir de loyauté ou que sa description du critère juridique applicable comportait une erreur. La Cour d'appel n'a pas relevé la présence d'une erreur manifeste et déterminante et elle a procédé de façon inacceptable à un réexamen de l'ensemble de la preuve en se fondant sur une divergence d'opinions quant à l'importance qu'il faut donner à la preuve. Le fait que la Cour d'appel aurait apprécié différemment la preuve ou tiré des inférences différentes ne justifie pas son intervention. Même si la juge du procès n'a pas traité de certains aspects de la relation professionnelle qui unissait l'avocat et le conseiller recommandé, en particulier la divulgation par l'avocat de communications qu'il a eues avec sa cliente et le fait qu'il a collaboré avec le conseiller recommandé et la société de placements à au moins une occasion, de telles omissions n'ont pas eu d'incidence sur ses conclusions. La juge du procès a examiné comme il convient les facteurs qui auraient pu soulever des doutes quant à la loyauté et au dévouement exclusifs de l'avocat envers ses clientes, à savoir son amitié avec le conseiller recommandé et leur relation financière, notamment les cadeaux ou les commissions qu'il a reçus. La juge du procès pouvait tirer la conclusion que de tels facteurs ne suffisaient pas à placer l'avocat dans une situation où son intérêt personnel entrerait en conflit avec celui de ses clientes, et il convient de faire preuve de déférence à l'égard de cette conclusion.

Selon un principe fondamental de la responsabilité civile, une personne ne peut être tenue responsable que des préjudices causés par sa faute. Une cause véritable est établie lorsque le demandeur prouve que le préjudice est une conséquence logique, directe et immédiate de la faute. En l'absence de toute preuve que la faute a directement causé le préjudice en totalité ou en partie, il ne suffit pas de démontrer que la faute a augmenté la probabilité qu'il y ait préjudice. L'analyse du lien de causalité demeure une démarche contextuelle qui se prête mal à la théorisation juridique. Il appartient au juge des faits de tirer une ligne, ou d'identifier le point de rupture, entre les conséquences qui découlent directement et immédiatement de la faute et les autres. Il ne suffit pas de prouver qu'un avocat a manqué à ses devoirs professionnels pour établir une responsabilité civile; un lien causal avec le préjudice doit aussi être établi.

Dans la présente affaire, la Cour d'appel n'aurait pas dû procéder à une nouvelle appréciation complète de la preuve et modifier les conclusions de la juge du procès

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basis of the distorting lens metaphor. It was open to the trial judge to find that the fraud was the only true cause of the losses and that the recommendation of the investment firm and financial advisor was not close enough to the injury to qualify as a logical, direct and immediate cause. With respect to the duties of loyalty and confidentiality, it is unclear how the alleged breaches might have caused the losses. Moreover, even if the lawyer did commit additional faults related to his duty to advise and his duties of loyalty and confidentiality after he had become aware of a news article raising doubts about the firm's practices, the outcome would be the same as the funds were no longer recoverable by that time. Hence, any faults occurring after that date had no consequence on the losses.

concernant le lien de causalité en se fondant sur la métaphore du prisme déformant. La juge du procès pouvait donc conclure que la fraude est la seule cause véritable des pertes et que la recommandation de la société de placements et du conseiller financier n'a pas de lien suffisamment étroit avec le préjudice pour constituer une cause logique, directe et immédiate. Pour ce qui est des devoirs de loyauté et de confidentialité, il n'apparaît pas clairement de quelle façon les manquements reprochés auraient pu causer les pertes. De plus, même si l'avocat avait effectivement commis d'autres fautes relativement à son devoir de conseil et à ses devoirs de loyauté et de confidentialité après avoir eu connaissance d'un article publié dans le journal qui soulevait des doutes relativement aux pratiques de la société de placements, l'issue aurait été la même étant donné que les fonds ne pouvaient plus être recouvrés à ce moment. Par conséquent, les fautes commises après cette date n'ont eu aucune conséquence sur les pertes.

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By Côté J. (dissenting)

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Douglas C. Mitchell, *Audrey Boctor* and *Olga Redko*, for the appellants.

Suzanne Payer inc., 2017 QCCS 2474; *Harris (Succession), Re*, 2016 QCCA 50, 25 C.C.L.T. (4th) 1; *Roberge c. Bolduc*, [1991] 1 R.C.S. 374; *Phillips c. Naamani*, 1998 CanLII 9332; *F.H. c. McDougall*, 2008 CSC 53, [2008] 3 R.C.S. 41; *Hinse c. Canada (Procureur général)*, 2015 CSC 35, [2015] 2 R.C.S. 621; *Parrot c. Thompson*, [1984] 1 R.C.S. 57; *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Bombardier Inc. (Bombardier Aéronautique Centre de formation)*, 2015 CSC 39, [2015] 2 R.C.S. 789; *Dallaire c. Paul-Émile Martel Inc.*, [1989] 2 R.C.S. 419; *Stellaire Construction Inc. c. Ciment Québec Inc.*, 2002 CanLII 35591; *Lacombe c. André*, [2003] R.J.Q. 720.

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Douglas C. Mitchell, *Audrey Boctor* et *Olga Redko*, pour les appelants.

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Pierre Bienvenu, *Azim Hussain*, *Andres C. Garin* and *Frédéric Wilson*, for the respondents.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ. was delivered by

GASCON J. —

I. Overview

[1] This case concerns the professional liability of a lawyer who has referred clients to a financial advisor where that advisor subsequently turns out to be a fraudster and where, in addition to the referral, the lawyer has over a number of years been recommending and endorsing the advisor's investments.

[2] By 2003, the first appellant, Kenneth F. Salomon, had been the lawyer of the respondents, Judith Matte-Thompson and 166376 Canada Inc. ("166"), in Quebec for a long time. During that year, he introduced them to Themis Papadopoulos, his personal friend and his own financial advisor, and recommended that they consult him. In the following four years, the respondents ended up investing over $7.5 million with Mr. Papadopoulos's investment firm, Triglobal Capital Management Inc. ("Triglobal"). Over the course of those four years, Mr. Salomon repeatedly endorsed Mr. Papadopoulos as a financial advisor and encouraged the respondents to make and retain investments with Triglobal. In 2007, Mr. Papadopoulos and his associate, Mario Bright, disappeared with the savings of around 100 investors, including those of the respondents.

[3] The respondents claimed that Mr. Papadopoulos and Mr. Bright had fraudulently misappropriated their investments. They also claimed that Mr. Salomon and the second appellant, his law firm Sternthal Katznelson Montigny LLP ("SKM"),[1] had been professionally negligent in two ways. First,

[1] In this Court and the courts below, SKM presented a common defence with Mr. Salomon and did not present separate arguments concerning its own liability.

Pierre Bienvenu, *Azim Hussain*, *Andres C. Garin* et *Frédéric Wilson*, pour les intimées.

Version française du jugement du juge en chef Wagner et des juges Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe et Martin rendu par

LE JUGE GASCON —

I. Aperçu

[1] La présente affaire concerne la responsabilité professionnelle imputable à un avocat qui aiguille des clients vers un conseiller financier qui se révèle ultérieurement être un fraudeur, dans un contexte où, outre l'aiguillage lui-même, l'avocat recommande et commente favorablement les placements de ce conseiller au fil des ans.

[2] En 2003, le premier appelant, Kenneth F. Salomon, est l'avocat de longue date des intimées, Judith Matte-Thompson et 166376 Canada Inc. (« 166 »), au Québec. Au cours de l'année, il leur présente Themis Papadopoulos, son ami proche et conseiller financier personnel, et leur recommande de le consulter. Au cours des quatre années qui suivent, les intimées finissent par investir plus de 7,5 millions de dollars dans la société de placements de M. Papadopoulos, Triglobal Capital Management Inc. (« Triglobal »). Durant ces quatre années, Me Salomon commente favorablement et de façon répétée les services de M. Papadopoulos en tant que conseiller financier, en plus d'encourager les intimées à effectuer et à conserver leurs placements chez Triglobal. En 2007, M. Papadopoulos et son associé, Mario Bright, se volatilisent avec les économies d'une centaine d'investisseurs, dont celles des intimées.

[3] Pour les intimées, MM. Papadopoulos et Bright ont détourné frauduleusement leurs investissements. Elles soutiennent aussi que Me Salomon et le deuxième appelant, son cabinet d'avocats Sternthal Katznelson Montigny, s.e.n.c.r.l. (« SKM »)[1], ont fait preuve de négligence professionnelle de deux façons.

[1] Devant notre Cour et devant les cours d'instances inférieures, SKM a présenté une défense commune avec Me Salomon et n'a pas formulé d'arguments distincts quant à sa propre responsabilité.

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Mr. Salomon and SKM had breached their duty to advise the respondents by recommending, endorsing and encouraging inappropriate investments with Mr. Papadopoulos's firm. Second, they had disregarded their duty of loyalty to the respondents by placing themselves in a conflict of interest that led them to turn a blind eye to the situation. The respondents sued Mr. Papadopoulos, Mr. Bright, Mr. Salomon and SKM for the loss of their investment capital, the loss of the opportunity to realize a return on those investments, and moral injury. They also sought an award of punitive damages against Mr. Papadopoulos and Mr. Bright.

Premièrement, Me Salomon et SKM ont manqué à leur devoir de conseil envers les intimées en recommandant, commentant favorablement et encourageant des investissements inopportuns auprès de la société de M. Papadopoulos. Deuxièmement, ils ont manqué à leur devoir de loyauté envers les intimées en se plaçant dans une situation de conflit d'intérêts qui les a amenés à fermer les yeux sur la situation. Les intimées ont poursuivi MM. Papadopoulos, Bright et Salomon et le cabinet SKM pour la perte de leurs investissements en capital, pour la perte de la possibilité de tirer des revenus de ces capitaux et pour leur préjudice moral. Elles ont également demandé que MM. Papadopoulos et Bright soient condamnés à leur verser des dommages-intérêts punitifs.

[4] The trial judge held that Mr. Papadopoulos and Mr. Bright were liable for the respondents' investment losses and moral injury, as well as for punitive damages, but dismissed the claim against Mr. Salomon and SKM. She concluded that Mr. Salomon had not committed any fault that was a cause of the respondents' losses. In her view, although he had breached his professional standard of care by making his initial recommendation to the individual respondent, Ms. Matte-Thompson, with regard to her investments, there was no causal link between that fault and Ms. Matte-Thompson's subsequent losses. The trial judge also found that Mr. Salomon had not been in a conflict of interest and that he had not provided financial advice to the corporate respondent, 166.

[4] La juge de première instance conclut que MM. Papadopoulos et Bright sont responsables des pertes subies par les intimées au titre de leurs placements et de leur préjudice moral, en plus de les condamner au paiement de dommages-intérêts punitifs. Elle rejette toutefois l'action contre Me Salomon et SKM, statuant que le premier n'a commis aucune faute qui aurait causé les pertes subies par les intimées. De l'avis de la juge de première instance, bien que Me Salomon ait manqué à son obligation de diligence professionnelle en formulant à l'intimée, Mme Matte-Thompson, sa recommandation initiale quant à ses placements, il n'existe aucun lien de causalité entre cette faute et les pertes subséquentes de Mme Matte-Thompson. La juge du procès conclut en outre que Me Salomon ne s'est pas placé dans une situation de conflit d'intérêts et qu'il n'a pas fourni de conseils financiers à l'autre intimée, 166.

[5] The Court of Appeal concluded that the trial judge had made reviewable errors, and it reversed her judgment. It made a number of findings, including (1) that Mr. Salomon's faults were not limited in time to that of the initial recommendation, (2) that those faults were committed not only against Ms. Matte-Thompson, but also against 166, and (3) that those faults caused the losses suffered by both of the respondents. In the Court of Appeal's opinion, the trial judge had viewed Mr. Salomon's acts and their consequences through a distorting lens which had led her to erroneously assess the evidence in isolated

[5] La Cour d'appel statue que la juge de première instance a commis des erreurs donnant ouverture à son intervention et elle a infirmé la décision. Elle tire un certain nombre de conclusions, statuant notamment : (1) que les fautes commises par Me Salomon ne se limitent pas dans le temps à celle relative à sa recommandation initiale, (2) que ces fautes ont été commises à l'égard non seulement de Mme Matte-Thompson, mais également de 166 et (3) que ces fautes ont causé les pertes subies par les deux intimées. De l'avis de la Cour d'appel, la juge de première instance a analysé les agissements

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silos, without the insight provided by a global analysis. The Court of Appeal also held that the trial judge had taken an unduly restrictive approach in analyzing Mr. Salomon's conflict of interest.

de Me Salomon et leurs conséquences à travers un prisme déformant, qui l'a amenée à apprécier erronément la preuve de façon compartimentée, sans l'éclairage que lui aurait procuré une vision d'ensemble des événements. La Cour d'appel conclut également que la juge de première instance a adopté une approche indûment restrictive lors de son analyse du conflit d'intérêts de Me Salomon.

[6] I am satisfied that the Court of Appeal had a sufficient basis for intervening as it did. I would therefore dismiss the appeal.

[6] J'estime que la Cour d'appel disposait d'assises suffisantes pour intervenir comme elle l'a fait. Je suis par conséquent d'avis de rejeter le pourvoi.

II. Context

II. Contexte

[7] Malcolm Thompson and his wife, Ms. Matte-Thompson, were business people who operated restaurant franchises in Ontario and Quebec. Four companies ("Companies"), including 166, were set up for the purpose of operating the restaurants. Mr. Thompson and Ms. Matte-Thompson owned, respectively, two thirds and one third of the shares of 166, and Mr. Thompson was the sole shareholder of the other three companies. In 2002, the Thompsons sold all of their restaurant franchises but one. With that one exception, the Companies remained owners of the real estate only.

[7] À l'époque pertinente, Malcolm Thompson et son épouse, Mme Matte-Thompson, sont des gens d'affaires qui exploitent des franchises de restaurants en Ontario et au Québec. Quatre sociétés (« Sociétés »), dont 166, sont alors constituées pour l'exploitation des restaurants. Monsieur Thompson et Mme Matte-Thompson détiennent respectivement les deux tiers et le tiers des actions de 166, et M. Thompson est le seul actionnaire des trois autres sociétés. En 2002, les Thompson vendent toutes leurs franchises de restaurants, sauf une. Hormis le cas de cette dernière, les Sociétés ne conservent que les actifs immobiliers.

[8] Mr. Thompson passed away in 2003. Ms. Matte-Thompson then became the sole director of the Companies. She remained 166's sole director until October 2006, when David Gemmill and Joseph Miller were appointed to the board. Mr. Gemmill had been Mr. Thompson's lawyer in Ontario, and Mr. Miller had been his brother-in-law.

[8] Monsieur Thompson décède en 2003 et Mme Matte-Thompson devient alors l'unique administratrice des Sociétés. Elle demeure la seule administratrice de 166 jusqu'en octobre 2006, alors que David Gemmill (l'avocat de M. Thompson en Ontario) et Joseph Miller (le beau-frère de M. Thompson) sont nommés membres du conseil d'administration.

[9] Mr. Thompson left two wills, in which he created three trusts for his grandchildren and one trust ("Trust") for most of his assets, including his shares in the Companies. Mr. Thompson appointed his wife, Mr. Gemmill and Mr. Miller as the trustees and executors under the wills. The wills named Ms. Matte-Thompson as the income beneficiary of the Trust until her death. The capital of the Trust was to be distributed to the children of Mr. Thompson and those of Ms. Matte-Thompson after Ms. Matte-Thompson's death. The purpose of this arrangement

[9] Monsieur Thompson laisse deux testaments aux termes desquels il constitue trois fiducies pour ses petits-enfants et une fiducie (« Fiducie ») composée de la majorité de ses actifs, y compris les actions qu'il détient dans les Sociétés. Monsieur Thompson désigne son épouse, ainsi que Me Gemmill et M. Miller, à titre de fiduciaires et de liquidateurs de la succession. Dans les testaments, Mme Matte-Thompson est désignée à titre de bénéficiaire des fruits et revenus de la Fiducie jusqu'à son décès. Après le décès de Mme Matte-Thompson, le capital de la Fiducie doit

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was to ensure that Ms. Matte-Thompson's needs were met and to provide her with financial security while preserving the capital for the children. Preserving the capital was a paramount consideration under the wills.

[10] Mr. Salomon had been the Thompsons' lawyer for their business operations in Quebec since 1989. Following her husband's death, Ms. Matte-Thompson regularly consulted Mr. Salomon for advice regarding the interpretation and implementation of the wills. She was uncomfortable with her dual position as an income beneficiary and a trustee of the Trust, and worried about how she could maintain her lifestyle without spending the children's capital. Ms. Matte-Thompson was an educated and experienced businesswoman, but did not have sophisticated knowledge of the investment world.

[11] Mr. Salomon introduced Ms. Matte-Thompson to Mr. Papadopoulos, his personal financial advisor and the directing mind of Triglobal, in September 2003. He had met Mr. Papadopoulos in 2001 when he himself was looking for a personal financial advisor. The two had subsequently become close friends. Mr. Salomon personally invested in three funds promoted by Triglobal: he put the bulk of his savings in a Manulife Financial product ("Manulife") and some smaller amounts in Focus Management Inc. ("Focus") and iVest Fund Ltd. ("iVest"). Respectively based in the Cayman Islands and the Bahamas, Focus and iVest were two offshore hedge funds linked to Triglobal and to Mr. Papadopoulos and Mr. Bright.

[12] Mr. Salomon recommended Triglobal and its iVest fund to Ms. Matte-Thompson. Among other things, he described iVest as "an excellent vehicle wherever security of capital is important" (A.R., vol. 3, at p. 352). Relying on that advice, Ms. Matte-Thompson decided to invest some of her personal savings with Triglobal in early 2004. She made an initial investment of $100,000 in iVest and a second one of $1,245,000 in Manulife. In the months

être distribué aux enfants de M. Thompson et à ceux de Mme Matte-Thompson. Cet arrangement vise à pourvoir aux besoins de Mme Matte-Thompson et à assurer sa sécurité financière, tout en préservant le capital pour les enfants. La préservation du capital est un objectif primordial aux termes des testaments.

[10] Depuis 1989, Me Salomon est l'avocat des Thompson pour leurs activités commerciales au Québec. Après le décès de son époux, Mme Matte-Thompson consulte régulièrement Me Salomon pour obtenir ses conseils quant à l'interprétation et à l'exécution des testaments. Elle est mal à l'aise d'être à la fois bénéficiaire des fruits et revenus de la Fiducie et fiduciaire de celle-ci, et elle se demande comment maintenir son style de vie sans entamer le capital destiné aux enfants. Bien qu'elle soit une femme d'affaires instruite et expérimentée, Mme Matte-Thompson ne possède pas une connaissance approfondie du milieu des placements.

[11] En septembre 2003, Me Salomon présente Mme Matte-Thompson à M. Papadopoulos, son conseiller financier personnel et l'âme dirigeante de Triglobal. Il avait rencontré M. Papadopoulos en 2001 lorsqu'il était lui-même à la recherche d'un conseiller financier personnel, et les deux sont devenus par la suite des amis proches. Maître Salomon a personnellement investi dans trois fonds dont Triglobal fait la promotion : il a placé le gros de ses économies dans un produit Manulife Financial (« Manulife ») ainsi que des sommes de moindre importance dans les fonds Focus Management Inc. (« Focus ») et iVest Fund Ltd. (« iVest »). Situés respectivement aux îles Cayman et aux Bahamas, Focus et iVest sont deux fonds spéculatifs extraterritoriaux (« *offshore hedge fund* ») liés à Triglobal et à MM. Papadopoulos et Bright.

[12] Maître Salomon recommande Triglobal et son fonds iVest à Mme Matte-Thompson. Il qualifie notamment iVest [TRADUCTION] « d'excellent véhicule de placement dans les cas où la sécurité du capital est une considération importante » (d.a., vol. 3, p. 352). Se fiant à ce conseil, Mme Matte-Thompson décide d'investir une partie de ses économies personnelles auprès de Triglobal au début de l'année 2004. Elle place d'abord 100 000 $ dans le fonds iVest, puis

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that followed, she transferred $400,000 from the Manulife account to iVest.

[13] From 2003 to 2006, Mr. Salomon was involved in a reorganization of the Companies. All of them, except the one still operating a restaurant, were merged into 166. Then, in February 2006, Mr. Salomon arranged the sale of 166's assets and prepared resolutions that authorized the opening of accounts for 166 with iVest and Manulife. In February and April 2006, following instructions received from a Triglobal representative, the proceeds of the sale, in the amount of $5,830,642, were invested entirely in Focus. In July 2006, Ms. Matte-Thompson redeemed part of her investment in iVest, and she also put a total of $1,188,949 in Focus in March and October 2006.

[14] Beginning in April 2006, Ms. Matte-Thompson expressed concern to Mr. Salomon regarding the investments, including Focus. She wanted more information on the nature of the investments and had been having difficulty communicating with Triglobal. Each time she expressed concern, Mr. Salomon either promptly reassured her or informed Mr. Papadopoulos, who would himself reassure her.

[15] Near the end of 2006, Mr. Miller urged the other two trustees and executors to request the redemption of 166's investments in Focus. They followed this advice in January 2007, but requested only gradual redemptions in order to avoid any penalty. Between February and July 2007, 166 received redemptions totalling $900,000.

[16] In May 2007, the *La Presse Affaires* magazine published an article that questioned investments made through Triglobal in iVest and Focus. In December 2007, Ms. Matte-Thompson asked for complete redemption of the investments in Focus, but by then, Triglobal, iVest and Focus had ceased doing business and their assets had been frozen. Most unfortunately for the respondents, the Focus and

1 245 000 $ dans le fonds Manulife. Dans les mois qui suivent, elle transfère une somme de 400 000 $ du compte Manulife vers le fonds iVest.

[13] De 2003 à 2006, Me Salomon participe à la réorganisation des Sociétés. À l'exception de celle qui exploite encore un restaurant, les Sociétés fusionnent alors avec 166. En février 2006, Me Salomon organise également la vente des actifs de 166 et prépare des résolutions autorisant l'ouverture pour 166 de comptes dans les fonds iVest et Manulife. En février et en avril 2006, conformément aux directives données par un représentant de Triglobal, le produit de la vente, qui s'élève à 5 830 642 $, est placé au complet dans le fonds Focus. En juillet 2006, Mme Matte-Thompson rachète une partie de son placement dans le fonds iVest, et elle place également une somme totale de 1 188 949 $ dans le fonds Focus en mars et octobre 2006.

[14] À partir d'avril 2006, Mme Matte-Thompson commence à faire part à Me Salomon de ses inquiétudes au sujet de ces placements, y compris dans le fonds Focus. Elle veut obtenir davantage de renseignements sur la nature des placements, et elle a de la difficulté à communiquer avec Triglobal. Chaque fois qu'elle exprime des préoccupations, ou bien Me Salomon la rassure promptement, ou bien il en informe M. Papadopoulos, qui communique lui-même avec elle pour la rassurer.

[15] Vers la fin de 2006, M. Miller conseille fortement aux deux autres fiduciaires et liquidateurs de la succession de demander le remboursement des placements de 166 dans le fonds Focus. Ils suivent son conseil en janvier 2007, mais ne demandent que des remboursements progressifs, dans le but d'éviter toute pénalité. Entre février et juillet 2007, 166 reçoit des remboursements totalisant 900 000 $.

[16] En mai 2007, le cahier *La Presse Affaires* publie un article qui met en doute les placements faits par l'entremise de Triglobal dans les fonds iVest et Focus. En décembre 2007, Mme Matte-Thompson réclame le remboursement intégral des placements dans le fonds Focus, mais, à cette date, Triglobal, iVest et Focus ont cessé leurs activités et leurs actifs ont été bloqués. Malheureusement pour les intimées,

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iVest funds turned out to be parts of a Ponzi scheme. Ms. Matte-Thompson lost $1,188,068 in Focus and iVest; 166 lost $4,006,366 in the same two funds. Globally, almost $100 million was lost in the fraud by approximately 100 investors.

les fonds Focus et iVest se révèlent faire partie d'un stratagème de type Ponzi. Madame Matte-Thompson perd une somme de 1 188 068 $ dans les fonds Focus et iVest, tandis que 166 perd 4 006 366 $ dans ces mêmes fonds. Globalement, cette fraude fait perdre près de 100 millions de dollars à une centaine d'investisseurs.

[17] Sometime after the collapse of Triglobal, Ms. Matte-Thompson learned that Mr. Salomon had received payments from Mr. Papadopoulos totalling $38,000 in 2006 and 2007. In early 2006, following a recommendation by Mr. Papadopoulos, Mr. Salomon had incorporated a company, 4307909 Canada Inc. ("430"), for the purpose of "financial consulting" (A.R., vol. 6, at p. 1778). Mr. Papadopoulos instructed 430 to issue two invoices, each in the amount of $10,000, for which payments were received in May and June 2006 even though no services were ever rendered in this regard. According to Mr. Salomon, these payments constituted a "gift" to help him renovate his apartment (A.R., vol. 10, at p. 3108). In February 2007, 430 received a further payment of $8,000, the purpose of which was allegedly to cover the taxes on the previous $20,000 "gift".

[17] Quelque temps après l'effondrement de Triglobal, Mme Matte-Thompson apprend que Me Salomon a reçu de M. Papadopoulos des sommes totalisant 38 000 $ en 2006 et 2007. Au début de 2006, par suite d'une recommandation de M. Papadopoulos, Me Salomon a constitué une société, 4307909 Canada Inc. (« 430 »), afin de fournir des services de [TRADUCTION] « consultation financière » (d.a., vol. 6, p. 1778). Conformément aux instructions de M. Papadopoulos, 430 a produit deux factures de 10 000 $ chacune, à l'égard desquelles des paiements ont été reçus en mai et juin 2006 bien qu'aucun service n'ait été fourni. Selon Me Salomon, ces sommes constituaient un [TRADUCTION] « cadeau » en vue de l'aider à rénover son appartement (d.a., vol. 10, p. 3108). En février 2007, 430 a reçu une autre somme de 8 000 $, supposément destinée à payer les impôts relatifs au « cadeau » précédent de 20 000 $.

[18] Then, in June 2007, Mr. Salomon made a request for redemption of his $70,000 investment in Focus, and he eventually received $50,000 in this regard. In September 2007, again following an instruction from Mr. Papadopoulos, Mr. Salomon issued a $50,000 invoice through 430 in order to receive an initial "bi-weekly" cheque. The following month, 430 received two cheques of $5,000 each from a company belonging to Mr. Papadopoulos called Themis Papadopoulos Financial Services Inc. Mr. Salomon testified that these payments represented a redemption of his own investment in Focus, but in an email written by Mr. Papadopoulos at that time, they were referred to as commissions.

[18] Ensuite, en juin 2007, Me Salomon a demandé le remboursement de la somme de 70 000 $ qu'il avait placée dans le fonds Focus; il a finalement reçu 50 000 $ à cet égard. En septembre 2007, toujours conformément aux instructions de M. Papadopoulos, Me Salomon a produit une facture de 50 000 $ par l'entremise de 430 afin de recevoir un premier chèque [TRADUCTION] « bimensuel ». Le mois suivant, 430 a reçu deux chèques de 5 000 $ chacun d'une société appartenant à M. Papadopoulos appelée Themis Papadopoulos Financial Services Inc. Maître Salomon a témoigné que les sommes ainsi versées représentent un remboursement de son propre placement dans le fonds Focus, mais dans un courriel rédigé à la même époque par M. Papadopoulos, ces paiements sont qualifiés de commissions.

[19] At the hearing before us, counsel for the appellants confirmed that Mr. Salomon had personally lost approximately $20,000 as a result of the fraud. Although the payments received by Mr. Salomon

[19] Lors de l'audience qui s'est déroulée devant nous, l'avocat des appelants confirme que Me Salomon a personnellement perdu environ 20 000 $ par suite de la fraude. Bien que les paiements reçus par

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($38,000) were small compared to the respondents' investments with Triglobal, I note that they were in fact greater than his personal loss from the fraud ($20,000).

[20] The respondents instituted their legal proceedings in January 2008.

III. Judicial History

A. *Quebec Superior Court (2014 QCCS 3072)*

[21] Mr. Papadopoulos and Mr. Bright did not defend the action against them. In a default judgment, the trial judge held that they were liable for the respondents' investment losses and for Ms. Matte-Thompson's moral injury. In addition, she ordered them to pay punitive damages to the respondents. Her conclusions with respect to Mr. Papadopoulos and Mr. Bright were not appealed.

[22] The trial judge dismissed the claim against Mr. Salomon and SKM, however. She found that, although Mr. Salomon had committed a fault in specifically recommending iVest to Ms. Matte-Thompson for her initial personal investment in 2003, that fault was not the cause of her subsequent losses from her investment in Focus. In the trial judge's view, by the time Ms. Matte-Thompson invested in that fund in 2006, she had developed her own relationship with Mr. Papadopoulos and therefore was not relying on Mr. Salomon's advice in making her investment decisions. The judge stressed that Mr. Salomon could not be held liable for the fraud committed by Mr. Papadopoulos and Mr. Bright.

[23] The trial judge also held that Mr. Salomon had committed no fault against 166, because he had not provided investment advice to the company, nor had he gone too far in reassuring it. Noting that Mr. Salomon had not been consulted before the money from 166 was wired to Focus, the trial judge found that 166 had not relied on his advice in deciding to invest in that fund. It was not Mr. Salomon's responsibility to verify the appropriateness of the investment

Me Salomon (38 000 $) soient peu élevés comparativement aux placements des intimées chez Triglobal, je signale qu'ils sont en définitive supérieurs à cette somme qu'il a personnellement perdue (20 000 $).

[20] Les intimées intentent leur action en justice en janvier 2008.

III. Décisions des cours d'instances inférieures

A. *Cour supérieure du Québec (2014 QCCS 3072)*

[21] Messieurs Papadopoulos et Bright ne contestent pas l'action intentée contre eux. Dans un jugement rendu par défaut, la juge de première instance conclut qu'ils sont responsables des pertes subies par les intimées au titre de leurs placements ainsi que du préjudice moral causé à Mme Matte-Thompson. De plus, elle condamne MM. Papadopoulos et Bright à verser des dommages-intérêts punitifs aux intimées. Les conclusions formulées par la juge de première instance à l'égard de MM. Papadopoulos et Bright ne sont pas portées en appel.

[22] La juge de première instance rejette toutefois l'action visant Me Salomon et SKM. Elle conclut que, bien que Me Salomon ait commis une faute en recommandant expressément à Mme Matte-Thompson d'investir dans le fonds iVest en 2003, cette faute n'est pas la cause des pertes ultérieures de cette dernière au titre de ses placements dans le fonds Focus. Selon la juge, lorsque Mme Matte-Thompson investit dans ce fonds en 2006, elle a déjà établi des liens personnels avec M. Papadopoulos, et elle ne s'appuie donc plus sur les conseils de Me Salomon pour prendre ses décisions en matière de placements. La juge souligne que Me Salomon ne peut être tenu responsable de la fraude commise par MM. Papadopoulos et Bright.

[23] La juge de première instance conclut également que Me Salomon n'a commis aucune faute à l'endroit de 166, parce qu'il ne lui a donné aucun conseil en matière de placements et qu'il n'est pas allé jusqu'à se montrer trop rassurant de quelque manière. Soulignant que Me Salomon n'a pas été consulté avant que l'argent de 166 ne soit viré dans le fonds Focus, la juge conclut que 166 ne s'en est pas remise à ses conseils pour décider d'investir dans

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recommended by specialists. Moreover, there was no proof that Mr. Salomon could have done anything after he learned about 166's investment in Focus.

ce fonds. Maître Salomon n'avait aucune obligation de vérifier si le placement recommandé par des spécialistes était opportun. De plus, rien ne prouve que Me Salomon aurait pu intervenir de quelque manière que ce soit après avoir été mis au courant de la décision de 166 d'investir dans le fonds Focus.

[24] Finally, the trial judge concluded that Mr. Salomon had not been in a conflict of interest. She gave credence to Mr. Salomon's testimony and stated that there was no specific proof that any of the payments made by Mr. Papadopoulos and received by Mr. Salomon through 430 were commissions received in exchange for referring clients to Triglobal.

[24] Enfin, la juge de première instance conclut que Me Salomon ne s'est pas placé en situation de conflit d'intérêts. Elle croit le témoignage de ce dernier et déclare qu'il n'existe aucune preuve précise indiquant que l'une des sommes payées par M. Papadopoulos et reçues par Me Salomon par l'entremise de 430 constitue une commission versée à celui-ci pour avoir aiguillé des clients vers Triglobal.

B. *Quebec Court of Appeal (2017 QCCA 273, 41 C.C.L.T. (4th) 1)*

B. *Cour d'appel du Québec (2017 QCCA 273, 41 C.C.L.T. (4th) 1)*

[25] The Court of Appeal unanimously allowed the appeal, holding that the trial judge had made palpable and overriding errors in her decision. First, it found that she had erred by limiting Mr. Salomon's breach of his duty to advise to the case of Ms. Matte-Thompson. It agreed with the trial judge that Mr. Salomon had breached his duty to advise Ms. Matte-Thompson by recommending iVest. However, the Court of Appeal held that Mr. Salomon had been acting for both of the respondents beginning in 2003, and had had the same obligations to both of them. The Court of Appeal concluded that the judge had viewed the evidence through a distorting lens (para. 66), which had led her to the erroneous conclusion that Mr. Salomon's fault had been committed against Ms. Matte-Thompson only.

[25] La Cour d'appel accueille l'appel à l'unanimité et conclut que la juge de première instance a commis des erreurs manifestes et déterminantes dans sa décision. Premièrement, elle conclut que la juge de première instance a commis une erreur en limitant à Mme Matte-Thompson le manquement de Me Salomon à son devoir de conseil. À l'instar de la juge de première instance, la Cour d'appel estime que Me Salomon a manqué à son devoir de conseil envers Mme Matte-Thompson en lui recommandant le fonds iVest. Toutefois, la Cour d'appel statue que Me Salomon a agi pour le compte des deux intimées à compter de 2003, et qu'il était tenu aux mêmes obligations envers chacune d'elles. La Cour d'appel conclut que la juge de première instance a évalué la preuve à travers un prisme déformant (par. 66), ce qui l'a amenée à conclure à tort que Me Salomon a commis une faute uniquement à l'endroit de Mme Matte-Thompson.

[26] Second, the Court of Appeal held that the trial judge had erred by limiting Mr. Salomon's faults to the initial investment in iVest in 2003 and 2004. The Court of Appeal concluded that his faults had continued through to 2007 and that they concerned the respondents' investments in both iVest and Focus. Mr. Salomon's repeated reassurances had induced an air of confidence regarding the investments, when in reality they were manifestly inadequate in relation to the respondents' needs. He had also failed to perform

[26] Deuxièmement, la Cour d'appel statue que la juge de première instance a commis une erreur en limitant les fautes de Me Salomon au placement initial dans le fonds iVest en 2003 et 2004. La Cour d'appel juge que les fautes de ce dernier se sont poursuivies jusqu'en 2007 et qu'elles concernent les placements des intimées tant dans iVest que dans Focus. En rassurant de façon répétée les intimées, Me Salomon a suscité chez elles un sentiment de confiance à l'égard des placements, alors que ceux-ci ne convenaient

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due diligence. These faults ceased only with the collapse of Triglobal at the end of 2007.

manifestement pas à leurs besoins. Il n'a en outre pas fait preuve de diligence raisonnable. Ces fautes n'ont cessé qu'au moment de l'effondrement de Triglobal à la fin de 2007.

[27] Third, the Court of Appeal held that the trial judge had erred by taking a restrictive approach to the evidence when considering Mr. Salomon's duty of loyalty. In its view, Mr. Salomon had placed himself in a conflict of interest which constituted an additional fault committed against the respondents. His relationship with Mr. Papadopoulos had led him to breach his duty of confidentiality and neglect the respondents' interests. The Court of Appeal stressed that Mr. Salomon had teamed up with Mr. Papadopoulos in order to ensure that the respondents retained their investments with Triglobal, revealingly using the pronoun "we" in some of his emails to Mr. Papadopoulos. In addition, the Court of Appeal was of the view that the trial judge had not given satisfactory reasons to explain her conclusion that Mr. Salomon had not received commissions for the clients he had referred to Triglobal.

[27] Troisièmement, la Cour d'appel estime que la juge de première instance a erré en adoptant une approche restrictive à l'égard de la preuve dans le cadre de son examen du devoir de loyauté qui incombe à Me Salomon. De l'avis de la cour, ce dernier s'est placé en situation de conflit d'intérêts, ce qui constitue une faute additionnelle commise à l'endroit des intimées. Les liens qu'il entretenait avec M. Papadopoulos l'ont amené à manquer à son devoir de confidentialité et à négliger les intérêts des intimées. La Cour d'appel souligne que Me Salomon a fait équipe avec M. Papadopoulos pour faire en sorte que les intimées conservent leurs placements auprès de Triglobal, comme en témoigne éloquemment l'utilisation par le premier du pronom anglais « *we* » (« nous ») dans quelques-uns de ses courriels à M. Papadopoulos. La Cour d'appel est également d'avis que la juge de première instance n'a pas motivé de manière satisfaisante sa conclusion suivant laquelle Me Salomon n'a pas reçu de commissions pour les clients qu'il a aiguillés vers Triglobal.

[28] Fourth, again alluding to the notion of a distorting lens (para. 120), the Court of Appeal held that the trial judge had erred in considering the issue of causation, and that the impact of Mr. Salomon's faults was far more significant than she had found them to be. The Court of Appeal was convinced that the respondents would have never invested money with Triglobal had Mr. Salomon acted as a competent, prudent and diligent lawyer from the outset. Moreover, Mr. Salomon had missed many opportunities to rectify the situation after 2003. The Court of Appeal also explained that the fraud did not break the causal link between Mr. Salomon's faults and the respondents' losses.

[28] Quatrièmement, recourant de nouveau à l'image du prisme déformant (par. 120), la Cour d'appel statue que la juge de première instance a commis une erreur lors de son analyse du lien de causalité, et que l'impact des fautes de Me Salomon a été beaucoup plus important que ce qu'a conclu la juge. La Cour d'appel est convaincue que jamais les intimées n'auraient investi auprès de Triglobal si Me Salomon avait dès le départ agi avec la compétence, la prudence et la diligence attendues d'un avocat. Qui plus est, ce dernier n'a pas saisi les nombreuses occasions qu'il a eues de corriger le tir après 2003. La Cour d'appel explique aussi que la fraude n'a pas rompu le lien de causalité entre les fautes de Me Salomon et les pertes subies par les intimées.

[29] The Court of Appeal therefore ordered Mr. Salomon and SKM solidarily to fully compensate the respondents for their investment losses, and Ms. Matte-Thompson for her non-pecuniary loss.

[29] En conséquence, la Cour d'appel condamne solidairement Me Salomon et SKM à indemniser pleinement les intimées des pertes qu'elles ont subies au titre de leurs placements et à verser à Mme Matte-Thompson une indemnité à l'égard de ses pertes non pécuniaires.

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IV. Issues

[30] The appellants challenge the Court of Appeal's decision on essentially four grounds:

A. Did the Court of Appeal err by employing the notion of a distorting lens in determining whether the trial judge had made palpable and overriding errors?

B. Did the Court of Appeal err by improperly expanding the professional obligations of lawyers who refer their clients to independent advisors?

C. Did the Court of Appeal err by interfering with the trial judge's findings relating to the faults committed by Mr. Salomon?

D. Did the Court of Appeal err by interfering with the trial judge's findings relating to causation?

V. Analysis

A. *Did the Court of Appeal Err by Employing the Notion of a Distorting Lens in Determining Whether the Trial Judge Had Made Palpable and Overriding Errors?*

[31] To determine whether the Court of Appeal erred by using the notion of a distorting lens, I must summarize the standards of appellate review it was required to apply in this case. These standards of review are not contested in this Court. They are the ones that were articulated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, which also apply to Quebec civil law cases (see, e.g., *Montréal (Ville) v. Lonardi*, 2018 SCC 29, [2018] 2 S.C.R. 103, at para. 68; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at paras. 36-37).

[32] Findings with respect to fault involve questions of mixed fact and law (*3091-5177 Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada*, 2018 SCC 43, [2018] 3 S.C.R. 8, at para. 23, citing *St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491, at paras. 60 and 104). Findings

IV. Questions en litige

[30] Les appelants contestent la décision de la Cour d'appel essentiellement pour quatre motifs :

A. La Cour d'appel a-t-elle commis une erreur en recourant à la notion du prisme déformant pour décider si la juge de première instance a commis des erreurs manifestes et déterminantes?

B. La Cour d'appel a-t-elle élargi à tort la portée des obligations professionnelles des avocats qui aiguillent leurs clients vers des conseillers indépendants?

C. La Cour d'appel a-t-elle erré en intervenant à l'égard des conclusions de la juge de première instance relativement aux fautes commises par Me Salomon?

D. La Cour d'appel a-t-elle erré en intervenant à l'égard des conclusions de la juge de première instance relativement au lien de causalité?

V. Analyse

A. *La Cour d'appel a-t-elle commis une erreur en recourant à la notion du prisme déformant pour décider si la juge de première instance a commis des erreurs manifestes et déterminantes?*

[31] Pour décider si la Cour d'appel a commis une erreur en recourant à la notion du prisme déformant, je dois résumer les normes de contrôle en appel qu'elle devait appliquer en l'espèce. Ces normes de contrôle ne sont pas contestées devant notre Cour. Il s'agit de celles qui ont été énoncées dans l'arrêt *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, qui s'appliquent également aux affaires de droit civil québécois (voir, p. ex., *Montréal (Ville) c. Lonardi*, 2018 CSC 29, [2018] 2 R.C.S. 103, par. 68; *Benhaim c. St-Germain*, 2016 CSC 48, [2016] 2 R.C.S. 352, par. 36-37).

[32] L'existence ou non d'une faute est une question mixte de fait et de droit (*3091-5177 Québec inc. (Éconolodge Aéroport) c. Cie canadienne d'assurances générales Lombard*, 2018 CSC 43, [2019] 3 R.C.S. 8, par. 23, citant *St-Jean c. Mercier*, 2002 CSC 15, [2002] 1 R.C.S. 491, par. 60 et 104). La

with respect to causation involve questions of fact (*Éconolodge*, at para. 24, citing *Lonardi*, at para. 41, *Benhaim*, at para. 36, and *St-Jean*, at paras. 104-5). In both situations, absent a palpable and overriding error, an appellate court must defer to the conclusions reached by the trial judge.

détermination du lien de causalité est une question de fait (*Éconolodge*, par. 24, citant *Lonardi*, par. 41, *Benhaim*, par. 36, et *St-Jean*, par. 104-105). Dans les deux cas, en l'absence d'erreur manifeste et déterminante, la juridiction d'appel doit faire preuve de déférence envers les conclusions du juge de première instance.

[33] Where the deferential standard of palpable and overriding error applies, an appellate court can intervene only if there is an obvious error in the trial decision that is determinative of the outcome of the case (*Benhaim*, at para. 38, quoting *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46; see also *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 56 and 69-70). Morissette J.A. explained this metaphorically as follows in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII): [TRANSLATION] ". . . a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions" (quoted in *Benhaim*, at para. 39). The fact that an alternative factual finding could be reached based on a different ascription of weight does not mean that a palpable and overriding error has been made (*Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, at para. 38).

[33] Lorsque la norme déférentielle de l'erreur manifeste et déterminante s'applique, les tribunaux d'appel ne peuvent intervenir que dans les cas où la décision de première instance est entachée d'une erreur évidente qui a déterminé l'issue de l'affaire (*Benhaim*, par. 38, citant l'arrêt *South Yukon Forest Corp. c. R.*, 2012 CAF 165, 4 B.L.R. (5th) 31, par. 46; voir également *H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401, par. 56 et 69-70). Le juge Morissette de la Cour d'appel a expliqué ce principe à l'aide d'une métaphore dans *J.G. c. Nadeau*, 2016 QCCA 167, par. 77 (CanLII) : « . . . une erreur manifeste et dominante tient, non pas de l'aiguille dans une botte de foin, mais de la poutre dans l'œil. Et il est impossible de confondre ces deux dernières notions » (citée dans l'arrêt *Benhaim*, par. 39). Le fait qu'une conclusion de fait différente aurait pu être tirée sur la base du poids attribué à différents éléments de preuve ne signifie pas qu'une erreur manifeste et déterminante a été commise (*Nelson (City) c. Mowatt*, 2017 CSC 8, [2017] 1 R.C.S. 138, par. 38).

[34] It is helpful at this point to recognize that the *Housen* standards of review also apply to this Court (*Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478, at para. 51; see also *St-Jean*, at paras. 37 and 46). That said, the focal point of the analysis that this Court — as the second and final court of appeal — has to perform in applying these standards is the decision of the first court of appeal, not that of the trial judge. The onus is on the appellants to demonstrate an error in the court of appeal's decision; this Court's role is not to conduct a *de novo* analysis of the trial judge's decision. Where the first court of appeal has justifiably intervened in the trial judgment and disagreed with the trial judge, this Court will intervene only if its own disagreement stems from "a clear satisfaction that an error has occurred in the first

[34] Il est utile, à ce stade-ci, de reconnaître que les normes de contrôle énoncées dans *Housen* s'appliquent également à notre Cour (*Québec (Directeur des poursuites criminelles et pénales) c. Jodoin*, 2017 CSC 26, [2017] 1 R.C.S. 478, par. 51; voir également l'arrêt *St-Jean*, par. 37 et 46). Cela dit, la décision de la première cour d'appel, et non celle du juge de première instance, constitue l'aspect principal de l'analyse que notre Cour — en tant que seconde et ultime juridiction d'appel — doit effectuer dans le cadre de l'application de ces normes. C'est aux appelants qu'il incombe de démontrer la présence d'une erreur dans la décision de la cour d'appel; notre Cour n'a pas pour rôle de procéder à une analyse *de novo* de la décision du juge de première instance. Dans les cas où la première juridiction d'appel était justifiée d'intervenir à l'égard

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appellate court's assessment of the facts" (*St-Jean*, at paras. 38-39 and 46).

du jugement de première instance et a exprimé son désaccord avec le tribunal qui l'a rendu, notre Cour n'interviendra que si son désaccord découle de « la nette conviction qu'une erreur s'est produite dans l'appréciation des faits par la première cour [d'appel] » (*St-Jean*, par. 38-39 et 46).

[35] As a general matter, the appellants suggest that the Court of Appeal erred in applying the standard of appellate review, because it relied on the notion of a distorting lens in determining whether the trial judge had made palpable and overriding errors. I disagree.

[35] De façon générale, les appelants affirment que la Cour d'appel a commis une erreur lors de son application de la norme de contrôle pertinente en appel, puisqu'elle s'est fondée sur la notion de prisme déformant pour décider si la juge du procès a commis des erreurs manifestes et déterminantes. Je ne suis pas de cet avis.

[36] In its decision, the Court of Appeal alluded twice to the notion of a distorting lens: first in its discussion on the faults committed against 166, and second in its analysis on causation. However, in discussing both of these issues, the Court of Appeal explicitly stated that it could reverse the trial judge's conclusions only if it were to find palpable and overriding errors.

[36] Dans sa décision, la Cour d'appel se réfère à deux reprises à l'image du prisme déformant : une première fois dans son examen des fautes commises contre 166, puis une seconde fois dans son analyse du lien de causalité. Toutefois, elle déclare explicitement dans les deux cas qu'elle ne peut infirmer les conclusions de la juge de première instance que si elle y décèle des erreurs manifestes et déterminantes.

[37] Thus, the notion of a distorting lens was nothing more than a metaphor the Court of Appeal used to explain why the standard of appellate review established in *Housen* was met. That metaphor has its genesis in *Ford du Canada ltée v. Automobiles Duclos inc.*, 2007 QCCA 1541:

[37] Par conséquent, l'image du prisme déformant n'est rien de plus qu'une métaphore utilisée par la Cour d'appel pour expliquer en quoi la norme de contrôle applicable en appel établie dans l'arrêt *Housen* est respectée. Cette métaphore tire ses origines de l'arrêt *Ford du Canada ltée c. Automobiles Duclos inc.*, 2007 QCCA 1541 :

[TRANSLATION] . . . the high degree of deference owed to the trial judge with regard to the assessment of evidence, a principle stated repeatedly by the Supreme Court, cannot preclude intervention by an appellate court where an analysis of the case shows that the trial judge assessed the evidence through a lens that must be discarded and that clearly had a distorting effect. [para. 128 (CanLII)]

. . . le haut degré de déférence due au juge de première instance en matière d'évaluation de la preuve, principe maintes fois énoncé par la Cour suprême, ne peut faire obstacle à l'intervention d'une cour d'appel lorsqu'une analyse du dossier révèle que l'évaluation du juge de première instance s'est faite à travers un prisme qui doit être écarté et qui a clairement eu un effet déformant. [par. 128 (CanLII)]

[38] Since that case, the Quebec Court of Appeal has on numerous occasions used the notion of a distorting lens when overturning findings made by trial judges that it considered to be tainted to some extent by a general misperception (see *Softmedical inc. v. Daabous*, 2017 QCCA 1270, at paras. 47

[38] Depuis, la Cour d'appel du Québec a eu recours à de nombreuses occasions à la notion de prisme déformant pour infirmer des conclusions qu'avaient tirées des juges de première instance qu'elle considérait entachées dans une certaine mesure d'une erreur d'appréciation générale (voir *Softmedical inc. c.*

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and 66 (CanLII); *Droit de la famille — 161960*, 2016 QCCA 1300, at paras. 76-78 (CanLII); *Droit de la famille — 132381*, 2013 QCCA 1505, at paras. 104-5 (CanLII); *Francoeur v. 4417186 Canada inc.*, 2013 QCCA 191, at paras. 64-65 (CanLII)).

[39] Unfortunately, some litigants have seen this as an invitation to ask the court to retry the case, which is simply not what is intended (see *Desrochers v. 2533-0838 Québec inc.*, 2016 QCCA 825, at para. 49 (CanLII)). It is interesting to note that there have been several cases in which the Quebec Court of Appeal has in fact referred specifically to this notion of a distorting lens in declining to interfere with the findings of a trier of fact (*Gutin v. Cenfood International Inc.*, 2018 QCCA 317, at paras. 24-26 (CanLII); *2758792 Canada inc. v. Bell Distribution inc.*, 2017 QCCA 603, at para. 9 (CanLII); *Mangiola v. R.*, 2017 QCCA 741, at paras. 4-5 (CanLII); *Desrochers*, at para. 46; *Dunkin' Brands Canada Ltd. v. Bertico Inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1, at para. 120; *Hydro-Québec v. Construction Kiewit cie*, 2014 QCCA 947, at para. 102 (CanLII); *R. v. Lalonde*, 2014 QCCA 639, at para. 16 (CanLII)).

[40] In this regard, I agree with the appellants that a distorting lens cannot be invoked as a substitute for identifying a reviewable error "or to mask the fact that an 'error' identified by an appellate court does not meet the high standard imposed by *Housen*" (A.F., at para. 81). Although appellate courts may find this notion helpful in explaining the basis for their interventions, it in no way changes the standards articulated in *Housen*. An appellate court must identify a crucial flaw in the lower court's decision, be it — depending on which *Housen* standard applies — an error of law or a palpable and overriding error. More particularly, the notion of a distorting lens does not warrant an appellate court's reweighing the evidence or merely substituting its own factual findings for those of the trial judge.

Daabous, 2017 QCCA 1270, par. 47 et 66 (CanLII); *Droit de la famille — 161960*, 2016 QCCA 1300, par. 76-78 (CanLII); *Droit de la famille — 132381*, 2013 QCCA 1505, par. 104-105 (CanLII); *Francoeur c. 4417186 Canada inc.*, 2013 QCCA 191, par. 64-65 (CanLII)).

[39] Malheureusement, certains plaideurs considèrent qu'il s'agit là d'une invitation à demander à la cour d'instruire à nouveau l'affaire, ce qui n'est tout simplement pas l'objectif visé (voir *Desrochers c. 2533-0838 Québec inc.*, 2016 QCCA 825, par. 49 (CanLII)). De fait, il est intéressant de souligner que, dans plusieurs affaires, la Cour d'appel du Québec renvoie expressément à cette notion de prisme déformant pour refuser d'intervenir à l'égard des conclusions du juge des faits (*Gutin c. Cenfood International Inc.*, 2018 QCCA 317, par. 24-26 (CanLII); *2758792 Canada inc. c. Bell Distribution inc.*, 2017 QCCA 603, par. 9 (CanLII); *Mangiola c. R.*, 2017 QCCA 741, par. 4-5 (CanLII); *Desrochers*, par. 46; *Dunkin' Brands Canada Ltd. c. Bertico Inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1, par. 120; *Hydro-Québec c. Construction Kiewit cie*, 2014 QCCA 947, par. 102 (CanLII); *R. c. Lalonde*, 2014 QCCA 639, par. 16 (CanLII)).

[40] À ce propos, tout comme les appelants, je reconnais que l'image du prisme déformant ne peut être invoquée pour remplacer l'obligation de déceler la présence d'une erreur révisable [TRADUCTION] « ou masquer le fait qu'une "erreur" constatée par une cour d'appel ne respecte pas la norme élevée imposée par l'arrêt *Housen* » (m.a., par. 81). Bien que les cours d'appel puissent considérer cette notion utile pour expliquer le fondement de leurs interventions, elle ne change en rien les normes énoncées dans l'arrêt *Housen*. La juridiction d'appel doit dégager l'erreur fatale que comporte la décision de la juridiction inférieure, qu'il s'agisse — selon la norme énoncée dans l'arrêt *Housen* qui s'applique — d'une erreur de droit ou d'une erreur manifeste et déterminante. De façon plus précise, la notion de prisme déformant n'autorise pas la juridiction d'appel à soupeser la preuve à nouveau ou à simplement substituer ses propres conclusions de fait à celles du juge de première instance.

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[41] In the case at bar, the Court of Appeal did not use the notion of a distorting lens to mask an absence of palpable and overriding errors. On the contrary, the Court of Appeal held that the distorting lens through which the trial judge had viewed the evidence — in this case a narrow, siloed approach — had led her to make precisely identified palpable and overriding errors: first, despite evidence clearly showing that Mr. Salomon had been acting for both respondents as early as 2003, the trial judge found that he had provided financial advice to Ms. Matte-Thompson only; second, despite evidence clearly showing that Mr. Salomon's faults had continued after 2004, the trial judge found that they had been limited in time to 2003 and 2004; third, despite clear evidence of Mr. Salomon's divided loyalties to the respondents on the one hand and to Mr. Papadopoulos and Triglobal on the other, the trial judge found that he had not placed himself in a conflict of interest; and fourth, despite the clear relationship between Mr. Salomon's faults and the respondents' losses, causation had not been established.

[41] Dans le cas qui nous occupe, la Cour d'appel n'utilise pas la notion de prisme déformant pour masquer une absence d'erreurs manifestes et déterminantes. Au contraire, la Cour d'appel conclut que le prisme déformant au moyen duquel la juge de première instance a examiné la preuve — en l'espèce, une approche étroite et compartimentée — a amené cette dernière à commettre des erreurs manifestes et déterminantes identifiées de façon précise par la cour : premièrement, malgré la présence d'éléments de preuve montrant clairement que Me Salomon agit pour les deux intimées dès 2003, la juge du procès conclut que ce dernier a fourni des conseils financiers uniquement à Mme Matte-Thompson; deuxièmement, en dépit d'éléments de preuve montrant clairement que les fautes de Me Salomon se perpétuent après 2004, la juge de première instance statue qu'elles se sont limitées dans le temps aux années 2003 et 2004; troisièmement, malgré une preuve claire des loyautés partagées de Me Salomon envers les intimées, d'une part, et envers M. Papadopoulos et Triglobal, d'autre part, la juge de première instance estime que celui-ci ne s'est pas placé dans une situation de conflit d'intérêts; et, quatrièmement, malgré le lien évident entre les fautes de Me Salomon et les pertes subies par les intimées, la juge de première instance conclut que le lien de causalité n'est pas établi.

[42] The appellants have not satisfied me that the Court of Appeal erred by concluding that the trial judge had made these palpable and overriding errors. I see no reason to interfere with the Court of Appeal's findings.

[42] Les appelants ne me convainquent pas que la Cour d'appel a eu tort de conclure que la juge de première instance a commis ces erreurs manifestes et déterminantes. Je ne vois aucune raison de modifier les conclusions de la Cour d'appel.

B. *Did the Court of Appeal Err by Improperly Expanding the Professional Obligations of Lawyers Who Refer Their Clients to Independent Advisors?*

B. *La Cour d'appel a-t-elle élargi à tort la portée des obligations professionnelles des avocats qui aiguillent leurs clients vers des conseillers indépendants?*

[43] Before entering into the details of this analysis, I wish to emphasize that the courts below properly agreed that the relationship between lawyers and their clients can usually be characterized as a contract of mandate, and that the relationship in the instant case is no exception (trial reasons, at para. 113 (CanLII); C.A. reasons, at para. 94; see J.-L. Baudouin, P. Deslauriers and B. Moore, *La*

[43] Avant d'analyser cette question en détail, je tiens à préciser que les cours d'instances inférieures ont à juste titre reconnu que la relation avocat-client peut habituellement être qualifiée de contrat de mandat, et que la relation dans la présente affaire ne fait pas exception (motifs de première instance, par. 113 (CanLII); motifs de la C.A., par. 94; voir J.-L. Baudouin, P. Deslauriers et B. Moore, *La responsabilité*

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responsabilité civile (8th ed. 2014), at No. 2-124). As mandataries, lawyers are subject to the obligations provided for in art. 2138 of the *Civil Code of Québec* ("*C.C.Q.*"), which reads as follows:

2138. A mandatary is bound to fulfill the mandate he has accepted, and he shall act with prudence and diligence in performing it.

He shall also act honestly and faithfully in the best interests of the mandator, and shall avoid placing himself in a position where his personal interest is in conflict with that of his mandator.

[44] Although they do not frame their arguments in such a way as to allege an error of law, the appellants nonetheless suggest that the Court of Appeal failed to consider one of its recent decisions (*Harris (Succession), Re*, 2016 QCCA 50, 25 C.C.L.T. (4th) 1) that, in their submission, limits the obligations owed by a referring lawyer to his or her client. They assert that *Harris* is applicable in the circumstances of this appeal. I do not share that view.

[45] The principles articulated in *Harris* can be summarized as follows. Lawyers who refer clients to other professionals or advisors have an obligation of means, not one of result. Although lawyers do not guarantee the services rendered by professionals or advisors to whom they refer their clients, they must nevertheless act competently, prudently and diligently in making such referrals, which must be based on reasonable knowledge of the professionals or advisors in question. Referring lawyers must be convinced that the professionals or advisors to whom they refer clients are sufficiently competent to fulfill the contemplated mandates (*Harris*, at paras. 16, 20 and 22). In *Harris*, the Quebec Court of Appeal pointed out that the question of the referring lawyer's liability [TRANSLATION] "cannot be answered in the abstract. The answer necessarily depends on the facts of the case" (para. 13). The court added that "[i]n such matters, the circumstances are everything" (para. 22).

civile (8e éd. 2014), no 2-124). En tant que mandataires, les avocats sont assujettis aux obligations énoncées à l'art. 2138 du *Code civil du Québec* (« *C.c.Q.* »), dont voici le texte :

2138. Le mandataire est tenu d'accomplir le mandat qu'il a accepté et il doit, dans l'exécution de son mandat, agir avec prudence et diligence.

Il doit également agir avec honnêteté et loyauté dans le meilleur intérêt du mandant et éviter de se placer dans une situation de conflit entre son intérêt personnel et celui de son mandant.

[44] Bien qu'ils ne formulent pas leurs arguments de façon à soulever une erreur de droit, les appelants affirment néanmoins que la Cour d'appel a omis de considérer une de ses décisions récentes (*Harris (Succession), Re*, 2016 QCCA 50, 25 C.C.L.T. (4th) 1), laquelle, prétendent-ils, limite les obligations auxquelles est tenu l'avocat qui aiguille son client vers un autre professionnel. Ils soutiennent que cet arrêt s'applique aux circonstances du présent pourvoi. Je ne partage pas cette opinion.

[45] Les principes énoncés dans l'arrêt *Harris* peuvent être résumés comme suit. L'avocat qui aiguille des clients vers un autre professionnel ou conseiller a une obligation de moyens et non de résultat. Bien que l'avocat n'agisse pas comme garant des services rendus par le professionnel ou le conseiller vers lequel il dirige ses clients, il doit néanmoins faire preuve de compétence, prudence et diligence lorsqu'il formule une telle recommandation, laquelle doit être basée sur une connaissance raisonnable du professionnel ou du conseiller en question. Il doit être convaincu que la personne qu'il recommande à son client est suffisamment compétente pour s'acquitter du mandat envisagé (*Harris*, par. 16, 20 et 22). Dans l'arrêt *Harris*, la Cour d'appel du Québec souligne que la question de la responsabilité de l'avocat qui recommande les services d'une personne « ne peut trouver réponse dans l'abstrait. Elle est nécessairement tributaire des faits de l'espèce » (par. 13). La cour ajoute qu'« [e]n cette matière, tout est affaire de circonstances » (par. 22).

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[46] That is an apt description of the standard of conduct for lawyers who refer clients to other professionals and advisors, and I endorse it.

[47] Applying these principles, the Quebec Court of Appeal found in *Harris* that Mr. Salomon and SKM (coincidentally also the lawyer and law firm involved in that case) were not liable for the losses suffered by a client as a result of fraud committed by estate liquidator Earl Jones, whom Mr. Salomon had recommended. In the appellants' opinion, the case at hand is analogous to *Harris*, because Triglobal had a good reputation until its collapse in 2007, and Mr. Salomon cannot be faulted for having failed to discover a fraud that no one had seen.

[48] *Harris* can be distinguished on the basis of the facts surrounding the referral, but there is another important distinction between it and the instant case that relates to the entirety of Mr. Salomon's conduct. Whereas *Harris* involved a mere referral, neither the trial judge nor the Court of Appeal found that Mr. Salomon had merely referred the respondents to Mr. Papadopoulos. Although they reached different results, they both analyzed the legal consequences of several of Mr. Salomon's acts subsequent to the referral, from the recommendation of the iVest fund in 2003 to the promotion, endorsement and encouragement of Triglobal's products that followed and, finally, to the reassurances offered in the months before Triglobal's collapse in 2007.

[49] The question in the case at bar is not whether the initial referral of the respondents to Mr. Papadopoulos was or was not sufficient in and of itself to establish the appellants' professional liability. The focus here is instead on the entirety of Mr. Salomon's conduct. But one thing is clear. Just as a referral is not a guarantee of the services rendered by the professional or advisor to whom the client is referred, it is also not a shield against liability for other wrongful

[46] Ces observations décrivent adéquatement la norme de conduite pour les avocats qui aiguillent des clients vers d'autres professionnels et conseillers, et je les fais miennes.

[47] Appliquant ces principes, la Cour d'appel du Québec conclut, dans l'arrêt *Harris*, que Me Salomon et SKM (incidemment les mêmes avocat et cabinet concernés dans cette autre affaire) ne sont pas responsables des pertes subies par un client par suite de la fraude commise par le liquidateur de la succession, Earl Jones, que Me Salomon avait recommandé. Selon les appelants, la présente espèce est analogue à l'affaire *Harris*, en ce que Triglobal jouissait d'une bonne réputation jusqu'à son effondrement en 2007, et qu'on ne peut reprocher à Me Salomon de ne pas avoir mis au jour une fraude que personne n'avait anticipée.

[48] L'affaire *Harris* se distingue de la présente espèce en raison des faits entourant l'aiguillage, mais il existe une autre distinction importante entre cette affaire et celle qui nous occupe au regard de l'ensemble du comportement de Me Salomon. Alors que l'affaire *Harris* porte sur un simple aiguillage, en l'espèce ni la juge de première instance ni la Cour d'appel ne concluent que Me Salomon a simplement aiguillé les intimées vers M. Papadopoulos. Quoique les deux tribunaux en arrivent à des résultats différents, ils analysent tous deux les conséquences juridiques de plusieurs gestes de Me Salomon postérieurs à l'aiguillage, d'abord la recommandation d'investir dans le fonds iVest en 2003, puis la promotion des produits de Triglobal — par des commentaires favorables à leur égard et des encouragements à en acquérir —, et enfin les assurances répétées formulées au cours des mois qui précèdent l'effondrement de Triglobal en 2007.

[49] Il ne s'agit pas en l'espèce de savoir si l'aiguillage initial des intimées vers M. Papadopoulos aurait pu suffire à lui seul à établir la responsabilité professionnelle des appelants. L'aspect central de l'analyse dans le cas qui nous occupe est plutôt l'ensemble du comportement de Me Salomon. Toutefois, une chose est certaine : de même que le fait de recommander à un client un professionnel ou un conseiller ne saurait constituer une garantie des services rendus, une telle

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acts committed by the referring lawyer. This is one way in which the facts in this case differ substantively from the facts in *Harris*.

recommandation ne saurait pas non plus protéger l'avocat qui l'a formulée contre toute responsabilité pour d'autres actes répréhensibles qu'il aurait commis. Il s'agit là d'un des points sur lesquels les faits de la présente affaire diffèrent considérablement des faits dans l'arrêt *Harris*.

[50] Contrary to the appellants' assertion, the decision of the Court of Appeal in the instant case did not broaden the basis of liability for lawyers who refer clients to other professionals or advisors beyond the standard recently set in *Harris*: lawyers can refer their clients to other professionals or advisors so long as they discharge their professional obligations in so doing. The Court of Appeal did not find that the referral itself was determinative; rather, it assessed all of Mr. Salomon's acts in the context of his professional duties — the duty to advise and the duty of loyalty in particular — to his clients. It found that Mr. Salomon had done far more than merely make a referral. As I will explain below, Mr. Salomon also repeatedly recommended Mr. Papadopoulos, his investment firm and their in-house products, and encouraged the respondents to invest — and retain their investments — in Triglobal funds. Moreover, Mr. Salomon turned a blind eye to a conflict of interest which resulted in him serving two masters and sacrificing the respondents' interests. It was the entirety of Mr. Salomon's conduct that led the Court of Appeal to hold the appellants liable in the circumstances.

[50] Contrairement à l'affirmation des appelants, la décision rendue par la Cour d'appel en l'espèce n'élargit pas les bases de la responsabilité des avocats qui aiguillent des clients vers d'autres professionnels ou d'autres conseillers au-delà de la norme récemment énoncée dans l'arrêt *Harris*; les avocats peuvent aiguiller leurs clients vers d'autres professionnels ou conseillers, tant qu'ils s'acquittent de leurs obligations professionnelles lorsqu'ils le font. La Cour d'appel ne conclut pas que l'aiguillage lui-même est décisif; elle apprécie plutôt l'ensemble de la conduite de Me Salomon au regard de ses obligations professionnelles — plus particulièrement son devoir de conseil et son devoir de loyauté — envers ses clients. Elle conclut que Me Salomon est allé bien au-delà d'un simple aiguillage. Comme je l'explique plus loin, Me Salomon a également recommandé de façon répétée aux intimées les services de M. Papadopoulos et de sa société de placements, ainsi que leurs produits, en plus de les encourager à investir dans des fonds de Triglobal et à conserver ces placements. Qui plus est, fermant les yeux sur un conflit d'intérêts, Me Salomon s'est trouvé à servir deux maîtres et à sacrifier les intérêts des intimées. C'est l'ensemble du comportement de Me Salomon qui amène la Cour d'appel à conclure à la responsabilité des appelants dans les circonstances.

C. *Did the Court of Appeal Err by Interfering With the Trial Judge's Findings Relating to the Faults Committed by Mr. Salomon?*

C. *La Cour d'appel a-t-elle erré en intervenant à l'égard des conclusions de la juge de première instance relativement aux fautes commises par Me Salomon?*

[51] The appellants argue, next, that the Court of Appeal erred by interfering with the trial judge's findings relating to Mr. Salomon's duty to advise and duty of loyalty. I disagree with that submission. I will discuss each of these findings in turn.

[51] Les appelants plaident ensuite que la Cour d'appel a erré en intervenant à l'égard des conclusions de la juge de première instance en ce qui concerne le devoir de conseil et le devoir de loyauté de Me Salomon. Je ne peux retenir cet argument. Je vais examiner chacune de ces conclusions à tour de rôle.

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(1) Mr. Salomon's Duty to Advise

[52] A lawyer's duty to advise is threefold, encompassing duties (1) to inform, (2) to explain, and (3) to advise in the strict sense. The duty to inform pertains to the disclosure of relevant facts; the duty to explain requires that the legal and economic consequences of a course of action be presented; and the duty to advise in the strict sense requires that a course of action be recommended (*Poulin v. Pilon*, [1984] C.S. 177, at p. 180; M.-C. Thouin, "L'avocat, toujours de bon conseil?", in Service de la formation permanente du Barreau du Québec, vol. 228, *Développements récents en déontologie, droit professionnel et disciplinaire* (2005), 49, at pp. 51-52).

[53] The duty to advise is inherent in the legal profession and exists regardless of the nature of the mandate (Baudouin, Deslauriers and Moore, at No. 2-138; *Labrie v. Tremblay*, [2000] R.R.A. 5 (Que. C.A.), at p. 10). Its exact scope depends on the circumstances, including the object of the mandate, the client's characteristics and the expertise the lawyer claims to have in the field in question (*Côté v. Rancourt*, 2004 SCC 58, [2004] 3 S.C.R. 248, at para. 6; Thouin, at pp. 55-69).

[54] As no bright lines can be drawn in this regard, the case law is replete with examples of situations in which courts have had to perform the difficult task of deciding whether lawyers should, in advising their clients, have taken the initiative to go beyond what the clients specifically asked them for (see, e.g., *Labrie*, at p. 11; *Sylvestre v. Karpinski*, 2011 QCCA 2161, at para. 19 (CanLII); *Daigneault v. Lapierre*, [2003] R.R.A. 902 (Que. Sup. Ct.)). One thing is clear, however: when lawyers do provide advice, they must always act in their clients' best interests and meet the standard of the competent, prudent and diligent lawyer in the same circumstances. In this respect, I agree with the Court of Appeal that any advice lawyers give that exceeds their mandates may, if wrongful, engage their liability. Whether Mr. Salomon was acting within the limits of his mandate in providing financial advice to the respondents is therefore

(1) Le devoir de conseil de Me Salomon

[52] Le devoir de conseil de l'avocat comporte trois volets : (1) informer, (2) expliquer et (3) conseiller au sens strict du terme. L'obligation d'informer consiste à communiquer les faits pertinents; l'obligation d'expliquer requiert de l'avocat qu'il présente les conséquences juridiques et financières d'une ligne de conduite envisagée; et le devoir de conseil au sens strict du terme l'oblige à recommander une ligne de conduite (*Poulin c. Pilon*, [1984] C.S. 177, p. 180; M.-C. Thouin, « L'avocat, toujours de bon conseil? », dans Service de la formation permanente du Barreau du Québec, vol. 228, *Développements récents en déontologie, droit professionnel et disciplinaire* (2005), 49, p. 51-52).

[53] Le devoir de conseil fait partie intégrante de la profession d'avocat et existe indépendamment de la nature du mandat (Baudouin, Deslauriers et Moore, no 2-138; *Labrie c. Tremblay*, [2000] R.R.A. 5 (C.A. Qc), p. 10). L'étendue exacte de ce devoir varie selon les circonstances, en fonction notamment de l'objet du mandat, des caractéristiques du client et de l'expertise que soutient avoir l'avocat dans le domaine en question (*Côté c. Rancourt*, 2004 CSC 58, [2004] 3 R.C.S. 248, par. 6; Thouin, p. 55-69).

[54] Vu qu'on ne peut tracer de lignes de démarcation nettes à cet égard, la jurisprudence regorge d'exemples de situations où les tribunaux ont dû s'acquitter de la tâche difficile de décider si les avocats devraient, lorsqu'ils conseillent leurs clients, aller au-delà de ce que ceux-ci leur demandent explicitement (voir, p. ex., *Labrie*, p. 11; *Sylvestre c. Karpinski*, 2011 QCCA 2161, par. 19 (CanLII); *Daigneault c. Lapierre*, [2003] R.R.A. 902 (C.S. Qc)). Une chose reste claire, toutefois : l'avocat qui prodigue des conseils à un client doit toujours agir dans l'intérêt supérieur de ce dernier et respecter les normes que tout avocat compétent, prudent et diligent aurait suivies dans les mêmes circonstances. À cet égard, je suis d'accord avec la Cour d'appel pour dire que tout conseil qu'un avocat prend l'initiative de donner au-delà de son mandat peut, s'il est erroné, engager sa responsabilité. La question de savoir si Me Salomon agissait ou non dans les limites de son

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immaterial. He is liable for any wrongful advice he gave in that context.

[55] In this case, the Court of Appeal found that Mr. Salomon had failed to advise the respondents as a competent, prudent and diligent lawyer would have done. Contrary to the trial judge, it held that Mr. Salomon was acting for both Ms. Matte-Thompson and 166 when he provided wrongful investment advice, and that his faults had continued throughout the period from 2003 to 2007. On both of these issues, the court properly identified palpable and overriding errors made by the trial judge in her assessment of the parties' relationships and in her finding that those relationships had not continued up until the collapse of Triglobal. These errors were identified precisely, and they had a direct impact on the trial judge's findings regarding the scope of any wrongful advice given by Mr. Salomon. I conclude that the Court of Appeal had a sufficient basis to intervene as it did in this regard.

[56] First, the Court of Appeal did not err in holding that Mr. Salomon had provided financial advice to both respondents. As the Court of Appeal emphasized, Ms. Matte-Thompson had consulted Mr. Salomon for advice regarding her delicate position as a beneficiary of the Trust's fruits and revenues — which were supposed to meet her financial needs — and as a trustee — with an obligation to preserve the Trust's capital for the children. At the time, Ms. Matte-Thompson wore many different hats, as she (1) was an executor of Mr. Thompson's wills, (2) served as a trustee, (3) was the president and a director of 166, and (4) acted in her personal capacity. It was in these multiple capacities that she retained Mr. Salomon's services, and he understood the nature of this situation very well. To isolate the relationship between Ms. Matte-Thompson and Mr. Salomon from that between 166 and Mr. Salomon was indeed to take an improperly narrow view of the evidence as a whole, and this justified the Court of Appeal's criticism of

mandat lorsqu'il a prodigué des conseils financiers aux intimées n'est donc pas pertinente. Il est responsable de tout conseil erroné qu'il a donné dans ce contexte.

[55] Dans le cas qui nous occupe, la Cour d'appel juge que Me Salomon n'a pas conseillé les intimées comme il incombe à un avocat compétent, prudent et diligent de le faire. Contrairement à la juge de première instance, la Cour d'appel conclut que Me Salomon agit à la fois pour Mme Matte-Thompson et pour 166 lorsqu'il donne des conseils erronés en matière de placements et que ses fautes se sont poursuivies pendant toute la période de 2003 à 2007. Dans les deux cas, la cour relève effectivement la présence d'erreurs manifestes et déterminantes dans l'appréciation par la juge du procès des relations des parties et dans sa conclusion selon laquelle ces relations ne se sont pas poursuivies jusqu'à l'effondrement de Triglobal. Ces erreurs, qui sont relevées de façon précise, ont influencé directement les conclusions de la juge de première instance quant à l'ampleur des conseils erronés donnés par Me Salomon. Je considère que la Cour d'appel disposait d'assises suffisantes pour intervenir comme elle l'a fait.

[56] Premièrement, la Cour d'appel ne commet pas d'erreur en concluant que Me Salomon a prodigué des conseils financiers aux deux intimées. Comme le souligne la Cour d'appel, Mme Matte-Thompson a consulté Me Salomon pour obtenir des conseils sur sa situation délicate en tant que bénéficiaire des fruits et des revenus de la Fiducie — lesquels sont censés pourvoir à ses besoins financiers — et en tant que fiduciaire — tenue à l'obligation de préserver le capital de la Fiducie pour les enfants. À l'époque, Mme Matte-Thompson agit à plusieurs titres, car (1) elle est l'exécutrice des testaments de M. Thompson, (2) elle agit comme fiduciaire, (3) elle est présidente et administratrice de 166 et (4) elle agit à titre personnel. C'est à ces nombreux titres qu'elle retient les services de Me Salomon, qui est très au fait de toute cette situation. En isolant la relation qui existe entre Mme Matte-Thompson et Me Salomon et celle qu'entretiennent 166 et Me Salomon, la juge de première instance se trouve dans les faits à adopter une vision erronément étroite de l'ensemble de la

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the trial judge's compartmentalized vision of those relationships.

[57] In this regard, the Court of Appeal noted, for instance, that, starting in 2003, Mr. Salomon had charged virtually all his legal fees to 166, including fees for introducing Mr. Papadopoulos to Ms. Matte-Thompson, preparing the initial email recommending the iVest fund, and requesting investment information from Triglobal. As well, Mr. Salomon's key memoranda outlining financial strategies for Ms. Matte-Thompson and for the Trust were addressed to 166.

[58] Second, the Court of Appeal did not err in holding that Mr. Salomon had breached his duty to advise the respondents. Beyond the fact that Mr. Salomon often flirted with — or overstepped — the limits of his professional capabilities, the advice he provided to both of the respondents was wrongful for a number of reasons, which the Court of Appeal summarized (para. 69). To start with, Mr. Salomon should not have recommended a non-diversified investment in offshore hedge funds to clients whose primary goal was to preserve the capital. In this regard, the trial judge herself stated that Mr. Salomon "knew that in order to respect the legal rights and interests of all the beneficiaries of the trusts and to abide by the terms of the wills, the investments decisions had to be consistent with the requirement of capital preservation" (para. 172 (footnote omitted)). Yet, according to the uncontradicted expert evidence, offshore hedge funds (like iVest and Focus) are not investment vehicles that offer security of capital.

[59] Mr. Salomon also breached his duty to advise by continually recommending financial products without performing due diligence or asking any questions about them. The trial judge noted that, before recommending iVest, Mr. Salomon had merely "relied on [Mr.] Papadopoulos' advice and felt comfortable with that advice" (para. 188 (footnote omitted)). Mr. Salomon failed to verify the nature or the

preuve, approche qui justifie les critiques formulées par la Cour d'appel à l'égard de la vision compartimentée de ces relations adoptée par la juge de première instance.

[57] À cet égard, la Cour d'appel mentionne à titre d'exemple que, à partir de 2003, Me Salomon a facturé pratiquement tous ses services professionnels à 166, y compris pour avoir présenté M. Papadopoulos à Mme Matte-Thompson, rédigé le premier courriel recommandant le fonds iVest et demandé à Triglobal des renseignements sur les placements. De plus, Me Salomon a adressé à 166 ses mémorandums clés exposant les stratégies financières envisagées pour Mme Matte-Thompson et pour la Fiducie.

[58] Deuxièmement, la Cour d'appel ne commet pas d'erreur en concluant que Me Salomon a manqué à son devoir de conseil envers les intimées. Outre le fait que Me Salomon agit souvent aux confins de ses capacités professionnelles (quand il ne les dépasse pas), les conseils qu'il donne aux intimées sont fautifs pour les nombreuses raisons que résume la Cour d'appel (par. 69). Tout d'abord, Me Salomon n'aurait pas dû recommander un placement non diversifié dans des fonds spéculatifs extraterritoriaux à des clients dont l'objectif principal est la préservation de leur capital. À cet égard, la juge de première instance déclare elle-même que Me Salomon [TRADUCTION] « savait que, pour qu'elles respectent les droits et les intérêts légaux de tous les bénéficiaires des fiducies ainsi que les conditions des testaments, les décisions en matière de placements devaient respecter l'exigence relative à la préservation du capital » (par. 172 (note en bas de page omise)). Pourtant, suivant le témoignage non contredit des experts, les fonds spéculatifs extraterritoriaux (tels iVest et Focus) ne sont pas des véhicules de placement qui offrent la sécurité du capital.

[59] Maître Salomon manque aussi à son devoir de conseil en recommandant continuellement des produits financiers sans faire preuve d'aucune forme de diligence appropriée au sujet de ces produits ou poser quelque question que ce soit à leur égard. La juge du procès souligne que, avant de recommander d'investir dans iVest, Me Salomon s'est simplement [TRADUCTION] « fié à l'avis de [M.] Papadopoulos,

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terms and conditions of the recommended financial products. Had he made such inquiries, he would have learned that iVest and Focus were not registered with the Autorité des marchés financiers ("AMF"). In fact, neither Mr. Papadopoulos nor Triglobal was registered with the AMF as a securities adviser or dealer under Quebec securities law. As the Court of Appeal rightly noted, this fault of omission on Mr. Salomon's part was of a continuous nature, given that he had intervened several times over the years to reassure the respondents prior to Triglobal's collapse in 2007 without ever making any of the appropriate inquiries.

estimant que ça lui convenait » (par. 188 (note en bas de page omise)). Maître Salomon omet de vérifier la nature ou les conditions et modalités des produits financiers recommandés. S'il s'était renseigné, il aurait appris qu'iVest et Focus n'étaient pas inscrits auprès de l'Autorité des marchés financiers (« AMF »). En fait, ni M. Papadopoulos ni Triglobal n'étaient inscrits auprès de l'AMF en tant que conseillers ou courtiers en valeurs mobilières conformément à la législation québécoise en la matière. Comme l'indique à juste titre la Cour d'appel, cette faute d'omission de la part de Me Salomon a un caractère continu, car il est intervenu à plusieurs reprises au fil des ans pour rassurer les intimées avant l'effondrement de Triglobal en 2007, sans jamais procéder à quelque recherche appropriée.

[60] Third, the Court of Appeal did not err in holding that Mr. Salomon's faults against the respondents had commenced in 2003 and had continued until 2007. Mr. Salomon had, on the sole basis of his blind confidence in Mr. Papadopoulos, induced his clients to erroneously believe that investing in iVest and Focus was safe. From 2003 to 2007, he repeatedly reassured the respondents that their investments with Triglobal gave them security of capital. In this regard, the Court of Appeal noted the following comments made by Mr. Salomon:

- In August 2003, he stated, "iVest is an excellent vehicle whenever security of the capital is important (as with the grandchildren and yourself)" (para. 52 (emphasis deleted); A.R., vol. 3, at p. 352).
- In September 2003, he suggested that the respondents "invest the Estate assets based on a conservative model, perhaps using iVest products and a mix of segregated products (for absolute security of capital)" (para. 59 (emphasis deleted); A.R., vol. 6, at p. 1828).
- The following month, he added, "I would point out that [Mr. Papadopoulos] is very conservative when it comes to preservation of capital" (para. 62; A.R., vol. 3, at p. 393).

[60] Troisièmement, la Cour d'appel ne fait pas erreur en jugeant que les fautes commises par Me Salomon envers les intimées ont commencé en 2003 et se sont poursuivies jusqu'en 2007. Sur la seule foi de sa confiance aveugle en M. Papadopoulos, Me Salomon a incité ses clientes à croire erronément qu'elles pouvaient investir en toute sécurité dans iVest et dans Focus. De 2003 à 2007, il rassure de façon répétée les intimées quant au fait que leurs placements auprès de Triglobal garantissent la sécurité de leur capital. À cet égard, la Cour d'appel relève les commentaires suivants formulés par Me Salomon :

- en août 2003, il déclare [TRADUCTION] « [qu']iVest est un excellent véhicule de placement dans les cas où la sécurité du capital est une considération importante (comme c'est le cas pour vos petits-enfants et pour vous) » (par. 52 (soulignement omis); d.a., vol. 3, p. 352);
- en septembre 2003, il suggère aux intimées [TRADUCTION] « d'investir les actifs de la succession suivant une stratégie conservatrice, peut-être en utilisant des produits iVest et une combinaison de produits distincts (pour une sécurité absolue du capital) » (par. 59 (soulignement omis); d.a., vol. 6, p. 1828);
- au cours du mois suivant, il ajoute : [TRADUCTION] « Je tiens à signaler que [M. Papadopoulos] est très conservateur lorsqu'il s'agit de préservation du capital » (par. 62; d.a., vol. 3, p. 393);

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- In July 2004, he stated, "the RBC proposal is somewhat undimensional (*sic*) and is interest rate sensitive. The Triglobal proposal is less risky and the returns are good. Let's talk" (para. 123 (emphasis deleted); A.R., vol. 3, at p. 566).

- en juillet 2004, il déclare que [TRADUCTION] « la proposition de la RBC est quelque peu unidimensionnelle et tributaire des taux d'intérêt. La proposition de Triglobal est moins risquée et les rendements sont bons. Il faut se parler » (par. 123 (soulignement omis); d.a., vol. 3, p. 566);

- In June 2005, he stated, referring to the iVest and Manulife funds, "I believe that both forms of investments are excellent and quite conservative, and I would have no difficulty in recommending either one to you and to your co-trustee . . . (as trustees acting responsibly)" (para. 125; A.R., vol. 4, at p. 657).

- en juin 2005, il déclare, au sujet des fonds iVest et Manulife : [TRADUCTION] « Je crois que les deux types de placement sont excellents et très conservateurs, et je n'aurais aucune hésitation à vous recommander l'un ou l'autre, à vous et à votre cofiduciaire [. . .] (en tant que fiduciaires agissant de façon responsable) » (par. 125; d.a., vol. 4, p. 657);

- In April 2006, he responded to concerns expressed by Ms. Matte-Thompson regarding the security of the respondents' investments (including in Focus) that he was "certain that everything [was] ok" (para. 78 (emphasis deleted); A.R., vol. 4, at p. 935).

- en avril 2006, il répond aux préoccupations formulées par Mme Matte-Thompson quant à la sécurité des placements des intimées (y compris dans Focus), en disant qu'il était [TRADUCTION] « certain que tout [allait] bien » (par. 78 (italique omis); d.a., vol. 4, p. 935);

- In November 2006, he stated, after informing Ms. Matte-Thompson that he had visited Mr. Bright in Nassau, that the latter "has become resident there in order to manage the Focus, Ivest and structured products funds", concluding that "[a]ll is well" (para. 130 (emphasis deleted); A.R., vol. 5, at p. 1248).

- en novembre 2006, il déclare, informant Mme Matte-Thompson qu'il avait visité M. Bright à Nassau, que ce dernier [TRADUCTION] « est devenu résident de cet endroit afin de gérer les fonds Focus et Ivest et des fonds de produits structurés », et conclut en disant « [t]out va bien » (par. 130 (italique omis); d.a., vol. 5, p. 1248);

- In July 2007, he stated, "[t]he Triglobal returns continue to be excellent and I remain very happy to have my investments performing so well with such controlled risk" (para. 133; A.R., vol. 6, at p. 1603).

- en juillet 2007, il affirme ceci : [TRADUCTION] « [l]es rendements de Triglobal demeurent excellents et je continue d'être très heureux que mes placements aient un aussi bon rendement avec un risque aussi contrôlé » (par. 133; d.a., vol. 6, p. 1603);

- In September 2007, he added, "I think that the two funds (iVest and Focus) are performing as predicted" (para. 134 (emphasis deleted); A.R., vol. 6, at p. 1660).

- en septembre 2007, il ajoute ce qui suit : [TRADUCTION] « Je pense que les deux fonds (iVest et Focus) se comportent comme prévu » (par. 134 (italique omis); d.a., vol. 6, p. 1660);

- In December 2007, he stated, commenting on Mr. Papadopoulos's latest promises to worried investors, "FYI. This is good" (para. 138 (emphasis deleted); A.R., vol. 6, at p. 1690).

- en décembre 2007, il dit, commentant les dernières promesses de M. Papadopoulos aux investisseurs inquiets : [TRADUCTION] « Pour votre information. De bonnes nouvelles » (par. 138 (italique omis); d.a., vol. 6, p. 1690).

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[61] Given the foregoing, the Court of Appeal had a strong basis for concluding that the trial judge was wrong to assert that Mr. Salomon had committed a fault only as against Ms. Matte-Thompson in her personal capacity and only in 2003. When properly assessed as a whole, as the Court of Appeal did, the evidence reveals that the advice and reassurances Mr. Salomon gave between 2003 and 2007 were all part of a single continuum, and that placing them in separate silos would be artificial. Regardless of the scope of his original mandate, Mr. Salomon voluntarily chose to provide (and be paid for) his advice and reassurances to the respondents over the four years leading up to the collapse of Triglobal. Having so chosen, he cannot escape liability by pointing to the narrow scope of his original mandate.

[62] When he interacted with Ms. Matte-Thompson, Mr. Salomon provided advice with respect to all the patrimonies she administered. At no time did he differentiate between the respondents, as he often provided advice to both of them in the same emails and in memoranda addressed to 166. As the Court of Appeal pointed out, references Mr. Salomon had made in 2003 to the trusts, to the Companies and to capital preservation — which he knew to be crucial for the Trust — show that his recommendations extended beyond Ms. Matte-Thompson's personal interests. It should be borne in mind that reconciling her many roles was the very reason why Ms. Matte-Thompson had sought Mr. Salomon's advice from 2003 onwards.

[63] I agree with the Court of Appeal that a proper review of the whole of the evidence reveals that, during this entire period from 2003 to 2007, Mr. Salomon was acting for both respondents when he provided financial information and advice. His comments about the nature and the quality of investments with Triglobal concerned both the financial strategy of 166 and that of Ms. Matte-Thompson.

[64] From this standpoint, it is immaterial that 166's assets had not yet been sold in 2003, since Mr. Salomon consistently maintained the same

[61] Vu ce qui précède, la Cour d'appel disposait de solides assises pour conclure que la juge de première instance a erronément affirmé que Me Salomon avait uniquement commis une faute envers Mme Matte-Thompson personnellement et uniquement en 2003. Appréciée adéquatement dans son ensemble, comme l'a fait la Cour d'appel, la preuve révèle que les conseils et assurances donnés par Me Salomon entre 2003 et 2007 s'inscrivent dans un seul et même continuum, et qu'il est artificiel de les compartimenter. Indépendamment de l'étendue de son mandat initial, Me Salomon a volontairement choisi de donner (et ce contre rémunération) ses conseils et ses assurances aux intimées pendant la période de quatre ans qui s'est soldée par l'effondrement de Triglobal. Ayant fait ce choix, il ne peut se dérober à sa responsabilité en invoquant la portée étroite de son mandat initial.

[62] Dans ses interactions avec Mme Matte-Thompson, Me Salomon lui prodiguait des conseils sur tous les patrimoines qu'elle administrait. Il n'a jamais fait de distinction entre les intimées, et a souvent donné des conseils à toutes les deux dans les mêmes courriels et mémorandums qui étaient adressés à 166. Comme le souligne la Cour d'appel, les mentions que Me Salomon a faites en 2003 relativement aux fiducies, aux Sociétés et à la préservation du capital — élément qu'il savait être crucial pour la Fiducie — montrent que ses recommandations dépassaient les intérêts personnels de Mme Matte-Thompson. Il convient de garder à l'esprit que la conciliation des nombreux rôles qu'elle jouait est la raison même pour laquelle Mme Matte-Thompson a commencé à consulter Me Salomon en 2003.

[63] À l'instar de la Cour d'appel, j'estime qu'il ressort d'un examen adéquat de l'ensemble de la preuve que, pendant toute la période de 2003 à 2007, Me Salomon agissait pour les deux intimées lorsqu'il fournissait des renseignements et des conseils financiers. Ses commentaires sur la nature et la qualité des placements chez Triglobal concernaient tant la stratégie financière de 166 que celle de Mme Matte-Thompson.

[64] Lorsqu'on considère la situation sous cet angle, il importe peu que les actifs de 166 n'avaient pas encore été vendus en 2003, étant donné que

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position vis-à-vis Triglobal and its in-house products. Moreover, he never distinguished between his recommendations and reassurances regarding Ms. Matte-Thompson's personal investments and those regarding 166's later investments. Even the trial judge disbelieved Mr. Salomon's claim that "he had absolutely no involvement in 166376's decision to invest and that he knew nothing about it" (para. 220). In fact, his actions included commenting on the advisability of investing the proceeds of the sale of 166's assets in iVest and participating in meetings with Ms. Matte-Thompson and Mr. Papadopoulos at which they discussed the investment strategy for the sale proceeds. It is worth noting, as the Court of Appeal did, that Mr. Salomon himself considered Focus to be "less risky" than iVest (para. 131 (emphasis deleted), quoting A.R., vol. 6, at p. 1553).

[65] In sum, the Court of Appeal provided solid justifications and explanations for concluding that it was not only the initial recommendation of iVest to Ms. Matte-Thompson that was wrongful, but that Mr. Salomon's breaches of his duty to advise concerned 166 as well and that they continued until Triglobal's collapse in 2007. There is no basis for this Court to interfere and to vary the judgment of the first court of appeal on this point.

(2) Mr. Salomon's Duty of Loyalty

[66] The Court of Appeal also concluded that Mr. Salomon's personal and financial relationship with Mr. Papadopoulos had placed him in a conflict of interest, which constituted an additional fault committed against the respondents. The trial judge had found that there was no conflict of interest. In this regard, the evidence established not only that Mr. Papadopoulos was Mr. Salomon's close friend and personal financial advisor, but also in particular that, unbeknownst to the respondents, Mr. Salomon had received payments totalling $38,000 from Mr. Papadopoulos in 2006 and 2007 while continuing to reassure them regarding their investments with Triglobal.

Me Salomon n'a jamais modifié sa position relativement à Triglobal et à ses produits. En outre, il n'a jamais fait de distinction entre ses recommandations et assurances au sujet des placements personnels de Mme Matte-Thompson et celles au sujet des placements ultérieurs de 166. Même la juge de première instance refuse d'ajouter foi à l'affirmation de Me Salomon [TRADUCTION] « qu'il n'avait absolument rien à voir avec la décision de 166376 d'investir et qu'il n'en savait rien » (par. 220). En fait, Me Salomon a notamment formulé des observations au sujet de l'opportunité d'investir le produit de la vente des actifs de 166 dans iVest et il a participé avec Mme Matte-Thompson et M. Papadopoulos à des réunions où il a été question de la stratégie d'investissement du produit de la vente. Il convient de noter, comme le fait la Cour d'appel, que Me Salomon lui-même considérait le fonds Focus comme [TRADUCTION] « moins risqué » que le fonds iVest (par. 131 (soulignement omis), citant d.a., vol. 6, p. 1553).

[65] En somme, la Cour d'appel fournit de solides justifications et explications au soutien de sa conclusion que ce n'est pas seulement la recommandation initiale d'iVest à Mme Matte-Thompson qui est fautive, mais que les manquements de Me Salomon à son devoir de conseil concernent aussi 166 et que ceux-ci se sont poursuivis jusqu'à l'effondrement de Triglobal en 2007. Rien ne justifie notre Cour d'intervenir et de modifier ce jugement de la première juridiction d'appel sur ce point.

(2) Le devoir de loyauté de Me Salomon

[66] La Cour d'appel conclut, de plus, que les relations personnelles et financières qu'entretenait Me Salomon avec M. Papadopoulos l'ont mis dans une situation de conflit d'intérêts, qui constitue une faute additionnelle commise par Me Salomon à l'endroit des intimées. La juge de première instance a conclu qu'il n'y avait pas de conflit d'intérêts. À cet égard, non seulement la preuve établit que M. Papadopoulos était un ami proche de Me Salomon et son conseiller financier personnel, mais plus particulièrement que, à l'insu des intimées, Me Salomon a reçu de M. Papadopoulos des sommes totalisant 38 000 $ en 2006 et en 2007 tout en continuant à rassurer les intimées au sujet de leurs placements chez Triglobal.

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[67] On this point, the trial judge found that "[t]he fact that [Mr.] Salomon had some personal investments with Triglobal did not preclude him from referring his clients to a financial advisor with whom he was satisfied", given that the clients were aware of those investments (para. 142). However, this narrow and limited statement disregards the fact that Mr. Salomon went well beyond merely making a referral. As the Court of Appeal noted, [TRANSLATION] "Mr. Salomon put himself in a conflict of interest by not limiting the role he played with the [respondents] to simply recommending Triglobal, its representative, [Mr.] Papadopoulos, and the products they offered" (para. 98).

[68] The trial judge also accepted the explanations given by Mr. Salomon for the different payments he had received from Mr. Papadopoulos through 430, namely that these payments represented (1) "gifts" for the renovation of his apartment, (2) an additional amount to cover the taxes on those "gifts", and (3) the redemption of his own investment in Focus. She found that there was no proof that these payments were commissions for referring clients to Triglobal or that Mr. Salomon had received such commissions in 2003 or in 2006 when Ms. Matte-Thompson and 166, respectively, had made their first investments. She stated that she could not therefore conclude that these circumstances had placed Mr. Salomon in a conflict of interest.

[69] On this issue, the Court of Appeal expressed the opinion that the trial judge had adopted an unduly restrictive approach in analyzing the principles relating to conflicts of interest. It found that she had erred by holding that an exact concomitance between the payments and the referral or "specific proof" that the payments were indeed commissions (trial reasons, at para. 155) was needed before such a conflict of interest could be found to exist. This unduly restrictive approach tainted her entire analysis concerning the breach of Mr. Salomon's duty of loyalty to the respondents.

[67] Sur ce point, la juge de première instance statue que [TRADUCTION] « [l]e fait que [Me] Salomon avait certains placements personnels chez Triglobal ne l'empêchait pas de recommander à ses clientes un conseiller financier dont il était satisfait », étant donné que les clientes étaient au courant de ces placements (par. 142). Toutefois, cette affirmation de portée particulièrement étroite néglige le fait que Me Salomon a fait bien davantage que d'aiguiller ses clientes. Comme le note la Cour d'appel, « Me Salomon s'est placé en situation de conflit d'intérêts en ne limitant pas son intervention auprès des [intimées] à une simple recommandation de Triglobal, de son représentant [M.] Papadopoulos et des produits qu'ils offraient » (par. 98).

[68] La juge du procès accepte aussi les explications données par Me Salomon au sujet des divers paiements qu'il a reçus de M. Papadopoulos par l'intermédiaire de 430, notamment que ces paiements représentaient (1) des « cadeaux » pour la rénovation de son appartement; (2) une somme additionnelle pour le paiement des impôts sur ces « cadeaux »; et (3) le montant du remboursement de son propre placement dans Focus. Elle conclut qu'aucune preuve ne démontrait que ces paiements constituaient des commissions versées pour avoir aiguillé des clients vers Triglobal ou que Me Salomon a reçu de telles commissions en 2003 ou en 2006 lorsque Mme Matte-Thompson et 166, respectivement, ont effectué leurs premiers placements. Pour cette raison, elle affirme qu'il lui est impossible de conclure que ces circonstances avaient placé Me Salomon dans une situation de conflit d'intérêts.

[69] Sur cette question, la Cour d'appel exprime l'opinion que la juge de première instance a adopté une approche indûment restrictive dans son analyse des principes relatifs aux conflits d'intérêts. La cour estime que la juge a fait erreur en concluant qu'une concomitance parfaite entre les paiements et l'aiguillage ou une [TRADUCTION] « preuve précise » que les paiements étaient effectivement des commissions (motifs de première instance, par. 155) est nécessaire pour qu'il soit possible de conclure à l'existence d'un tel conflit d'intérêts. Cette interprétation indûment restrictive entache toute son analyse relative au manquement de Me Salomon à son devoir de loyauté envers les intimées.

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[70] As the Court of Appeal rightly noted, the trial judge had failed to comment on or explain certain other factors that confirmed the very close nature of the relationship between Mr. Salomon and Mr. Papadopoulos and that could not be ignored in assessing the payments received by Mr. Salomon in 2006 and 2007. A proper consideration of the evidence as a whole leads to the conclusion that this very close relationship affected Mr. Salomon's objectivity in advising the respondents. This breach of his duty of loyalty informs the assessment of Mr. Salomon's breach of his duty to advise, as it ultimately led him to turn a blind eye to a situation to which he should have been more attentive and alert.

[71] As mandataries, lawyers have a duty to avoid placing themselves in situations in which their personal interests are in conflict with those of their clients (art. 2138 para. 2 *C.C.Q.*). The duty to avoid conflicts of interest is a salient aspect of the duty of loyalty they owe to their clients (*Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649, at para. 19, citing *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, at para. 19; see also C.A. reasons, at para. 94). In conjunction with the duty of commitment to the client's cause, the duty to avoid conflicting interests ensures that "divided loyalt[ies] d[o] not cause the lawyer to 'soft peddle' his or her [representation] of a client out of concern for [other interests]" (*McKercher*, at para. 43, quoting *Neil*, at para. 19). In the same manner, the duty of loyalty shields the performance of the lawyer's duty to advise clients from the taint of undue interference.

[72] It is true that Mr. Salomon's friendship with Mr. Papadopoulos had been divulged to Ms. Matte-Thompson. However, that disclosure did not entitle him to shirk his duty to properly advise the respondents. Again, the Court of Appeal had a solid basis for finding that the record showed that Mr. Salomon's relationship with Mr. Papadopoulos had caused him to neglect his professional duty to advise the respondents. In addition to his blindly endorsing Triglobal without performing due diligence, there were two clear indications that Mr. Salomon's divided loyalties

[70] Ainsi que le signale à juste titre la Cour d'appel, la juge de première instance n'a ni commenté ni expliqué certains autres facteurs qui confirment la nature très étroite des liens qui existaient entre Me Salomon et M. Papadopoulos et qui ne peuvent être passés sous silence dans l'appréciation des paiements reçus par Me Salomon en 2006 et en 2007. Il ressort d'un examen adéquat de l'ensemble de la preuve que ces liens très étroits ont eu une incidence sur l'objectivité de Me Salomon lorsqu'il conseillait les intimées. Ce manquement de Me Salomon à son devoir de loyauté éclaire l'analyse du manquement à son devoir de conseil, en ce qu'il l'a en définitive amené à fermer les yeux sur une situation à l'égard de laquelle il aurait dû être plus attentif et vigilant.

[71] En tant que mandataires, les avocats sont tenus d'éviter de se placer dans une situation de conflit entre leurs intérêts personnels et les intérêts de leurs clients (art. 2138 al. 2 *C.c.Q.*). L'obligation d'éviter les conflits d'intérêts est un des principaux aspects du devoir de loyauté des avocats envers leurs clients (*Compagnie des chemins de fer nationaux du Canada c. McKercher LLP*, 2013 CSC 39, [2013] 2 R.C.S. 649, par. 19, citant *R. c. Neil*, 2002 CSC 70, [2002] 3 R.C.S. 631, par. 19; voir aussi motifs de la C.A., par. 94). Conjugué au devoir de dévouement de l'avocat à la cause de son client, le devoir d'éviter les conflits d'intérêts vise à assurer qu'« une situation de loyauté[s] partagée[s] n'incite pas l'avocat à "mettre une sourdine" à la [représentation] de son client par souci [de] ménager [d'autres intérêts] » (*McKercher*, par. 43, citant l'arrêt *Neil*, par. 19). De même, le devoir de loyauté protège l'accomplissement du devoir de conseil que les avocats doivent à leurs clients contre l'effet d'influences inappropriées.

[72] Il est vrai que les liens d'amitié qu'entretenait Me Salomon avec M. Papadopoulos ont été divulgués à Mme Matte-Thompson. La divulgation de ce fait n'autorisait toutefois pas Me Salomon à se dérober à son devoir de conseiller adéquatement les intimées. Là encore, la Cour d'appel disposait de solides assises lui permettant de conclure que, selon le dossier, la relation qu'entretenait Me Salomon avec M. Papadopoulos avait amené le premier à négliger son devoir professionnel de conseil envers les intimées. Outre les propos aveuglément favorables à

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had led him to neglect the respondents' interests. But because of the trial judge's restrictive approach to the conflict of interest analysis, she did not comment on these revealing examples of his divided loyalties.

Triglobal formulés par Me Salomon sans faire preuve de diligence appropriée, deux situations indiquent clairement que les loyautés partagées de Me Salomon l'ont amené à négliger les intérêts des intimées. Cependant, en raison de l'approche restrictive qu'elle applique à l'égard de l'analyse relative au conflit d'intérêts, la juge de première instance ne commente pas ces exemples éloquents des loyautés partagées de Me Salomon.

[73] The first of these indications was that Mr. Salomon had disregarded his duty of confidentiality regarding his communications with the respondents. As this Court stated in *McKercher*, "[t]he first major concern addressed by the duty to avoid conflicting interests is the misuse of confidential information. The duty to avoid conflicts of interest reinforces the lawyer's duty of confidentiality — which is a distinct duty — by preventing situations that carry a heightened risk of a breach of confidentiality" (para. 24). In the case at bar, Mr. Salomon's close relationship with Mr. Papadopoulos fostered the precise type of divided loyalties that would increase the risk of a breach of confidentiality. And such breaches did in fact occur. Mr. Salomon repeatedly disclosed confidential communications he had received from Ms. Matte-Thompson to Mr. Papadopoulos without her authorization. For instance, he transmitted the content of several of her emails to Mr. Papadopoulos, including ones in which she expressed concerns about the trustworthiness of the investment firm, asked about withdrawing the investments or announced that she intended to commence legal proceedings.

[73] La première de ces situations est que Me Salomon a négligé son obligation de protéger la confidentialité de ses communications avec les intimées. Comme le déclare notre Cour dans l'arrêt *McKercher*, « [l]a prévention de l'utilisation à mauvais escient de renseignements confidentiels constitue la première considération importante visée par le devoir d'éviter les conflits d'intérêts. Ce devoir renforce le devoir de confidentialité de l'avocat — un devoir distinct — en prévenant les situations comportant un risque élevé de manquement à la confidentialité » (par. 24). En l'espèce, les liens étroits qu'entretenait Me Salomon avec M. Papadopoulos ont favorisé le type précis de loyautés partagées susceptible d'accroître le risque de manquement à la confidentialité. De tels manquements se sont effectivement produits. Maître Salomon divulgue de façon répétée à M. Papadopoulos, sans l'autorisation de Mme Matte-Thompson, des communications confidentielles reçues de cette dernière. Par exemple, il transmet à M. Papadopoulos le contenu de plusieurs courriels de Mme Matte-Thompson, y compris certains dans lesquels celle-ci exprime des inquiétudes au sujet de la fiabilité de la société de placements, se demande s'il ne serait pas judicieux de retirer les placements et fait part de son intention d'intenter des procédures judiciaires.

[74] The second indication was that Mr. Salomon had teamed up with Mr. Papadopoulos in an attempt to convince Ms. Matte-Thompson not to withdraw the respondents' investments with Triglobal. In emails addressed to Mr. Papadopoulos or to his assistant, Mr. Salomon wrote:

[74] La deuxième situation est celle où Me Salomon fait équipe avec M. Papadopoulos pour tenter de convaincre Mme Matte-Thompson de ne pas retirer les placements des intimées auprès de Triglobal. Dans des courriels adressés à M. Papadopoulos ou à son assistant, Me Salomon écrit ce qui suit :

[TRADUCTION]

What [Ms. Matte-Thompson] wants to have is a report . . . .

Ce que veut [Mme Matte-Thompson], c'est un rapport . . .

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I believe that I know exactly what she wants and would like to help prepare this report . . . . If we do this right, there will be no uncertainty in the future.

It is important that we get this right this time so that she feels secure and can deal with the critics (e.g. her accountant). Please let me know if it is okay for me to discuss this briefly with Mario [Angelopoulos].

(A.R., vol. 5, at p. 1441 (emphasis added), referred to in C.A. reasons, at para. 99.)

I believe that we have a very good mix of investments set up for Judy . . . . She has received input (from her accountant) that is critical of the investment strategy, and I want us to be able to respond to same.

(A.R., vol. 5, at p. 1445 (emphasis added))

She is unhappy with the Focus setup. Can we make it simpler? Perhaps straight Ivest? Or is the idea to have the capital in the less risky Focus?

(A.R., vol. 6, at p. 1553 (emphasis added), quoted in C.A. reasons, at para. 131 (emphasis deleted).)

[75] The Court of Appeal pointed to the use of the word "we" as a strong indication of Mr. Salomon's divided loyalties in the key period from 2006 to 2007. These emails evidenced a form of coalition between Mr. Salomon and Mr. Papadopoulos. When Ms. Matte-Thompson expressed concerns regarding the respondents' investments, Mr. Salomon decided to help Mr. Papadopoulos prepare a report meant to appease her and to [TRANSLATION] "silence the criticisms" (C.A. reasons, at para. 100), without ever inquiring into the basis of her concerns. Another illustration of Mr. Salomon's divided loyalties arose in May 2007, when he failed to inform the respondents of the *La Presse Affaires* article, which raised "serious doubts about the investments made through Triglobal in the iVest or Focus funds" (trial reasons, at paras. 260-61). In this context, the Court of Appeal was right to conclude that Mr. Salomon had acted in a manner that was incompatible with the respondents'

Je crois que je sais exactement ce qu'elle veut et je voudrais aider à la préparation de ce rapport [. . .] Si nous nous y prenons comme il faut, il n'y aura pas d'incertitude à l'avenir.

Il est important que nous fassions les choses adéquatement cette fois pour qu'elle se sente en sécurité et puisse répondre aux critiques (p. ex. son comptable). S'il te plaît, laisse-moi savoir s'il n'y a pas d'inconvénients à ce que j'en discute brièvement avec Mario [Angelopoulos].

(d.a., vol. 5, p. 1441 (je souligne), mentionné dans les motifs de la C.A., par. 99.)

Je crois que nous avons une très bonne combinaison de placements pour Judy [. . .] Elle a reçu des commentaires (de son comptable) critiquant la stratégie de placement, et je veux que nous soyons capables de répondre à ces critiques.

(d.a., vol. 5, p. 1445 (je souligne))

Le montage dans Focus ne lui plaît pas. Pouvons-nous faire quelque chose de plus simple? Peut-être strictement Ivest? Ou est-ce que l'idée est de placer le capital dans Focus, le fonds moins risqué?

(d.a., vol. 6, p. 1553 (je souligne), cité dans les motifs de la C.A., par. 131 (soulignement omis).)

[75] La Cour d'appel souligne que l'emploi du pronom « *we* » (« nous ») dans les courriels anglais originaux constitue une solide illustration des loyautés partagées de Me Salomon au cours de la période clé, soit 2006 à 2007. Ces courriels témoignent de l'existence d'une sorte de coalition entre Me Salomon et M. Papadopoulos. Lorsque Mme Matte-Thompson exprime ses inquiétudes au sujet des placements des intimées, Me Salomon décide d'aider M. Papadopoulos à préparer un rapport destiné à l'apaiser et à « [faire] taire les critiques » (motifs de la C.A., par. 100), sans jamais chercher à connaître la raison de ses inquiétudes. Une autre illustration des loyautés partagées de Me Salomon se produit en mai 2007, lorsqu'il omet d'informer les intimées de l'article de *La Presse Affaires* qui soulève [TRADUCTION] « des doutes sérieux au sujet des placements faits par l'entremise de Triglobal dans les fonds iVest ou Focus » (motifs de première instance, par. 260-261). Dans

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interests. The documentary evidence supported this finding, which could hardly be disregarded in assessing a conflict of interest allegation like the one raised by the respondents against Mr. Salomon.

ce contexte, c'est à bon droit que la Cour d'appel conclut que Me Salomon a agi d'une manière incompatible avec les intérêts des intimées. La preuve documentaire appuie cette conclusion, qui peut difficilement être laissée de côté dans l'examen d'une allégation de conflit d'intérêts comme celle formulée par les intimées contre Me Salomon.

[76] Furthermore, given the circumstances, including this close relationship, the Court of Appeal was right to find it troubling that Mr. Salomon had received $20,000 in "gifts" from Mr. Papadopoulos in May and June 2006 through a company that had been incorporated solely for that purpose and after invoices had been issued for services that were in fact never rendered. These "gifts" were subsequently topped up in February 2007 with an additional amount of $8,000 that was meant to cover the taxes on the amount that had already been received.

[76] De plus, compte tenu des circonstances, y compris les liens étroits existant entre Me Salomon et M. Papadopoulos, la Cour d'appel est d'avis, à juste titre, qu'il est troublant que Me Salomon ait reçu des « cadeaux » totalisant 20 000 $ de M. Papadopoulos en mai et juin 2006, par l'entremise d'une société constituée à cette seule fin, après envoi de factures pour des services qui n'ont en fait jamais été rendus. À ces « cadeaux », s'ajoute ensuite, en février 2007, une somme additionnelle de 8 000 $ destinée à payer les impôts afférents au montant déjà reçu.

[77] Despite these facts, the trial judge found that there was no conflict of interest, relying for this purpose solely on the explanations given by Mr. Salomon. She insisted that there was no proof that the payments constituted commissions for the referral of the respondents to Triglobal or that that referral was contemporaneous with the payments. The Court of Appeal found that this conclusion was palpably wrong. It was inconsistent with the documentary evidence, which contained no mention of "gifts", and ignored the fact that 430's stated purpose — "financial consulting" — was relevant to the question of whether these payments were gifts or commissions. As well, the payments had not been considered in the context of the evidence as a whole, a context that raised concerns as to the divided loyalties of Mr. Salomon: after all, the payments were at all times kept secret from the respondents. In addition, the troubling fact of Mr. Papadopoulos's willingness to request and pay artificial invoices to 430 had improperly been considered irrelevant, even though this raised obvious concerns as to the general probity of the individual Mr. Salomon was recommending and endorsing to the respondents at the same time as he was receiving these payments. In fact, irrespective of whether they were characterized as gifts or commissions, the payments raised serious

[77] Malgré ces faits, la juge de première instance conclut qu'il n'y a pas de conflit d'intérêts, sur la seule foi des explications données par Me Salomon. Elle insiste sur le fait qu'il n'existe aucune preuve établissant que les paiements constituent des commissions pour l'aiguillage des intimées vers Triglobal, ou que l'aiguillage a coïncidé avec les paiements. Suivant la Cour d'appel, cette conclusion est manifestement erronée. Elle est incompatible avec la preuve documentaire, qui ne fait aucune mention de « cadeaux », et fait abstraction du fait que l'objet déclaré de 430 — la « consultation financière » — est pertinent pour répondre à la question de savoir si les paiements sont des cadeaux ou des commissions. De plus, les paiements ne sont pas situés dans le contexte de l'ensemble de la preuve, contexte qui suscite des préoccupations sur les loyautés partagées de Me Salomon; après tout, ces paiements ont en tout temps été cachés aux intimées. En outre, le fait troublant que M. Papadopoulos est disposé à demander et à payer à 430 des comptes d'honoraires factices est considéré à tort comme non pertinent, même si une telle situation soulève d'évidentes préoccupations quant à la probité générale de l'individu que Me Salomon recommande favorablement aux intimées, alors même qu'il reçoit les paiements en question. De fait, qu'on les qualifie de cadeaux ou

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doubts regarding the independence of the lawyer who had received them.

[78] The impact of this evidence was reinforced by the two $5,000 cheques Mr. Salomon had subsequently received in October 2007 and by Mr. Papadopoulos's email referring to these payments as "comms" (A.R., vol. 6, at p. 1674). When she considered this email, the trial judge wrote that there was nonetheless "no specific proof that those commissions were given to [Mr.] Salomon in consideration of the investments made by the [respondents] or any other clients" (para. 155). The Court of Appeal was clearly uncomfortable with this conclusion, as it stated: [TRANSLATION] "How can it not be concluded that Mr. Salomon received commissions for the clients he referred to Mr. Papadopoulos?" (para. 107). Once again, the Court of Appeal emphasized the trial judge's failure to explain this.

[79] I would reiterate that the incorporation of 430 for "financial consulting" purposes and the payment of false invoices for services that had never been rendered occurred between March and June 2006. Mr. Papadopoulos's lack of probity in issuing payments for those false invoices was therefore known to Mr. Salomon at that time. Yet it was in April 2006 that some of his specific reassurances to the respondents about their investments with Triglobal (which at the time included those in Focus) were made, and without a single qualification. Meanwhile, the respondents were not aware of the payments, which were never disclosed to them.

[80] I therefore find that the Court of Appeal had strong bases for overturning the trial judge's conclusion in this respect, and for concluding that Mr. Salomon's personal and financial relationship with Mr. Papadopoulos did place him in a conflict of interest in more than one way. The trial judge's unduly restrictive approach prevented her from properly assessing the totality of the evidence on this

de commissions, les paiements font naître de sérieux doutes quant à l'indépendance de l'avocat qui les reçoit.

[78] L'impact de ces éléments de preuve est renforcé par les deux chèques de 5 000 $ reçus subséquemment par Me Salomon en octobre 2007, et par le courriel de M. Papadopoulos qualifiant ces paiements de « *comms* » (d.a., vol. 6, p. 1674). Lorsqu'elle examine ce courriel, la juge de première instance écrit qu'il n'y a néanmoins [TRADUCTION] « aucune preuve précise que ces commissions ont été versées à [Me] Salomon en contrepartie des placements effectués par les [intimées] ou par quelque autre client » (par. 155). La Cour d'appel est manifestement mal à l'aise face à cette conclusion, et elle déclare ceci : « Comment ne pas conclure que Me Salomon reçoit des commissions pour les clients qu'il réfère à [M.] Papadopoulos? » (par. 107). Encore une fois, la Cour d'appel souligne le défaut de la juge de première instance de fournir des explications à ce sujet.

[79] Je tiens à rappeler que la constitution en personne morale de 430 afin de fournir des services de « consultation financière » et le paiement de comptes d'honoraires factices pour des services qui n'ont jamais été rendus ont lieu entre les mois de mars et de juin 2006. À ce moment, Me Salomon est donc au fait du manque de probité dont M. Papadopoulos a fait preuve en acquittant ces comptes d'honoraires factices. Pourtant, c'est en avril 2006 qu'il rassure expressément les intimées à quelques reprises quant à leurs placements chez Triglobal (placements qui comprennent alors ceux réalisés dans le fonds Focus), sans exprimer la moindre réserve. Pendant tout ce temps, les intimées ne connaissent pas l'existence de ces paiements, qui ne leur sont jamais divulgués.

[80] Par conséquent, j'estime que la Cour d'appel disposait de solides assises pour infirmer la conclusion de la juge de première instance sur ce point et pour conclure que Me Salomon s'est placé à plus d'un égard en situation de conflit d'intérêts en raison des liens personnels et financiers qu'il entretenait avec M. Papadopoulos. L'approche indûment restrictive adoptée par la juge du procès l'a

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topic. The evidence not only pointed to questionable payments received by Mr. Salomon at the same time as he was reassuring the respondents about their investments, it also revealed his very close relationship with Mr. Papadopoulos and the divided loyalties that had resulted from that relationship. The evidence as a whole on this issue pointed to one reasonable conclusion: that Mr. Salomon was in a conflict of interest.

empêchée d'apprécier adéquatement l'ensemble de la preuve sur cette question. Les éléments de preuve font non seulement ressortir le caractère douteux des paiements qu'a reçus Me Salomon alors même qu'il rassure les intimées sur leurs placements, mais ils illustrent aussi les liens très étroits que ce dernier entretenait avec M. Papadopoulos, ainsi que les loyautés partagées qui découlent de ces liens. L'ensemble de la preuve sur cette question conduit à une seule conclusion raisonnable : Me Salomon était en conflit d'intérêts.

[81] Conflicts of interest must be proven on a balance of probabilities (*Parizeau v. Poulin De Courval*, [2000] R.R.A. 67 (Que. C.A.), at paras. 22-23 and 29; see also, in the common law context, *McKercher*, at para. 38). The trial judge erred by disregarding the overwhelming evidence of Mr. Salomon's close personal and financial relationship with Mr. Papadopoulos on the basis that it did not lead to the conclusion that there was a conflict of interest (paras. 163-64; see also C.A. reasons, at para. 107). The Court of Appeal was justified in finding that Mr. Salomon had been in a conflict of interest and that he had in the end neglected the respondents' interests, thereby violating his duty of loyalty to them in addition to his duty to advise them.

[81] L'existence d'un conflit d'intérêts doit être prouvée selon la prépondérance des probabilités (*Parizeau c. Poulin De Courval*, [2000] R.R.A. 67 (C.A. Qc), par. 22-23 et 29); voir également, en common law, *McKercher*, par. 38). La juge de première instance commet une erreur en ne tenant pas compte de la preuve abondante des liens personnels et financiers étroits qu'entretenait Me Salomon avec M. Papadopoulos au motif qu'elle ne permet pas de conclure à l'existence d'un conflit d'intérêts (par. 163-164; voir aussi les motifs de la C.A., par. 107). La Cour d'appel était justifiée de conclure que Me Salomon s'est placé dans une situation de conflit d'intérêts, et qu'il a en définitive négligé les intérêts des intimées, manquant ainsi tant à son devoir de loyauté qu'à son devoir de conseil envers elles.

D. *Did the Court of Appeal Err by Interfering With the Trial Judge's Findings Relating to Causation?*

D. *La Cour d'appel a-t-elle erré en intervenant à l'égard des conclusions de la juge de première instance relativement au lien de causalité?*

[82] Finally, the Court of Appeal held that the trial judge had made a palpable and overriding error by concluding that Mr. Salomon's fault had not caused the respondents' losses. In its view, the impact of Mr. Salomon's faults was much greater than she had found it to be. The appellants argue that this decision was erroneous. They point out that the trial judge had found that the respondents' investment losses were a consequence of the fraud committed by Mr. Papadopoulos and Mr. Bright, and not of Mr. Salomon's faults. Once again, I disagree with the appellants. Once Mr. Salomon's faults had been properly identified and circumscribed, the causal link to the respondents' losses was in fact quite obvious. As I will explain, the Court of Appeal was

[82] Enfin, la Cour d'appel décide que la juge de première instance a commis une erreur manifeste et déterminante en concluant que la faute de Me Salomon n'a pas causé les pertes subies par les intimées. De l'avis de la Cour d'appel, les fautes de Me Salomon ont eu un impact beaucoup plus grand que celui auquel en est arrivée la première juge. Les appelants prétendent que cette conclusion est erronée. Ils soulignent que la juge du procès a statué que les pertes subies par les intimées au titre de leurs placements sont la conséquence de la fraude commise par MM. Papadopoulos et Bright et non des fautes de Me Salomon. À nouveau, je suis en désaccord avec les appelants. Une fois les fautes de Me Salomon correctement déterminées et circonscrites, le lien de

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right to intervene in the trial judge's conclusion on causation.

(1) True Causal Connection

[83] There is no doubt that the fraud committed in the Ponzi scheme is a cause of the respondents' losses. That said, more than one fault — a contractual fault in this case — can cause a single injury so long as each of the faults is a true cause, and not a mere condition, of the injury (Baudouin, Deslauriers and Moore, at No. 1-685; *Dallaire v. Paul-Émile Martel Inc.*, [1989] 2 S.C.R. 419, at p. 425; see, e.g., *Compagnie 99885 Canada inc. v. Monast*, [1994] R.R.A. 217 (Que. C.A.), at p. 221). The liability of Mr. Papadopoulos and Mr. Bright for their fraud therefore does not mean that the appellants are not liable if their faults were a cause of the respondents' losses.

[84] A fault is a true cause of its logical, immediate and direct consequences (art. 1607 *C.C.Q.*; Baudouin, Deslauriers and Moore, at No. 1-683; D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at No. 2962; see *Lonardi*, at para. 76; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 50). This characterization is largely a factual matter, which depends on all the circumstances of the case (Lluelles and Moore, at Nos. 2962-63; *Stellaire Construction Inc. v. Ciment Québec Inc.*, 2002 CanLII 35591 (Que. C.A.), at para. 39).

[85] I agree with the Court of Appeal that the trial judge erred by minimizing the consequences of the fault that Mr. Salomon had in her view committed in relation to Ms. Matte-Thompson's initial investment in iVest. First, if he had performed due diligence regarding the funds he recommended, he would have known that neither iVest nor Focus was registered with the AMF. This information would have

causalité entre celles-ci et les pertes subies par les intimées est de fait particulièrement évident. Comme je vais l'expliquer, c'est à juste titre que la Cour d'appel est intervenue à l'égard de la conclusion de la juge de première instance au sujet du lien de causalité.

(1) Le véritable lien de causalité

[83] Il ne fait aucun doute que la fraude commise par le truchement du stratagème de type Ponzi constitue une cause des pertes subies par les intimées. Cela dit, il peut arriver que plus d'une faute — une faute de nature contractuelle en l'espèce — cause un seul préjudice, pour autant toutefois que chacune d'entre elles soit une véritable cause du préjudice et non une simple occasion de celui-ci (Baudouin, Deslauriers et Moore, n° 1-685; *Dallaire c. Paul-Émile Martel Inc.*, [1989] 2 R.C.S. 419, p. 425; voir, p. ex., *Compagnie 99885 Canada inc. c. Monast*, [1994] R.R.A. 217 (C.A. Qc), p. 221). La responsabilité imputable à MM. Papadopoulos et Bright à l'égard de leur fraude ne signifie donc pas que les appelants ne sont pas responsables si les fautes commises par ces derniers ont causé les pertes des intimées.

[84] Une faute constitue une cause véritable du préjudice si celui-ci en est la suite logique, directe et immédiate (art. 1607 *C.c.Q.*; Baudouin, Deslauriers et Moore, n° 1-683; D. Lluelles et B. Moore, *Droit des obligations* (2e éd. 2012), n° 2962; voir *Lonardi*, par. 76; *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Bombardier Inc. (Bombardier Aéronautique Centre de formation)*, 2015 CSC 39, [2015] 2 R.C.S. 789, par. 50). Cette détermination est dans une large mesure une question de fait et elle dépend de l'ensemble des circonstances de l'affaire (Lluelles et Moore, nos 2962-2963; *Stellaire Construction Inc. c. Ciment Québec Inc.*, 2002 CanLII 35591 (C.A. Qc), par. 39).

[85] À l'instar de la Cour d'appel, j'estime que la juge de première instance commet une erreur en minimisant les conséquences de la faute que Me Salomon a, selon elle, commise relativement à l'investissement initial de Mme Matte-Thompson dans le fonds iVest. Premièrement, s'il avait fait preuve de la diligence appropriée à l'égard des fonds qu'il recommandait, Me Salomon aurait su que ni iVest ni Focus n'étaient

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triggered further suspicions about Mr. Papadopoulos and Triglobal, who were not authorized to offer investment funds such as iVest and Focus. Second, if Mr. Salomon had told Ms. Matte-Thompson from the start that offshore hedge funds were not investment vehicles that provide security of capital, she would not have invested in either iVest or Focus.

inscrits auprès de l'AMF. Cette information aurait fait naître chez lui des soupçons additionnels au sujet de M. Papadopoulos et de Triglobal, lesquels n'étaient pas autorisés à offrir des fonds de placement tels iVest et Focus. Deuxièmement, si Me Salomon avait dès le départ avisé Mme Matte-Thompson que des fonds spéculatifs extraterritoriaux n'étaient pas des véhicules qui garantissaient la sécurité du capital, cette dernière n'aurait investi ni dans iVest ni dans Focus.

[86] The trial judge's findings regarding the extent of the faults committed by Mr. Salomon no doubt had an impact on her causation analysis. As I explained above, assessing the evidence in separate silos based on the timing of the events and the specific funds that had been recommended was artificial. The events at the heart of this case are part of a single continuum that concerned both respondents and their losses in both iVest and Focus. The trial judge's causation analysis was also distorted by her erroneous finding that Mr. Salomon had not breached his duty of loyalty.

[86] Il ne fait aucun doute que les conclusions de la juge de première instance quant à l'ampleur des fautes de Me Salomon ont influencé son analyse du lien de causalité. Comme je l'ai expliqué précédemment, il était artificiel d'apprécier la preuve de façon compartimentée en se fondant sur la chronologie des faits et sur les fonds précis qui avaient été recommandés. Les faits au cœur de la présente affaire s'inscrivent dans un seul et même continuum, qui concerne à la fois les intimées et les pertes qu'elles ont subies au titre de leurs placements dans iVest et dans Focus. La conclusion erronée de la juge de première instance suivant laquelle Me Salomon n'a pas manqué à son devoir de loyauté a également faussé son analyse de la causalité.

[87] Taken together, Mr. Salomon's faults with respect to both his duty to advise and his duty of loyalty were a true cause of the losses suffered by the respondents. Ms. Matte-Thompson referred to Mr. Salomon as her "friend and lawyer for the past 20+ years" (A.R., vol. 4, at p. 948). It is clear from the record that she had full confidence in him and that she relied not only on his legal advice on the management of the patrimonies she administered, but also on his professional judgment concerning the investments she was contemplating. As the Court of Appeal found, Mr. Salomon induced an air of confidence regarding the investments when in reality they were manifestly inadequate in relation to the respondents' needs. The evidence supported the view that this was based on far more than simply a general sense of confidence on their part. The respondents' trust in and reliance on Mr. Salomon was based on recommendations, endorsements and reassurances that remained constant and uniform over the years. Mr. Salomon actively encouraged their reliance by providing multiple investment recommendations and

[87] Considérées globalement, les fautes de Me Salomon relativement à son devoir de conseil et à son devoir de loyauté constituent une cause véritable des pertes subies par les intimées. Madame Matte-Thompson a dit de Me Salomon qu'il était son [TRADUCTION] « ami et [son] avocat depuis les 20 dernières années, sinon plus » (d.a., vol. 4, p. 948). Il ressort clairement du dossier qu'elle avait pleinement confiance en lui et qu'elle se fiait non seulement aux conseils juridiques que ce dernier lui donnait au sujet de la gestion des patrimoines qu'elle administrait, mais aussi à son jugement professionnel quant aux placements qu'elle envisageait de faire. Comme le fait observer la Cour d'appel, Me Salomon a suscité un climat de confiance à l'égard des placements, alors qu'en réalité ils ne convenaient manifestement pas aux besoins des intimées. La preuve indique que cette perception favorable reposait sur bien plus qu'un simple sentiment général de confiance de la part des intimées. La confiance des intimées envers Me Salomon et ses conseils était fondée sur des recommandations, des commentaires favorables et des assurances que ce dernier a formulés de façon

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professing to be knowledgeable in that field. Over the years, Mr. Salomon made every effort to convince the respondents to invest — and to retain their investments — with Triglobal. I would add that such reliance by a client on the advice and opinion of his or her lawyer is unsurprising, as it is inherent in the lawyer-client relationship. The credibility that lawyers generally enjoy with their clients is a factor to bear in mind when assessing the impact of the advice they provide (see *Harris*, at para. 19).

constante et uniforme au fil des ans. Maître Salomon a activement contribué à stimuler leur confiance en formulant de nombreuses recommandations en matière de placements et en déclarant être versé dans ce domaine. Au fil des années, Me Salomon n'a ménagé aucun effort pour convaincre les intimées d'effectuer — et de conserver — des placements chez Triglobal. J'ajouterai qu'il n'est pas étonnant de voir un client se fier ainsi aux conseils et à l'opinion de son avocat, puisqu'il s'agit d'une caractéristique inhérente de la relation entre les avocats et leurs clients. La crédibilité dont jouissent généralement les avocats auprès de leurs clients est un facteur qu'il ne faut pas perdre de vue dans l'évaluation des répercussions des conseils qu'ils prodiguent (voir *Harris*, par. 19).

[88] From this standpoint, the fact that Mr. Salomon initially recommended iVest and that the bulk of the respondents' monies were subsequently transferred to or directly invested in Focus is immaterial. This is a distinction without a difference because, as I mentioned above, the respondents would never have invested in either iVest or Focus had Mr. Salomon performed due diligence before making his initial investment recommendation or had he told them that offshore hedge funds are not investment vehicles that provide security of capital. It should be borne in mind in this regard that iVest and Focus constituted a single Ponzi scheme in which funds were transited through iVest to pay off investors in Focus, and that Mr. Salomon himself considered Focus to be "less risky" than iVest (C.A. reasons, at para. 131 (emphasis deleted), quoting A.R., vol. 6, at p. 1553). As the Court of Appeal aptly put it, the respondents' lost investments [TRANSLATION] "form indissociable parts of a system into which the [respondents] were drawn by Mr. Salomon's faults" (para. 140).

[88] Lorsqu'on envisage la question sous cet angle, le fait que Me Salomon ait recommandé au départ le fonds iVest et que la majeure partie de l'argent des intimées ait été transférée par la suite dans le fonds Focus ou investie directement dans celui-ci importe peu. Cette distinction ne porte pas à conséquence parce que, comme je l'ai mentionné précédemment, les intimées n'auraient jamais investi dans iVest ou dans Focus si Me Salomon avait fait preuve de la diligence appropriée avant de formuler sa recommandation initiale en matière de placements ou s'il avait dit aux intimées que les fonds spéculatifs extraterritoriaux n'étaient pas des véhicules de placement garantissant la sécurité du capital. À cet égard, il faut garder à l'esprit que les fonds iVest et Focus constituaient un seul et même stratagème de type Ponzi où les sommes investies transitaient par le fonds iVest pour rembourser les investisseurs ayant placé de l'argent dans le fonds Focus, et que Me Salomon considérait lui-même ce fonds [TRADUCTION] « moins risqué » que le fonds iVest (motifs de la C.A., par. 131 (soulignement omis), citant d.a., vol. 6, p. 1553). Comme le résume bien la Cour d'appel, les pertes subies par les intimées au titre de leurs placements « s'inscrivent de manière indissociable dans un engrenage où les [intimées] ont été entraînées par les fautes de Me Salomon » (par. 140).

[89] For the Court of Appeal, if Mr. Salomon had properly advised the respondents as a competent, prudent and diligent lawyer, and if the conflict of interest had not tainted his recommendations, endorsements

[89] Pour la Cour d'appel, si Me Salomon avait conseillé adéquatement les intimées comme un avocat compétent, prudent et diligent l'aurait fait, et si le conflit d'intérêts n'avait pas entaché les recommandations,

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and reassurances over the years, the respondents would never have invested, nor retained their investments, with Triglobal. They would consequently not have suffered the significant losses they did. There is no dispute that the faults of Mr. Salomon occurred well before any of their losses materialized.

[90] I note that the appellants argue that the respondents' losses were also caused by imprudence on Ms. Matte-Thompson's part. Given the circumstances of this case, I cannot accept this argument. While one might find that Ms. Matte-Thompson was very trusting, Mr. Salomon not only provided her with wrongful advice, but also repeatedly reassured her when she did express concern regarding the investments. In this context, Mr. Salomon's liability is neither excluded nor diminished by the fact that the respondents did not second-guess his wrongful advice. A client's ability to rely on advice given by his or her lawyer is central to the lawyer-client relationship. As a matter of principle, "[a] client's acceptance of a lawyer's negligent advice cannot shield the lawyer from liability" (R.F., at para. 102). That would turn the law of professional liability on its head (see, by analogy, *Laflamme v. Prudential-Bache Commodities Canada Ltd.*, 2000 SCC 26, [2000] 1 S.C.R. 638, at paras. 54-56).

(2) Absence of a Break in the Chain of Causation

[91] I also agree with the Court of Appeal that the fraud did not break the causal link between Mr. Salomon's faults and the respondents' losses. It is true that a person who commits a fault is not liable for the consequences of a new event that the person had nothing to do with and that has no relationship to the initial fault. This is sometimes referred to as the principle of *novus actus interveniens*: that new event may break the direct relationship required under art. 1607 *C.C.Q.* between the fault and the injury. Two conditions must be met for this principle to apply, however. First, the causal link between

ainsi que les commentaires favorables et les assurances qu'il leur a formulés au fil des ans, les intimées n'auraient jamais investi par l'entremise de Triglobal, ni conservé leurs placements chez celle-ci. Les pertes considérables qu'elles ont subies ne se seraient par conséquent jamais produites. Personne ne conteste que les fautes de Me Salomon sont survenues bien avant que les pertes en question ne se matérialisent.

[90] Je souligne que les appelants ont plaidé que les pertes subies par les intimées ont été également causées par l'imprudence de Mme Matte-Thompson. Compte tenu des circonstances de la présente affaire, je ne peux accepter cet argument. Bien qu'il soit permis de penser que Mme Matte-Thompson semblait faire considérablement confiance à Me Salomon, ce dernier lui a non seulement donné des conseils fautifs, mais il l'a également rassurée de manière répétée lorsqu'elle lui faisait part de ses inquiétudes au sujet des placements. Dans un tel contexte, la responsabilité de Me Salomon n'est ni écartée ni atténuée par le fait que les intimées n'ont pas remis en question les conseils fautifs qu'il leur donnait. La capacité d'un client de se fier aux conseils de son avocat est un aspect central de la relation avocat-client. En principe, [TRADUCTION] « le fait qu'un client accepte les conseils que lui formule de façon négligente son avocat ne saurait exonérer ce dernier de sa responsabilité » (m.i., par. 102). Une telle conclusion contredirait carrément les règles de droit relatives à la responsabilité professionnelle (voir, par analogie, *Laflamme c. Prudential-Bache Commodities Canada Ltd.*, 2000 CSC 26, [2000] 1 R.C.S. 638, par. 54-56).

(2) Absence de rupture du lien de causalité

[91] Je suis également d'accord avec la Cour d'appel pour dire que la fraude n'a pas rompu le lien de causalité entre les fautes de Me Salomon et les pertes des intimées. Il est vrai que l'auteur d'une faute n'est pas responsable des conséquences d'un événement subséquent qui est indépendant de lui et qui est sans rapport avec la faute initiale. Il s'agit d'un principe qui est parfois appelé *novus actus interveniens* : un tel événement subséquent peut rompre le lien direct que requiert l'art. 1607 *C.c.Q.* entre la faute et le préjudice. Toutefois, deux conditions doivent être réunies pour que ce principe s'applique. Dans un

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the fault and the injury must be completely broken. Second, there must be a causal link between that new event and the injury. Otherwise, the initial fault is one of the faults that caused the injury, in which case an issue of apportionment of liability may arise (Baudouin, Deslauriers, Moore, at Nos. 1-691 to 1-692; *Laval (Ville de) (Service de protection des citoyens, département de police et centre d'appels d'urgence 911) v. Ducharme*, 2012 QCCA 2122, [2012] R.J.Q. 2090, at paras. 64-65; *Lacombe v. André*, [2003] R.J.Q. 720 (C.A.), at paras. 58-60).

premier temps, il faut que le lien de causalité entre la faute initiale et le préjudice subi soit complètement rompu. Dans un second temps, il doit exister un lien de causalité entre ce nouvel événement et le préjudice subi. Dans le cas contraire, la faute initiale est une des fautes ayant causé le préjudice, auquel cas une question du partage de la responsabilité peut se soulever (Baudouin, Deslauriers, Moore, n°s 1-691 à 1-692; *Laval (Ville de) (Service de protection des citoyens, département de police et centre d'appels d'urgence 911) c. Ducharme*, 2012 QCCA 2122, [2012] R.J.Q. 2090, par. 64-65; *Lacombe c. André*, [2003] R.J.Q. 720 (C.A.), par. 58-60).

[92] The Court of Appeal rightly found that the first of these two requirements was not met in the case at bar; the causal link between the fault and the injury was not completely broken, quite the contrary. The case law confirms that fraud committed by a third party does not shield from liability persons who failed to take required precautions (see, e.g., *Beaulieu v. Paquet*, 2016 QCCA 1284, at paras. 36-41 (CanLII); *124329 Canada inc. v. Banque Nationale du Canada*, 2011 QCCA 226, [2011] R.J.Q. 295, at paras. 82-89). In the instant case, Mr. Salomon's blind endorsement of Mr. Papadopoulos, his failure to perform due diligence and his baseless reassurances caused the respondents to be vulnerable to a potential fraud (see *Beaulieu*, at para. 41). The fraud did not break the chain of causation. No losses would have been suffered without the faults first committed by Mr. Salomon. As this Court stated in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, albeit in the common law context, where the breach of an obligation "initiated the chain of events leading to the investor's loss . . . it is right and just that the breaching party account for this loss in full" (p. 443).

[92] La Cour d'appel conclut à bon droit que la première de ces deux conditions n'est pas remplie en l'espèce : le lien de causalité entre la faute et le préjudice n'a pas été complètement rompu, bien au contraire. La jurisprudence confirme que la commission d'une fraude par un tiers n'empêche pas que des personnes qui ont omis de prendre les précautions requises soient tenues responsables (voir, p. ex., *Beaulieu c. Paquet*, 2016 QCCA 1284, par. 36-41 (CanLII); *124329 Canada inc. c. Banque Nationale du Canada*, 2011 QCCA 226, [2011] R.J.Q. 295, par. 82-89). Dans le cas qui nous occupe, les commentaires aveuglément favorables à l'égard de M. Papadopoulos formulés par Me Salomon, l'omission de ce dernier de faire preuve de la diligence appropriée et les assurances sans fondement qu'il a données ont rendu les intimées vulnérables à une possible fraude (voir *Beaulieu*, par. 41). La fraude n'a pas rompu le lien de causalité. Aucune perte n'aurait été subie sans les fautes commises au départ par Me Salomon. Comme le déclare notre Cour dans l'arrêt *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, quoiqu'elle l'ait fait dans le contexte de la common law, lorsqu'un manquement à une obligation « a déclenché la série d'événements qui ont abouti à la perte de l'investisseur [. . .] [i]l n'est [. . .] que juste et équitable que ce soit l'auteur [de ce] manquement qui assume la perte en totalité » (p. 443).

(3) Foreseeability and Recoverability

(3) Prévisibilité et possibilité de recouvrement

[93] I wish to add two comments. First, the appellants argue that Mr. Salomon could not be held liable

[93] J'ajoute deux observations. Premièrement, les appelants soutiennent que Me Salomon ne peut être

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for damages that were not foreseeable. In the contractual context, art. 1613 *C.C.Q.* provides that "the debtor is liable only for damages that were foreseen or foreseeable at the time the obligation was contracted, where the failure to perform the obligation does not proceed from intentional or gross fault on his part". This does not assist the appellants here.

tenu responsable de dommages qui n'étaient pas prévisibles. En matière contractuelle, l'art. 1613 *C.c.Q.* prévoit que « le débiteur n'est tenu que des dommages-intérêts qui ont été prévus ou qu'on a pu prévoir au moment où l'obligation a été contractée, lorsque ce n'est point par sa faute intentionnelle ou par sa faute lourde qu'elle n'est point exécutée ». Cet article n'est d'aucun secours pour les appelants en l'espèce.

[94] This standard does not mean that it was necessary to be aware of or to suspect a potential fraud (see *Beaulieu*, at para. 41). The major risks associated with investment advice are a decline in market prices or fraud by a third party, either of which would result in the loss of the invested money. Where these risks materialize, and where the lawyers have failed to abide by standards of professional conduct that are meant to protect their clients against these very risks, they may be liable for their clients' investment losses (C.A. reasons, at para. 146; see also *Hodgkinson*, at p. 452). This does not turn lawyers into insurers for their clients' losses.

[94] Cette norme ne signifie pas qu'il est nécessaire d'être au fait d'une possible fraude ou d'en soupçonner l'existence (voir *Beaulieu*, par. 41). Les principaux risques découlant du fait de prodiguer des conseils en matière de placements sont la baisse des prix du marché et la fraude commise par un tiers, qui pourraient causer tous deux une perte des sommes investies. Lorsqu'un de ces risques se matérialise et que les avocats n'ont pas respecté les normes de conduite professionnelle destinées à protéger leurs clients contre ce risque précis, ils peuvent être tenus responsables des pertes subies par leurs clients au titre de leurs placements (motifs de la C.A., par. 146; voir aussi *Hodgkinson*, p. 452). Cela ne fait pas pour autant des avocats les assureurs de leurs clients en cas de pertes.

[95] Second, the trial judge found that there was no proof that Mr. Salomon could have remedied the situation on learning about the respondents' investments in Focus. The Court of Appeal countered that the issue of recoverability in 2006 or 2007 is irrelevant, given that the faults had already been committed at that time. I agree. It is often the case that the person who committed a fault has no chance to correct it afterwards. That has no impact on his or her liability. There is thus no need to speculate about whether the respondents would have been successful if they had asked to redeem their investments earlier. I nevertheless note that the respondents were able to redeem $900,000 from Focus and iVest between February and July 2007. In June 2007, Mr. Salomon, too, requested the redemption of his $70,000 investment in Focus, and he received $50,000.

[95] Deuxièmement, la juge de première instance conclut qu'aucune preuve n'indique que Me Salomon aurait pu corriger la situation lorsqu'il a appris l'existence des placements des intimées dans le fonds Focus. La Cour d'appel réplique que la question de savoir s'il aurait été possible de recouvrer ces placements en 2006 ou 2007 n'est pas pertinente, étant donné que les fautes avaient déjà été commises à l'époque. J'abonde dans le même sens. Il arrive souvent que l'auteur d'une faute n'ait pas la possibilité de la corriger par la suite. Cela n'a aucune incidence sur sa responsabilité. Il est donc inutile de se livrer à des spéculations sur la question de savoir si les intimées auraient été en mesure ou non de recouvrer leurs placements si elles en avaient demandé le remboursement plus tôt. Je signale néanmoins qu'elles ont pu recouvrer 900 000 $ des fonds Focus et iVest entre les mois de février et de juillet 2007. En juin 2007, Me Salomon a lui aussi demandé le remboursement de la somme de 70 000 $ qu'il avait investie dans Focus, et il a reçu 50 000 $.

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VI. Conclusion

[96] This is not a case about a mere referral. It concerns a referring lawyer who, over the course of several years, recommended and endorsed a financial advisor and financial products, and encouraged his clients to retain their investments with that advisor. Further, in doing this, he failed to perform adequate due diligence, misrepresented investment information, committed breaches of confidentiality and acted despite being in a conflict of interest. In such a context, a lawyer cannot avoid liability by hiding behind the high threshold for establishing liability that applies in a case in which a lawyer has merely referred a client.

[97] I am satisfied that the Court of Appeal applied the *Housen* standards of appellate review properly before overturning the trial judge's decision. The trial judge made palpable and overriding errors in her assessment of fault and causation, and she also erred in analyzing the conflict of interest at issue in this case. The professional liability of the appellants for the respondents' losses has been established. I would dismiss the appeal with costs.

The following are the reasons delivered by

CÔTÉ J. (dissenting) —

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VI. Conclusion

[96] Nous ne sommes pas en présence d'une simple affaire d'aiguillage. La présente espèce concerne un avocat qui, sur une période de plusieurs années, recommande et commente favorablement un conseiller financier et des produits financiers, et encourage ses clientes à conserver leurs placements chez ce conseiller. De surcroît, alors qu'il accomplit ces actes, cet avocat omet de faire preuve de la diligence appropriée, il fait des déclarations inexactes au sujet de placements, il manque à son devoir de confidentialité et il agit malgré l'existence d'un conflit d'intérêts. Dans un tel contexte, un avocat ne peut échapper à sa responsabilité en invoquant comme bouclier la norme élevée qui sert à établir la responsabilité dans les affaires où un avocat aiguille simplement un client.

[97] Je considère que la Cour d'appel a appliqué adéquatement les normes de contrôle pertinentes en appel énoncées dans l'arrêt *Housen* lorsqu'elle a infirmé la décision de la juge de première instance. Cette dernière a commis des erreurs manifestes et déterminantes dans son appréciation de la faute et du lien de causalité, et elle a en outre commis une erreur lors de son analyse de la situation de conflit d'intérêts en cause dans la présente affaire. La responsabilité professionnelle des appelants à l'égard des pertes subies par les intimées est établie. Je suis d'avis de rejeter le pourvoi avec dépens.

Version française des motifs rendus par

LA JUGE CÔTÉ (dissidente) —

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I. Overview

[98] No one doubts the disastrous consequences, for the respondents, Judith Matte-Thompson and 166376 Canada Inc. ("166"), of the fraud committed by their financial advisors, Themis Papadopoulos and Mario Bright. No one would dispute that the conduct of their lawyer, the appellant Kenneth F. Salomon, was in many respects far from commendable. Not content with referring his clients to the two financial advisors and their firm, Triglobal Capital Management Inc. ("Triglobal"), Mr. Salomon went on to improperly volunteer investment advice, which he was not qualified to do. Nevertheless, after carefully and thoroughly assessing the evidence, the trial judge found that Mr. Salomon was not liable for the losses the respondents had suffered as a result of their financial advisors' fraudulent conduct (2014 QCCS

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I. Aperçu

[98] Personne ne doute des conséquences désastreuses pour les intimées, Judith Matte-Thompson et 166376 Canada Inc. (« 166 »), de la fraude commise par leurs conseillers financiers, Themis Papadopoulos et Mario Bright. Personne ne conteste le caractère répréhensible à bien des égards de la conduite de leur avocat, l'appelant Kenneth F. Salomon. Ce dernier a non seulement recommandé ces deux conseillers financiers et leur firme, Triglobal Capital Management Inc. (« Triglobal »), à ses clientes, mais il leur a aussi donné à tort, de son propre chef, des conseils en matière de placements alors qu'il n'était pas qualifié pour le faire. Néanmoins, après avoir attentivement examiné la preuve, la juge du procès conclut que Me Salomon n'est pas responsable des pertes que les intimées ont subies en raison de la conduite

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3072). Contrary to my colleague, I fail to see how that finding is marred with reviewable errors. I am therefore of the opinion that the Court of Appeal's intervention was not warranted.

[99] The Court of Appeal purported to have identified four reviewable errors, and substituted the following findings for those of the trial judge: (1) Mr. Salomon's faults were not limited in time to the initial recommendation of specific investment products, but instead took place over a four-year period; (2) those faults were committed not only against Ms. Matte-Thompson, but also against 166; (3) Mr. Salomon's close relationship with Mr. Papadopoulos amounted to a conflict of interest; and (4) the impact of Mr. Salomon's faults was such that they caused the respondents' losses (2017 QCCA 273, 41 C.C.L.T. (4th) 1).

[100] The Court of Appeal's grounds for intervening rested largely on the premise that the trial judge had analyzed the case through a distorting lens in that she had failed to adopt a so-called "global" approach to the assessment of the evidence. In my view, however, it was open to the trial judge to find that all of Mr. Salomon's professional acts over a *four-year* period could not be regarded as forming a single continuum for the purpose of assessing his liability. Quite properly, the trial judge carefully analyzed the evidence to determine the "exact nature of the fault . . . and its consequences", as required by the general principles of Quebec civil law (*Laferrière v. Lawson*, [1991] 1 S.C.R. 541, at p. 609 (emphasis added)). In so doing, she benefited from a unique familiarity with the record acquired in the course of a nine-day trial during which six witnesses were heard and over six hundred exhibits were produced. The trial judge's conclusions are entitled to deference.

[101] It in fact appears to me that the Court of Appeal's approach, far from being truly "global", focused unduly on Mr. Salomon's conduct, to the

frauduleuse de leurs conseillers financiers (2014 QCCS 3072). Contrairement à mon collègue, je ne vois pas quelles erreurs donnant ouverture à révision entachent cette conclusion. Par conséquent, je suis d'avis que l'intervention de la Cour d'appel n'est pas justifiée.

[99] La Cour d'appel dit avoir décelé quatre erreurs révisables et a substitué les conclusions suivantes à celles de la juge du procès : (1) les fautes commises par Me Salomon ne se limitent pas dans le temps à la recommandation initiale concernant des produits de placement particuliers, mais s'échelonnent plutôt sur une période de quatre ans; (2) ces fautes n'ont pas été commises uniquement à l'égard de Mme Matte-Thompson, mais aussi à l'égard de 166; (3) l'étroite relation entre Me Salomon et M. Papadopoulos équivaut à un conflit d'intérêts; et (4) les conséquences des fautes de Me Salomon sont à ce point importantes qu'elles sont à l'origine des pertes des intimées (2017 QCCA 273, 41 C.C.L.T. (4th) 1).

[100] Les motifs d'intervention de la Cour d'appel reposent en grande partie sur la prémisse selon laquelle la juge du procès a analysé l'affaire sous l'angle d'un prisme déformant, c'est-à-dire qu'elle n'a pas adopté une approche dite « globale » pour apprécier la preuve. Or, à mon avis, il était loisible à la juge du procès de conclure que l'ensemble des actes professionnels de Me Salomon, posés sur une période de *quatre ans*, ne peuvent être considérés comme faisant partie d'un seul continuum aux fins de l'évaluation de sa responsabilité. À juste titre, la juge du procès a analysé soigneusement la preuve pour déterminer la « nature exacte de la faute [. . .] et ses conséquences », conformément aux principes généraux du droit civil du Québec (*Laferrière c. Lawson*, [1991] 1 R.C.S. 541, p. 609 (je souligne)). Pour ce faire, elle bénéficiait d'une connaissance sans égale du dossier, acquise lors d'un procès de neuf jours au cours duquel elle a entendu six témoins et examiné plus de six cent pièces. Il y a lieu de faire preuve de déférence à l'égard des conclusions de la juge du procès.

[101] De fait, l'approche adoptée par la Cour d'appel, loin d'être véritablement « globale », est à mon avis indûment axée sur la conduite de Me Salomon,

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point that the Court of Appeal lost sight of relevant circumstances. For instance, concerning fault, the Court of Appeal overstated Mr. Salomon's role and largely disregarded the specificity of his mandates and the involvement of other professionals. With respect to causation, the Court of Appeal disregarded the respondents' own relationship with Triglobal and Mr. Papadopoulos, and the fact that Mr. Salomon took no part in the investment decisions that led directly to the losses. Such a harsh approach to civil liability might inadvertently increase the exposure of numerous professionals who regularly recommend other advisors and then collaborate with them in their clients' interests.

au point où la Cour d'appel a perdu de vue certaines des circonstances pertinentes. Par exemple, en ce qui concerne la faute, la Cour d'appel surestime le rôle de Me Salomon et fait en grande partie abstraction de la spécificité de ses mandats et du rôle joué par d'autres professionnels. Pour ce qui est du lien de causalité, elle ne tient pas compte de la relation des intimées avec Triglobal et M. Papadopoulos, ni du fait que Me Salomon n'a pas pris part aux décisions en matière de placements ayant mené directement aux pertes. Une conception aussi draconienne de la responsabilité civile pourrait augmenter par inadvertance le risque de poursuites à l'encontre de nombreux professionnels qui recommandent régulièrement d'autres conseillers et collaborent ensuite avec ces derniers dans l'intérêt de leurs clients.

[102] In any event, regardless of the merits of the Court of Appeal's approach, it should not have substituted its own view of the case for that of the trial judge. With all due respect, the Court of Appeal's findings stem from nothing more than a divergence of opinion that is based on its reweighing of the evidence as a whole, which is clearly inconsistent with the role of an appellate court (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 3, quoting *Underwood v. Ocean City Realty Ltd*. (1987), 12 B.C.L.R. (2d) 199 (C.A.), at p. 204).

[102] Quoi qu'il en soit, indépendamment du bien-fondé de l'approche qu'elle a employée, la Cour d'appel n'aurait pas dû substituer sa propre analyse du dossier à celle de la juge du procès. Avec égards, les conclusions de la Cour d'appel ne découlent de rien d'autre que d'une divergence d'opinions fondée sur une nouvelle appréciation de l'ensemble de la preuve, ce qui est manifestement incompatible avec le rôle d'une juridiction d'appel (voir *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 3, citant *Underwood c. Ocean City Realty Ltd*. (1987), 12 B.C.L.R. (2d) 199 (C.A.), p. 204).

[103] More specifically, I am satisfied that there were no palpable and overriding errors in the following key findings of the trial judge:

(a) Mr. Salomon did not commit a fault by recommending Triglobal and Mr. Papadopoulos as financial advisors and expressing confidence in them (paras. 302-4 (CanLII)).

(b) Mr. Salomon did commit a fault by recommending specific investments, in 2003 and 2004 in particular, without making any inquiries and without being a qualified financial advisor (paras. 188-99).

(c) However, Mr. Salomon's wrongful investment recommendations did not directly cause the losses (paras. 208-10 and 216).

[103] Plus précisément, je suis convaincue qu'aucune erreur manifeste et déterminante n'entache les conclusions clés suivantes de la juge du procès :

a) Me Salomon n'a pas commis de faute en recommandant Triglobal et M. Papadopoulos comme conseillers financiers et en témoignant de sa confiance en eux (par. 302-304 (CanLII));

b) Me Salomon a commis une faute en recommandant des placements précis, particulièrement en 2003 et 2004, sans faire de recherches et sans être un conseiller financier qualifié (par. 188-199);

c) Toutefois, les recommandations erronées de Me Salomon en matière de placements n'ont pas directement causé les pertes (par. 208-210 et 216);

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(d) In 2005 and 2006, Mr. Salomon was not consulted regarding the investment decisions of Ms. Matte-Thompson and 166 which caused the losses (i.e. investing in Focus). By then, the respondents had established a good relationship with Mr. Papadopoulos and were relying on him for investment advice (paras. 201-11, 284, 288 and 290-92).

(e) Although Mr. Salomon became aware in April 2006 that Ms. Matte-Thompson was nervous about some of the investments, and later acted as a "conduit" to help her obtain the information she needed from Mr. Papadopoulos and Triglobal, it was not his responsibility in the circumstances to second-guess the investment advice given by the respondents' financial advisors or to discover the fraud (paras. 214, 248-49 and 299-300).

(f) Insofar as Mr. Salomon should have warned Ms. Matte-Thompson and 166 when he became aware of the May 2007 *La Presse Affaires* article that raised doubts about Triglobal's practices, it was at that point likely too late to recover the funds (paras. 304 and 308).

(g) Despite Mr. Salomon's personal and financial relationships with Mr. Papadopoulos, especially the gifts he received, he did not place himself in a conflict of interest, given his limited involvement in the respondents' investment decisions and the nature and timing of the payments made by Mr. Papadopoulos (paras. 132-65).

[104] When, as in this case, a first appellate court interferes with a trial judge's findings in the absence of reviewable errors, it is this Court's role to step in and to restore the trial judge's decision. In this regard, I worry that my colleague Gascon J. adopts an overly deferential approach towards the Court of Appeal, and that this approach undermines the principle of appellate non-intervention in respect of findings of fact or of mixed fact and law made at trial. I find it necessary to address this issue before

d) En 2005 et 2006, Me Salomon n'a pas été consulté au sujet des décisions de Mme Matte-Thompson et de 166 en matière de placements qui ont causé les pertes (à savoir l'investissement dans Focus). Les intimées avaient alors établi une bonne relation avec M. Papadopoulos et se fiaient à lui pour des conseils en matière de placements (par. 201-211, 284, 288 et 290-292);

e) Bien que Me Salomon ait appris en avril 2006 que certains placements préoccupaient Mme Matte-Thompson et qu'il ait plus tard agi comme « intermédiaire » pour l'aider à obtenir l'information nécessaire auprès de M. Papadopoulos et de Triglobal, il ne lui incombait nullement, dans les circonstances, de remettre en question les conseils en matière de placements donnés par les conseillers financiers des intimées ou de découvrir la fraude (par. 214, 248-249 et 299-300);

f) Dans la mesure où Me Salomon aurait dû avertir Mme Matte-Thompson et 166 lorsqu'il a eu connaissance de l'article de *La Presse Affaires* paru en mai 2007 qui évoquait de possibles pratiques douteuses de la part de Triglobal, il était probablement déjà trop tard à ce moment pour recouvrer les fonds (par. 304 et 308);

g) Malgré sa relation personnelle et financière avec M. Papadopoulos, et particulièrement les cadeaux qu'il a reçus, Me Salomon ne s'est pas placé dans une situation de conflit d'intérêts étant donné sa participation limitée aux décisions des intimées en matière de placements et la nature et le moment des paiements de M. Papadopoulos (par. 132-165).

[104] Lorsque, comme en l'espèce, une première juridiction d'appel modifie les conclusions du juge du procès en l'absence d'erreurs révisables, il appartient à notre Cour d'intervenir et de rétablir la décision du juge du procès. À cet égard, je crains que mon collègue le juge Gascon fasse preuve d'une trop grande déférence envers la Cour d'appel, ce qui pourrait miner le principe de non-intervention en appel à l'égard des conclusions de fait ou des conclusions mixtes de fait et de droit tirées en première instance.

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considering the propriety of the Court of Appeal's grounds for intervention in this case.

J'estime qu'il est nécessaire de traiter de cette question avant d'examiner le bien-fondé des motifs pour lesquels la Cour d'appel a décidé d'intervenir en l'espèce.

II. Applicable Standard of Appellate Review

II. Norme de contrôle applicable en appel

A. *The Principle of Appellate Non-Intervention*

A. *Le principe de non-intervention en appel*

[105] In the present case, the only appropriate standard of appellate review is that of "palpable and overriding" error, which applies both to findings of fact, including inferences of fact, and to findings of mixed fact and law (unless an extricable error of law can be shown to exist) (*Housen*, at paras. 10, 19, 28-31 and 36; *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, at para. 66). Findings of fault raise questions of mixed fact and law, because they involve the application of norms of behaviour required by law to a set of facts (*St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491, at para. 104; *Housen*, at para. 29). As for causation, it plainly involves questions of fact (*Montréal (Ville) v. Lonardi*, 2018 SCC 29, [2018] 2 S.C.R. 103, at para. 41; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at paras. 36 and 92).

[105] Dans la présente affaire, la seule norme de contrôle appropriée en appel est celle de l'erreur « manifeste et déterminante », qui s'applique autant aux conclusions de fait, y compris les inférences de fait, qu'aux conclusions mixtes de fait et de droit (à moins que l'existence d'une erreur de droit isolable puisse être démontrée) (*Housen*, par. 10, 19, 28-31 et 36; *Prud'homme c. Prud'homme*, 2002 CSC 85, [2002] 4 R.C.S. 663, par. 66). Les conclusions de faute soulèvent des questions mixtes de fait et de droit parce qu'elles comportent l'application à un ensemble de faits de normes de comportement prescrites par des règles de droit (*St-Jean c. Mercier*, 2002 CSC 15, [2002] 1 R.C.S. 491, par. 104; *Housen*, par. 29). Pour ce qui est des conclusions quant à la causalité, elles soulèvent manifestement des questions de fait (*Montréal (Ville) c. Lonardi*, 2018 CSC 29, [2018] 2 R.C.S. 103, par. 41; *Benhaim c. St-Germain*, 2016 CSC 48, [2016] 2 R.C.S. 352, par. 36 et 92).

[106] Palpable and overriding error is a "highly deferential" standard (*South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46, quoted in *Benhaim*, at para. 38). As this Court has stressed repeatedly, "it is wrong for an appellate court to set aside a trial judgment where there is not palpable and overriding error, and the only point at issue is the interpretation of the evidence as a whole" (*Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, at p. 4; see also *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, at p. 84; *Housen*, at paras. 10, 20 and 29).

[106] L'erreur manifeste et déterminante est une norme qui appelle « un degré élevé de retenue » (*South Yukon Forest Corporation c. R.*, 2012 CAF 165, 4 B.L.R. (5th) 31, par. 46, cité dans *Benhaim*, par. 38). Comme l'a souligné notre Cour à plusieurs reprises, « une cour d'appel commet une erreur lorsqu'elle infirme un jugement de première instance s'il n'y a pas une erreur manifeste et dominante, et si l'interprétation de l'ensemble de la preuve est le seul point en litige » (*Jaegli Enterprises Ltd. c. Taylor*, [1981] 2 R.C.S. 2, p. 4; voir également *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78, p. 84; *Housen*, par. 10, 20 et 29).

[107] The many reasons that underlie this principle of appellate non-intervention were aptly expounded in *Housen* (paras. 11-18). First, it promotes the autonomy and integrity of trial proceedings, which

[107] L'arrêt *Housen* expose bien les nombreuses raisons qui sous-tendent le principe de non-intervention en appel (par. 11-18). Premièrement, ce principe promeut l'autonomie et l'intégrité des procédures devant

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furthers the goal of providing final, effective and efficient solutions to legal disputes. Second, it recognizes that trial judges are better placed to make factual findings, given their exposure to the entire record and their advantage of having heard testimony *viva voce*. Third, it prevents a duplication of the fact-finding process which would increase the number, length and cost of appeals without offering any guarantee of a better outcome.

le tribunal de première instance, ce qui contribue à apporter des solutions efficaces et définitives aux litiges d'ordre juridique. Deuxièmement, ce principe reflète le fait que le juge du procès est celui qui est le mieux placé pour tirer des conclusions de fait parce qu'il a l'occasion d'examiner l'ensemble du dossier et l'avantage d'entendre les témoignages de vive voix. Troisièmement, ce principe permet d'éviter une répétition du processus de constatation des faits qui aurait pour effet d'accroître le nombre, la durée et le coût des appels sans garantie d'un meilleur résultat.

[108] Given the importance of this principle of appellate non-intervention for the sound administration of justice, this Court has characterized it as a "rule of law", and insisted that, failing a reviewable error, "an appellate court simply has no jurisdiction" (*Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 49, and *Laflamme v. Prudential-Bache Commodities Canada Ltd.*, 2000 SCC 26, [2000] 1 S.C.R. 638, at para. 41, quoting *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 426, itself citing *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351, at pp. 358-59). Therefore, on questions of fact or of mixed fact and law, an appellate court *cannot* make its own findings and draw its own inferences unless the trial judge is shown to have committed a palpable and overriding error (*H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 89).

[108] Étant donné l'importance du principe de non-intervention en appel pour la bonne administration de la justice, notre Cour a qualifié celui-ci de « règle de droit » et a tenu à préciser qu'à moins d'une erreur donnant ouverture à révision, « une cour d'appel n'est tout simplement pas compétente pour modifier les conclusions de fait d'un juge de première instance » (*Galambos c. Perez*, 2009 CSC 48, [2009] 3 R.C.S. 247, par. 49, et *Laflamme c. Prudential-Bache Commodities Canada Ltd.*, 2000 CSC 26, [2000] 1 R.C.S. 638, par. 41, citant *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, p. 426, citant lui-même *Lapointe c. Hôpital Le Gardeur*, [1992] 1 R.C.S. 351, p. 358-359). Par conséquent, pour ce qui est des questions de fait ou des questions mixtes de fait et de droit, une cour d'appel *ne peut* tirer ses propres conclusions et inférences que s'il est établi que le juge de première instance a commis une erreur manifeste et déterminante (*H.L. c. Canada (Procureur général)*, 2005 CSC 25, [2005] 1 R.C.S. 401, par. 89).

B. *The Identification of Palpable and Overriding Errors*

[109] It follows that, as a precondition to intervening in a trial judge's decision, an appellate court must properly identify a palpable and overriding error. While a palpable error is of course one that is "obvious" or "plainly seen" (*Housen*, at paras. 5-6), it must nevertheless be *explained*. The appellate court must show *why* and *in what respect* a given finding is marred with a "crucial flaw, fallacy or mistake" — meaning that it is "unreasonable or unsupported by the evidence" (*H.L.*, at paras. 56 and 70). Saying that an error is "palpable" does not make it

B. *L'identification d'erreurs manifestes et déterminantes*

[109] Il s'ensuit que pour pouvoir intervenir à l'égard de la décision d'un juge de première instance, une cour d'appel doit identifier correctement une erreur manifeste et déterminante. Si une erreur manifeste est une erreur « évidente » (*Housen*, par. 5-6), il n'en demeure pas moins qu'elle doit être *expliquée*. La cour d'appel doit établir *pourquoi* et *de quelle façon* la conclusion donnée est entachée d'une « faille ou [d'une] erreur fondamentale », c'est-à-dire qu'elle est « déraisonnabl[e] » ou « non étayé[e] par la preuve » (*H.L.*, par. 56 et 70). Dire qu'une erreur

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so (*P.L. v. Benchetrit*, 2010 QCCA 1505, at para. 24 (CanLII)).

[110] The appellate court must point to a "specific and identifiable error" that amounts to more than a "divergence of opinion" (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 33 (emphasis deleted); see also *Housen*, at paras. 23, 56, 58 and 62). As the majority explained in *Housen*, "a trial judge should not be found to have misapprehended or ignored evidence, or come to the wrong conclusions merely because the appellate court diverges in the inferences it draws from the evidence and chooses to emphasize some portions of the evidence over others" (para. 56). Likewise, it does not suffice to say that the basis of certain findings appears to be "thin" (*South Yukon Forest Corp.*, at para. 53). If the trial judge's findings are reasonably supported by the evidence, an appellate court cannot "reweigh the evidence by substituting . . . an equally — or even more — persuasive inference of its own" (*H.L.*, at para. 74 (emphasis in original); see also *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138, at para. 38; *Housen*, at paras. 22-23).

[111] I would add that an omission in the reasons does not amount to a palpable and overriding error unless "it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 15, quoted in *Housen*, at para. 72; see also *South Yukon Forest Corp.*, at paras. 50-51). Trial judges are *presumed* to have based their conclusions on a review of the entirety of the evidence (*Housen*, at para. 72).

[112] That being said, how should an appellate court proceed in order to identify a palpable and overriding error? By definition, this should not be a strenuous task. In this respect, like my colleague, I find the metaphor used by Morissette J.A. in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), to be very accurate and relevant: [TRANSLATION] ". . . a palpable and overriding error is in the nature

est « manifeste » ne suffit pas à la rendre telle (*P.L. c. Benchetrit*, 2010 QCCA 1505, [2010] R.J.Q. 1853, par. 24).

[110] La juridiction d'appel doit cibler une « erreur précise et discernable » qui n'équivaut pas simplement à une « divergence d'opinions » (*Schwartz c. Canada*, [1996] 1 R.C.S. 254, par. 33 (soulignement omis); voir également *Housen*, par. 23, 56, 58 et 62). Comme l'expliquent les juges majoritaires dans *Housen*, « on ne saurait conclure qu'un juge de première instance a négligé d'examiner la preuve, l'a mal interprétée ou est arrivé à des conclusions erronées, simplement parce que le tribunal d'appel tire des inférences divergentes de la preuve et décide d'accorder plus d'importance à certains éléments qu'à d'autres » (par. 56). De même, il ne suffit pas d'affirmer que le fondement de certaines conclusions paraît « mince » (*South Yukon Forest Corp.*, par. 53). Si les conclusions du juge du procès sont raisonnablement étayées par la preuve, la juridiction d'appel « ne peut soupeser la preuve à nouveau en substituant [. . .] sa propre inférence tout aussi convaincante, sinon plus » (*H.L.*, par. 74 (souligné dans l'original); voir aussi *Nelson (City) c. Mowatt*, 2017 CSC 8, [2017] 1 R.C.S. 138, par. 38; *Housen*, par. 22-23).

[111] J'ajouterais qu'une omission dans les motifs n'équivaut pas à une erreur manifeste et déterminante, sauf si « elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée » (*Van de Perre c. Edwards*, 2001 CSC 60, [2001] 2 R.C.S. 1014, par. 15, cité dans *Housen*, par. 72; voir aussi *South Yukon Forest Corp.*, par. 50-51). Il est *présumé* que les juges de première instance fondent leurs conclusions sur un examen de l'ensemble de la preuve (*Housen*, par. 72).

[112] Cela dit, comment une juridiction d'appel doit-elle procéder pour déceler une erreur manifeste et déterminante? Par définition, cela ne devrait pas être une tâche ardue. À cet égard, comme mon collègue, je trouve très juste et pertinente la métaphore que le juge Morissette de la Cour d'appel a utilisée dans *J.G. c. Nadeau*, 2016 QCCA 167, par. 77 (CanLII) : « . . . une erreur manifeste et dominante

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not of a needle in a haystack, but of a beam in the eye" (quoted in *Benhaim*, at para. 39). This metaphor does not merely show how obvious the error must be. Most importantly, it illustrates that the identification of a palpable and overriding error does *not* require a review of the evidence as a whole. If the appellate court cannot find such an error without combing through the proverbial haystack, then there is *none*. Here is how Morissette J.A. explained it:

[TRANSLATION] Thus, the error must be one that can be identified without expending extensive resources, without provoking a long semantic debate and without requiring the review of great quantities of documentary or testimonial evidence that is divided and contradictory, as is quite regularly what happens in contentious cases of some difficulty that go to trial.

Although the above ideas are not at all complex, and are even crystal-clear in several respects, it might be asked whether they are clearly understood by all members of the Bar. It still happens too frequently that a party urges the judges hearing an appeal to review most of the evidence in the record in minute detail in order to identify an alleged "palpable and overriding" error. A submission that is supported like that seems instantaneously to be suspect, as it contravenes the rule of conduct I stated in the final lines of the preceding paragraph. . . .

. . .

. . . [T]he Court of Appeal's role is not to restart from the beginning — as if its responsibility were to take the place of the judge who presided the trial — the exercise of assessing the probative value of each witness's testimony, an arduous exercise that the trial judge is required to conduct. In *South Yukon Forest Corporation*, Stratas J.A. wrote the following with respect to the role of an appellate court: "The Federal Court judge had a basis in the record for her key factual findings". The same is necessarily true in the instant case, in which the Court must determine, and confine itself to determining, whether there is support for the trial judge's findings of fact in the evidence. [Emphasis added; paras. 76-77 and 79.]

[113] This Court, too, has stressed that "the appellate task is not to review evidence globally, but rather

tient, non pas de l'aiguille dans une botte de foin, mais de la poutre dans l'œil » (cité dans *Benhaim*, par. 39). Cette métaphore ne fait pas qu'indiquer que l'erreur doit être évidente. Elle illustre surtout le fait qu'identifier une erreur manifeste et déterminante *n'*exige *pas* un examen de l'ensemble de la preuve. Si la juridiction d'appel ne peut pas déceler une telle erreur sans fouiller dans la proverbiale botte de foin, c'est qu'il *n'*y a *pas* d'erreur révisable. Voici comment l'a expliqué le juge Morissette de la Cour d'appel :

Il doit donc s'agir d'une erreur identifiable avec une grande économie de moyens, sans que la chose ne provoque un long débat de sémantique, et sans qu'il soit nécessaire de revoir des pans entiers d'une preuve documentaire ou testimoniale qui est partagée et contradictoire, comme c'est très généralement le cas dans les dossiers litigieux de quelque difficulté qui se rendent à procès.

Bien que les idées qui précèdent soient dénuées de complexité, et qu'elles soient même limpides à plusieurs égards, on peut se demander si elles sont bien comprises par tous les membres du Barreau. En effet, il demeure trop fréquent en appel que les juges saisis d'un pourvoi soient invités par une partie à réexaminer dans le menu détail la majeure partie de la preuve versée au dossier afin d'y déceler une prétendue erreur « manifeste et dominante ». Étayée de cette façon, la prétention apparaît instantanément suspecte, car elle contrevient à la règle de conduite que j'énonçais dans les dernières lignes du précédent paragraphe. . .

. . .

. . . [L]e rôle de la Cour d'appel n'est pas de recommencer en entier, et comme s'il lui revenait de prendre la place du juge qui présidait le procès, l'exercice d'appréciation de la force probante respective des dépositions, exercice ardu auquel doit s'astreindre le juge de première instance. Précisant le rôle d'une cour d'appel, le juge Stratas écrivait à ce sujet, dans *South Yukon Forest Corporation* : « Les principales conclusions de fait de la juge étaient fondées sur le dossier ». Il en va nécessairement de même ici, où la Cour doit se demander, et se borner à se demander, si les déterminations de fait de la juge de première instance trouvent un appui dans la preuve. [Je souligne; par. 76-77 et 79.]

[113] Notre Cour aussi a souligné que « la fonction d'une juridiction d'appel [. . .] ne consiste pas à

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to review the conclusions the first instance judge has drawn from the evidence" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 55). Thus, the focus of the review is not the entire record, but the trial judge's reasons and, if need be, specific pieces of evidence to which the appellant draws the attention of the appellate court to show that a given finding is unsupported by the evidence (see *Housen*, at para. 4; *Waxman v. Waxman* (2004), 186 O.A.C. 201, at para. 307; *Benchetrit*, at para. 24). Put another way, it would be inappropriate for the appellate court to conduct its own independent assessment of the evidence and then to take note of points of disagreement with the trial judge's findings and hold that those findings result from "palpable and overriding errors" in order to justify intervening (see *Van de Perre*, at para. 16; *Galambos*, at para. 53). That would be not a review for error, but a disguised rehearing, which is not the proper role of an appellate court (*H.L.*, at paras. 52 and 64).

[114] In this regard, it should be borne in mind that a trial judge's familiarity with the case as a whole, and often large quantities of evidence, is vastly superior to that of appellate courts (*Housen*, at paras. 14, 18 and 25). The corollary is that appellate courts are in comparison ill-equipped for the task of fact-finding. As the Court of Appeal for Ontario explained in *Waxman*, appellate courts can hardly claim to be in a better position to examine cases in a "global" manner:

> In a case as lengthy and factually complex as this case, appellate judges are very much like the blind men in the parable of the blind men and the elephant. Counsel invite the court to carefully examine isolated parts of the evidence, but the court cannot possibly see and comprehend the whole of the narrative. Like the inapt comparisons to the whole of the elephant made by the blind men who felt only one small part of the beast, appellate fact-finding is not likely to reflect an accurate appreciation of the entirety of the narrative. This case demonstrates that the "palpable and overriding" standard of review is a realistic reflection of the limitations and pitfalls inherent in appellate fact-finding.

examiner la preuve globalement, mais à s'en tenir aux conclusions que le juge de première instance a tirées à partir de la preuve » (*Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101, par. 55). En conséquence, l'examen doit être axé non pas sur l'ensemble du dossier, mais sur les motifs du juge du procès et, au besoin, sur des éléments de preuve précis sur lesquels l'appelant attire l'attention de la cour d'appel afin de montrer qu'une conclusion donnée n'est pas étayée par la preuve (voir *Housen*, par. 4; *Waxman c. Waxman* (2004), 186 O.A.C. 201, par. 307; *Benchetrit*, par. 24). Autrement dit, il serait inapproprié que la cour d'appel procède à sa propre appréciation indépendante de la preuve, pour ensuite relever les conclusions du juge du procès auxquelles elle ne souscrit pas et conclure que celles-ci découlent d'« erreurs manifestes et dominantes » afin de justifier son intervention (voir *Van de Perre*, par. 16; *Galambos*, par. 53). Cette façon de faire constituerait non pas un contrôle d'erreur, mais une nouvelle audition déguisée, ce qui ne relève pas du rôle que doit jouer une juridiction d'appel (*H.L.*, par. 52 et 64).

[114] À cet égard, il ne faut pas perdre de vue que le juge du procès connaît nettement mieux l'affaire dans son ensemble, et souvent de nombreux éléments de preuve, que les juridictions d'appel (*Housen*, par. 14, 18 et 25). Il s'ensuit qu'en comparaison, les juridictions d'appel ne sont pas bien outillées pour la tâche de tirer des conclusions de fait. Comme l'explique la Cour d'appel de l'Ontario dans *Waxman*, elles peuvent difficilement prétendre être mieux placées pour examiner une affaire de façon « globale » :

> [TRADUCTION] Dans une affaire aussi longue et aussi complexe sur le plan factuel que celle qui nous occupe, les juges d'appel sont dans une situation très semblable à celle des hommes aveugles dans la parabole des hommes aveugles et de l'éléphant. Les avocats invitent la cour à examiner attentivement des parties isolées de la preuve, mais elle ne peut connaître et comprendre toute l'affaire. À l'instar des comparaisons boiteuses à l'ensemble de l'éléphant par les hommes aveugles qui ont chacun palpé qu'une petite partie de l'animal, tirer des conclusions de fait en appel est susceptible de ne pas rendre compte d'une juste appréciation de l'ensemble de l'affaire. La présente affaire démontre que la norme de contrôle de l'erreur « manifeste et déterminante » reflète de manière réaliste les limites et les risques propres à la constatation des faits en appel.

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Despite the benefit of detailed reasons for judgment, lengthy and effective argument by counsel, and many hours of study, we are entirely satisfied that we cannot possibly know and understand this trial record in the way that the trial judge came to know and understand it. Her factual determinations are much more likely to be accurate than any that we might make. [Emphasis added; paras. 294-95.]

[115] In other words, while an appellate court can certainly identify specific palpable errors in a trial judge's decision, it must acknowledge the trial judge's privileged position and its own institutional limitations. Owing to time constraints and to its inability to hear witnesses, for instance, it cannot hope to do a better job than the trial judge in assessing the evidence as a whole (see *Benchetrit*, at para. 24). Absent palpable errors, appellate courts must thus leave the task of fact-finding to trial judges and dedicate their efforts and limited resources to their primary role, which is "to delineate and refine legal rules and ensure their universal application" (*Housen*, at para. 9).

[116] Further, it bears reiterating that identifying a truly "palpable" error in an impugned finding does not give the appellate court free rein to reassess the evidence as a whole and overturn all the trial judge's other findings. To warrant intervention, the error must also be *shown* to be "overriding", that is, it must be determinative of the outcome of the case (*Nelson*, at para. 38; *H.L.*, at paras. 55-56). Otherwise, whatever the error, the trial judge's findings must stand. To borrow the vivid metaphor used by Stratas J.A. in *South Yukon Forest Corp.*, at para. 46, "it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall" (quoted in *Benhaim*, at para. 38).

C. *The "Distorting Lens" Metaphor*

[117] It is a different metaphor that informed the appellate decision in the instant case, however.

En dépit de l'avantage que nous donnent des motifs de jugement détaillés, de longues et efficaces plaidoiries des avocats et de nombreuses heures d'étude, nous sommes tout à fait convaincus qu'il nous est impossible de connaître et de comprendre le dossier du procès comme la juge de première instance l'a connu et compris. Ses conclusions de fait sont beaucoup plus susceptibles d'être exactes que les nôtres. [Je souligne; par. 294-295.]

[115] En d'autres mots, s'il est vrai que la juridiction d'appel peut déceler des erreurs manifestes précises dans la décision du juge du procès, elle doit reconnaître la situation privilégiée de ce dernier et ses propres limites institutionnelles. En raison de contraintes de temps et de l'impossibilité d'entendre les témoins, par exemple, elle ne peut espérer s'acquitter mieux que le juge du procès de l'appréciation de l'ensemble de la preuve (voir *Benchetrit*, par. 24). En l'absence d'erreurs manifestes, les juridictions d'appel doivent donc laisser aux juges du procès la tâche de tirer les conclusions de fait, et consacrer leurs efforts et leurs ressources limitées à leur rôle principal, soit « de préciser et de raffiner les règles de droit et de veiller à leur application universelle » (*Housen*, par. 9).

[116] De plus, il convient de rappeler que le fait de déceler une véritable erreur « manifeste » dans une conclusion contestée ne donne pas toute latitude à la juridiction d'appel pour réévaluer l'ensemble de la preuve et infirmer toutes les autres conclusions du juge du procès. Pour qu'une intervention soit justifiée, il doit aussi être *démontré* que l'erreur est « dominante », c'est-à-dire déterminante pour l'issue de l'affaire (*Nelson*, par. 38; *H.L.*, par. 55-56). Autrement, peu importe l'erreur, les conclusions du juge du procès doivent être maintenues. Pour reprendre la métaphore très éloquente utilisée par le juge d'appel Stratas dans *South Yukon Forest Corp.*, par. 46, « on ne peut se contenter de tirer sur les feuilles et les branches et laisser l'arbre debout. On doit faire tomber l'arbre tout entier » (cité dans *Benhaim*, par. 38).

C. *La métaphore du « prisme déformant »*

[117] Toutefois, dans le cas qui nous occupe, c'est une autre métaphore qui sert de fondement à la

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Resorting to the notion of a "distorting lens", the Court of Appeal found that the trial judge had in analyzing the evidence taken an overly compartmentalized approach to civil liability, thereby misapprehending Mr. Salomon's professional conduct towards 166 and misconstruing the causal link between Mr. Salomon's faults and the losses of Ms. Matte-Thompson and 166 (paras. 65-66 and 120). I am of the view that, in so doing, the Court of Appeal wrongly intervened on the basis of mere differences of opinion regarding the assessment of the evidence.

[118] As my colleague recognizes (at para. 40), the distorting lens metaphor does not dispense with the requirement of identifying reviewable errors in accordance with the standards articulated in *Housen*. It follows that a "distorting lens" cannot justify a wide-ranging review of the entire record unless adopting the lens is shown to be, in itself, a reviewable error. A decision to the contrary would upend the principle of appellate non-intervention, since it would allow an appellate court to reweigh the evidence *before* a reviewable error has been identified. In my view, the distorting lens metaphor may, at most, be useful to illustrate how certain *palpable* errors (or errors of law) taint the analysis of the evidence to the point of having an *overriding* effect. A metaphor is not a full explanation, however. The appellate court must explain why the trial judge erred by viewing the case through the impugned "distorting lens", why that "error" amounts to more than a mere divergence in opinion, and precisely how it distorted the trial judge's analysis and affected the outcome of the case. In this regard, it is worth noting that, in the first decision in which the Court of Appeal invoked the distorting lens metaphor, *Ford du Canada ltée v. Automobiles Duclos inc.*, 2007 QCCA 1541, at paras. 126-35 (CanLII), it held that adopting the "lens" at issue — an incorrect understanding of the concept of abuse of right — constituted an error of law which had distorted the trial judge's assessment of the evidence and resulted in reviewable errors of fact. Further, the effect on the outcome of the case could be readily ascertained by examining the trial judge's reasons, without conducting an independent review of the record (see paras. 130-32). Used in

décision en appel. Recourant à la notion de « prisme déformant », la Cour d'appel conclut que la juge du procès adopte, lors de son analyse de la preuve, une approche indûment compartimentée en matière de responsabilité civile, ce qui fait en sorte qu'elle a mal compris la conduite professionnelle de Me Salomon envers 166 et qu'elle a mal interprété le lien de causalité entre les fautes de Me Salomon et les pertes de Mme Matte-Thompson et 166 (par. 65-66 et 120). Ce faisant, la Cour d'appel est, selon moi, intervenue à tort en se fondant sur de simples différences d'opinions concernant l'appréciation de la preuve.

[118] Comme le reconnaît mon collègue (par. 40), la métaphore du prisme déformant n'écarte pas l'obligation de relever la présence d'erreurs révisables conformément aux normes formulées dans *Housen*. Il s'ensuit qu'un « prisme déformant » ne peut justifier un examen général de l'ensemble du dossier sauf s'il est démontré que le recours à un tel prisme déformant constitue, en soi, une erreur ouvrant droit à révision. Adopter la position contraire aurait pour effet de compromettre le principe de non-intervention en appel, puisqu'une juridiction d'appel pourrait procéder à une nouvelle appréciation de la preuve *avant* qu'une erreur révisable ne soit décelée. À mon avis, la métaphore du prisme déformant peut, tout au plus, servir à illustrer la façon dont certaines erreurs *manifestes* (ou erreurs de droit) vicient l'analyse de la preuve au point d'avoir un effet *déterminant*. Une métaphore ne constitue toutefois pas une explication complète. La juridiction d'appel doit expliquer pourquoi le juge du procès a commis une erreur en analysant l'affaire sous l'angle du « prisme déformant » contesté, pourquoi cette « erreur » représente plus qu'une simple divergence d'opinions, et de quelle façon précise elle fausse l'analyse du juge de première instance et influe sur l'issue de l'affaire. À cet égard, il convient de souligner que dans la première décision de la Cour d'appel où la métaphore du prisme déformant est évoquée, *Ford du Canada ltée c. Automobiles Duclos inc.*, 2007 QCCA 1541, par. 126-135 (CanLII), la Cour d'appel a conclu que le recours au « prisme » en question — une interprétation erronée du concept d'abus de droit — constitue une erreur de droit qui a faussé l'appréciation de la preuve par le juge du procès et qui a entraîné des erreurs de fait donnant ouverture à révision. De plus, il était facile de déterminer

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this way, the distorting lens metaphor was arguably consistent with the principles from *Housen*.

l'effet de ces erreurs sur l'issue de l'affaire en examinant les motifs du juge du procès, sans qu'il soit nécessaire de procéder à un examen indépendant du dossier (voir par. 130-132). On peut soutenir que la métaphore du prisme déformant, utilisée de cette façon, est conforme aux principes établis dans *Housen*.

[119] In the instant case, however, I find that the Court of Appeal merely preferred a different "lens" than the one used by the trial judge. In my view, no true reviewable error justifying a broad reassessment of the evidence was identified. The Court of Appeal does not even say that, let alone explain how, the trial judge's "distorting lens" — her supposed failure to take a "broad" approach to the case — was in itself a palpable error. Yet the Court of Appeal relied on that "lens" to justify reassessing and reweighing the evidence (paras. 50, 65, 97 and 121), thus disregarding well-settled principles of appellate review. My understanding is that the Court of Appeal began its analysis by re-examining the entire record, concluded that it disagreed with the trial judge's approach to the case, purported to identify "palpable and overriding errors", and proceeded to substitute its own findings for those of the trial judge. Indeed, this is largely how my colleague describes the Court of Appeal's review process:

[119] Dans la présente affaire, toutefois, je conclus que la Cour d'appel privilégie simplement un « prisme » différent de celui auquel a recouru la juge du procès. À mon avis, aucune véritable erreur révisable justifiant un réexamen général de la preuve n'est identifiée. La Cour d'appel n'affirme même pas que le « prisme déformant » auquel a recouru la juge du procès — sa supposée omission d'adopter une approche « globale » à l'égard de l'affaire — est, en soi, une erreur manifeste, et elle explique encore moins de quelle façon il pourrait l'être. Pourtant, la Cour d'appel se fonde sur ce « prisme » pour justifier le réexamen et une nouvelle appréciation de la preuve (par. 50, 65, 97 et 121), faisant ainsi abstraction des principes bien établis du contrôle en appel. Je crois comprendre que la Cour d'appel commence son analyse en réexaminant l'ensemble du dossier, conclut qu'elle est en désaccord avec l'approche de la juge du procès à l'égard du dossier, dit constater l'existence d'« erreurs manifestes et déterminantes » et substitue ses propres conclusions à celles de la juge du procès. D'ailleurs, c'est en grande partie de cette façon que mon collègue décrit le processus d'examen mené par la Cour d'appel :

> When properly assessed as a whole, as the Court of Appeal did, the evidence reveals that the advice and reassurances Mr. Salomon gave between 2003 and 2007 were all part of a single continuum, and that placing them in separate silos would be artificial. [Emphasis added; para. 61; see also paras. 63 and 70.]

> Appréciée adéquatement dans son ensemble, comme l'a fait la Cour d'appel, la preuve révèle que les conseils et assurances donnés par Me Salomon entre 2003 et 2007 s'inscrivent dans un seul et même continuum, et qu'il est artificiel de les compartimenter. [Je souligne; par. 61; voir aussi par. 63 et 70.]

[120] In my respectful view, this is not how the "distorting lens" metaphor should be invoked, and it is certainly not how the standard of appellate review should be applied to findings of fact or of mixed law and fact. My colleague condones this approach, but I see it as a serious, and unjustified, dilution of the principle of appellate non-intervention as articulated in *Housen*.

[120] À mon humble avis, ce n'est pas la façon dont la métaphore du « prisme déformant » doit être invoquée, et ce n'est certainement pas la façon dont la norme de contrôle en appel doit être appliquée aux conclusions de fait ou aux conclusions mixtes de fait et de droit. Mon collègue tolère cette approche, mais j'estime qu'elle constitue une dilution grave et injustifiée du principe de non-intervention en appel formulé dans *Housen*.

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D. *The Role of a Second and Final Appellate Court*

[121] Whenever this Court hears an appeal, part of its role as a second and final court of appeal is to ensure that a trial judge's findings of fact or of mixed fact and law remain undisturbed unless a "palpable and overriding" error is established. It follows that this Court should not refrain from intervening if a first appellate court has disregarded or misapplied the standards of appellate review.

[122] In my view, my colleague downplays this Court's role in ensuring that the appropriate standards are applied (para. 34). I agree that the "focal point" of this Court as a second and final court of appeal is the first appellate court's decision, not that of the trial judge. Our role is not to redo the first appeal as if the first appellate court did not exist. Therefore, there is no question that the onus is on the appellants who are asking this Court to intervene, or that careful attention must be paid to the reasons articulated by the first appellate court. However, the existence of "palpable and overriding errors" is not simply to be accepted at face value. In order to determine whether the first appellate court correctly identified reviewable errors, this Court must inevitably return to the trial judge's reasons and conduct its own assessment (see *Prud'homme*, at paras. 66-67; as illustrations of this approach, see, e.g., *Housen*, at paras. 50-55, 64, 66 and 71-75; *H.L.*, at paras. 111-36; *Laflamme*, at paras. 39-50; *Galambos*, at paras. 48-62; *Benhaim*, at paras. 80-86).

[123] To be clear, this Court should not defer to the first appellate court with respect to the identification of reviewable errors. As the Court noted in *Schwartz*, at para. 36, it will intervene if it is satisfied that the first appellate court's decision unjustifiably interfered with the trial court's findings: "Clearly, if the ground upon which a first appellate court relies to justify disturbance — being a question of law — is, in the eyes of a second appellate court,

D. *Le rôle des juridictions de second et dernier ressort*

[121] Chaque fois que notre Cour entend un pourvoi, il lui incombe, en tant que juridiction d'appel de second et ultime ressort, de s'assurer que les conclusions de fait ou les conclusions mixtes de fait et de droit du juge du procès sont respectées, à moins que l'existence d'une erreur « manifeste et déterminante » ne soit établie. Il s'ensuit que notre Cour ne devrait pas s'abstenir d'intervenir lorsque la première juridiction d'appel a ignoré les normes de contrôle applicable en appel ou les a mal appliqués.

[122] À mon avis, mon collègue minimise le rôle que doit jouer notre Cour afin de s'assurer de l'application des normes appropriées (par. 34). Je conviens que « l'objet principal » de l'examen de notre Cour en tant que seconde et dernière juridiction d'appel doit être la décision de la première juridiction d'appel, et non celle du juge du procès. Notre rôle n'est pas de refaire le premier appel comme si la première juridiction d'appel n'existait pas. Par conséquent, il est incontestable que le fardeau incombe aux appelants qui sollicitent l'intervention de notre Cour, et qu'il faut accorder une attention particulière aux motifs énoncés par la première juridiction d'appel. Cependant, nous ne devons pas souscrire sans réserve aux conclusions concernant l'existence d'« erreurs manifestes et déterminantes ». Pour déterminer si la première juridiction d'appel a correctement identifié des erreurs révisables, notre Cour doit nécessairement examiner les motifs du juge du procès et effectuer sa propre évaluation (voir *Prud'homme*, par. 66-67; pour une illustration de cette approche, voir, p. ex., *Housen*, par. 50-55, 64, 66 et 71-75; *H.L.*, par. 111-136; *Laflamme*, par. 39-50; *Galambos*, par. 48-62; *Benhaim*, par. 80-86).

[123] En clair, notre Cour ne devrait pas faire montre de retenue à l'égard de la première juridiction d'appel en ce qui concerne l'identification des erreurs révisables. Comme l'arrêt *Schwartz* l'indique (au par. 36), notre Cour interviendra si elle est convaincue que la décision de la première juridiction d'appel modifie indûment les conclusions du tribunal de première instance : « De toute évidence, lorsque le motif invoqué par la première cour d'appel

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ill-founded, the trial judge's decision will be restored by the second appellate court" (emphasis in original; see also *St-Jean*, at para. 40; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2, at pp. 8-9; *Palsky v. Humphrey*, [1964] S.C.R. 580, at p. 583; *Maze v. Empson*, [1964] S.C.R. 576, at pp. 578-79).

pour justifier la modification — ce qui constitue une question de droit — n'est pas fondé selon la seconde cour d'appel, cette dernière rétablit la décision du juge de première instance » (souligné dans l'original; voir aussi *St-Jean*, par. 40; *Beaudoin-Daigneault c. Richard*, [1984] 1 R.C.S. 2, p. 8-9; *Palsky c. Humphrey*, [1964] R.C.S. 580, p. 583; *Maze c. Empson*, [1964] R.C.S. 576, p. 578-579).

[124] Deferring to a conclusion that the trial judge made a palpable and overriding error would mean that, in practice, this Court would be affording more weight to the first appellate court's assessment of the facts than to the trial judge's findings. This, it seems to me, would be incompatible with the principle of appellate non-intervention, which is primarily concerned with the autonomy and integrity of the *trial* process. As La Forest J. noted in *Schwartz*, at para. 37, "judicial policy concerns . . . regarding a trial court's role would obviously not justify deference towards the assessment made by an appellate court".

[124] Faire montre de retenue à l'égard d'une conclusion selon laquelle le juge du procès a fait une erreur manifeste et déterminante signifierait, en pratique, que notre Cour accorderait plus de poids à l'appréciation des faits de la première cour d'appel qu'aux conclusions du juge de première instance à cet égard. À mon sens, une telle approche serait incompatible avec le principe de non-intervention en appel, qui vise pour l'essentiel à préserver l'autonomie et l'intégrité du *procès*. Comme le souligne le juge La Forest dans *Schwartz*, par. 37, « les préoccupations liées à la politique judiciaire [. . .] au sujet du rôle d'un tribunal de première instance ne justifieraient pas que l'on fasse preuve de retenue envers l'appréciation de la preuve par une cour d'appel ».

[125] It is worth clarifying that there are two steps to be taken when this Court reviews a decision in which the first appellate court has substituted its own findings of fact or of mixed fact and law for those of the trial judge. The first step is to inquire into whether the first appellate court correctly identified reviewable errors. If it did not, the trial judge's findings must be restored regardless of the merits of the first appellate court's findings (see *Nelson*, at para. 38). If, however, this Court agrees that the intervention was warranted, then the first appellate court was justified in proceeding with its own independent assessment of the relevant evidence and substituting its own findings. At that point, and this is the second step, this Court must ask whether the first appellate court has erred in making its assessment. It is only at this step that this Court will show a certain deference and will therefore avoid intervening unless "clearly satisfied" that the first appellate court's findings are erroneous (*St-Jean*, at para. 46).

[125] Il convient de préciser que notre Cour doit suivre deux étapes lorsqu'elle examine une décision dans laquelle la première cour d'appel a substitué ses propres conclusions de fait, ou conclusions mixtes de fait et de droit, à celles du juge du procès. La première étape consiste à se demander si la première cour d'appel a correctement identifié des erreurs révisables. Dans la négative, les conclusions du juge du procès doivent être rétablies sans égard au bien-fondé des conclusions de la première cour d'appel (voir *Nelson*, par. 38). Cependant, si notre Cour reconnaît que l'intervention était justifiée, la première cour d'appel pouvait légitimement procéder de façon indépendante à sa propre appréciation des éléments de preuve pertinents et substituer ses propres conclusions à celles du juge du procès. À ce moment, et il s'agit de la deuxième étape, notre Cour doit se demander si la première cour d'appel a commis une erreur dans son appréciation. Ce n'est qu'à cette étape que la Cour fera preuve d'une certaine déférence, et elle évitera donc d'intervenir sauf si elle est « clairement satisfaite » que les conclusions de la première cour d'appel sont erronées (*St-Jean*, par. 46).

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[126] To sum up, I would reiterate that when the occasion arises, it is the proper role of this Court to inquire into whether the first appellate court's intervention in the trial judge's decision was justified. If a reviewable error has not been correctly established, the trial judge's findings must be restored. Although our analysis focuses on the first appellate court's stated grounds for intervening, we must review them in light of the trial judge's decision itself.

III. Analysis of the Trial Judge's Purported Errors

[127] When the principles of appellate review, which I believe to be uncontroversial, are properly applied to the instant case, the inevitable conclusion is that the Court of Appeal's intervention was unwarranted. In my respectful view, the reason why my colleague comes to a different conclusion is that he largely skips over the first, and most important, step of the analysis — that is, the review of the purported grounds for intervention — and instead focuses on the Court of Appeal's own findings. For instance, regarding Mr. Salomon's alleged fault in relation to the duty to advise, my colleague concludes in a single paragraph that the Court of Appeal "properly identified palpable and overriding errors" (para. 55) before going on to consider whether it erred in its assessment of the facts (paras. 56-65). Moreover, in discussing the duty of loyalty, my colleague does not take issue with the Court of Appeal's obvious failure to point to any specific reviewable error, as if, in his view, disagreeing with the trial judge's "restrictive approach" was sufficient to justify retrying the case on the basis of the written record. With respect, I beg to differ.

[128] Upon a more rigorous examination, I am satisfied that the Court of Appeal impermissibly reassessed the evidence as a whole, and nonetheless found no truly reviewable error. As I noted above, the Court of Appeal's approach to appellate review was inconsistent with the principles articulated in *Housen*. If I may paraphrase Morissette J.A.'s metaphor, the Court of Appeal searched through the

[126] En résumé, je réitère que lorsque l'occasion se présente, il appartient à notre Cour de s'assurer que l'intervention de la première cour d'appel à l'égard de la décision du juge du procès était justifiée. Si la présence d'une erreur révisable n'a pas été correctement établie, les conclusions du juge du procès doivent être rétablies. Même si notre analyse porte principalement sur les motifs d'intervention de la première cour d'appel, nous devons examiner ces motifs à la lumière de la décision du juge du procès.

III. Analyse des erreurs reprochées à la juge du procès

[127] Lorsque les principes du contrôle en appel — que j'estime incontestés — sont correctement appliqués en l'espèce, la conclusion inévitable qui en découle est que l'intervention de la Cour d'appel n'est pas justifiée. À mon avis, la raison pour laquelle mon collègue arrive à une autre conclusion est qu'il escamote en grande partie la première et la plus importante étape de l'analyse, c'est-à-dire l'examen des motifs qui auraient justifié l'intervention, et qu'il se concentre plutôt sur les conclusions de la Cour d'appel. Par exemple, pour ce qui est de la faute reprochée à Me Salomon concernant son devoir de conseil, mon collègue conclut dans un seul paragraphe que la Cour d'appel « relève effectivement la présence d'erreurs manifestes et déterminantes » (par. 55), et vérifie ensuite si elle commet une erreur dans l'appréciation des faits (par. 56-65). De plus, dans son analyse du devoir de loyauté, mon collègue ne critique pas l'omission évidente de la Cour d'appel de signaler une erreur révisable précise, comme si, selon lui, le fait de ne pas être d'accord avec l'« approche restrictive » de la juge du procès suffit pour justifier une nouvelle audition de l'affaire sur la base du dossier écrit. Avec égards, je ne suis pas de cet avis.

[128] À la suite d'un examen plus rigoureux, j'estime que la Cour d'appel réexamine indûment l'ensemble de la preuve, et qu'elle ne relève néanmoins aucune véritable erreur révisable. Comme je l'ai déjà mentionné, l'approche de la Cour d'appel à l'égard du contrôle en appel est contraire aux principes formulés dans *Housen*. Pour reprendre la métaphore du juge d'appel Morissette, la Cour d'appel fouille dans

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haystack, arguably found a needle, and tried to present it as a beam. This Court should therefore restore the trial judge's findings.

[129] With these considerations in mind, I will now consider the purported palpable and overriding errors in the trial judge's findings on the subjects of (a) fault and (b) causation. While my understanding of the case differs from my colleague's, I am largely in agreement with his summary of the context and judicial history and do not see a need to replicate it. Rather, I will discuss the relevant facts in the course of my analysis. In this respect, I feel compelled to delve into factual matters more than would generally be appropriate for an appellate judge. This is warranted in the instant case, however, given the approach taken by the Court of Appeal and by my colleague.

A. *The Trial Judge Did Not Make a Palpable and Overriding Error With Respect to Fault*

[130] Concerning fault, the purported errors identified by the Court of Appeal boil down to a view that the trial judge failed to assess the evidence in a "global" manner, and erroneously compartmentalized Mr. Salomon's conduct in accordance with the chronology of the respondents' investments (paras. 50, 65-67, 70-71, 97 and 120). On the basis that this "lens" had had a distorting effect, the Court of Appeal reassessed the evidence as a whole and reached the conclusion that Mr. Salomon's faults were not limited to the initial recommendation of specific investments to Ms. Matte-Thompson. Rather, in its view, those faults were part of a single four-year continuum, and were committed against both Ms. Matte-Thompson and 166. It added that the trial judge's restrictive approach to the evidence had led her to downplay the potential conflict of interest arising from Mr. Salomon's personal relationship with Mr. Papadopoulos.

[131] As mentioned above, the purported distorting lens could not, in my view, justify a broad

une botte de foin, trouve possiblement une aiguille et tente de la présenter comme une poutre. En conséquence, notre Cour devrait rétablir les conclusions de la juge du procès.

[129] Avec ces considérations à l'esprit, j'examinerai maintenant les prétendues erreurs manifestes et déterminantes qui se trouveraient dans les conclusions de la juge du procès concernant a) la faute et b) le lien de causalité. Bien que ma compréhension de l'affaire soit différente de celle de mon collègue, je souscris en grande partie à son résumé du contexte et de l'historique judiciaire, et je ne vois pas la nécessité de le reproduire. J'examinerai plutôt les faits pertinents tout au long de mon analyse. À cet égard, je me vois contrainte d'approfondir les questions de fait plus qu'il ne serait généralement approprié pour un juge d'appel de le faire. Cependant, il y a lieu de procéder à un tel examen dans la présente affaire, étant donné l'approche adoptée par la Cour d'appel et par mon collègue.

A. *La juge du procès n'a pas commis d'erreur manifeste et déterminante en ce qui concerne la faute*

[130] En ce qui concerne la faute, les erreurs qu'aurait relevées la Cour d'appel se résument à l'opinion selon laquelle la juge du procès n'apprécie pas la preuve de manière « globale » et compartimente erronément la conduite de Me Salomon en fonction de la chronologie des placements des intimées (par. 50, 65-67, 70-71, 97 et 120). Sur la base de l'effet déformant qu'a eu ce « prisme », la Cour d'appel réexamine l'ensemble de la preuve et conclut que les fautes de Me Salomon ne se limitent pas à la recommandation initiale d'investissements précis faite à Mme Matte-Thompson. À son avis, ces fautes font plutôt partie d'un même continuum de quatre ans et ont été commises à l'égard non seulement de Mme Matte-Thompson mais aussi de 166. La Cour d'appel ajoute que l'approche restrictive adoptée par la juge du procès à l'égard de la preuve la mène à minimiser le conflit d'intérêts potentiel découlant de la relation personnelle de Me Salomon avec M. Papadopoulos.

[131] Comme je l'ai déjà mentionné, le prétendu prisme déformant ne peut justifier, à mon avis, un

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reassessment of the evidence. My colleague endorses the Court of Appeal's approach (paras. 55-56, 61, 63, 65, 70 and 80-81), but I find that it falls squarely into "divergence of opinion" territory. It was open to the trial judge to consider that all of Mr. Salomon's professional acts — in a four-year period — could not be lumped together. And may I add that it was the proper way to approach the case. As required under the principles of Quebec civil law, the trial judge canvassed the evidence so as to determine the "exact nature of the fault" (*Laferrière*, at p. 609). Quite correctly, she was careful not to oversimplify and inappropriately mix the multiple mandates, professional relationships and investments at issue over the relevant period. The Court of Appeal's preferred "lens", by contrast, is "global" only insofar as Mr. Salomon's conduct is concerned. As my colleague explains, the scope of a lawyer's duty to advise depends largely on the context (para. 53). Yet, in the instant case, the Court of Appeal lost sight of some of the relevant circumstances, especially the scope of Mr. Salomon's mandates and the roles of the other players. This resulted in an approach which disregarded Mr. Salomon's limited role in respect of the investments that led to the losses.

[132] In any event, irrespective of the merits of the Court of Appeal's approach, the trial judge's findings should not be disturbed. First, as I noted above, the Court of Appeal relied on a broad reassessment of the evidence in order to identify the purported errors, which is at odds with *Housen* and its progeny. This, it seems to me, should suffice to resolve the matter. Second, I disagree with my colleague that the trial judge made her findings "despite evidence clearly showing" the contrary (para. 41). But even if that were true, it would not by itself amount to a palpable and overriding error. It is open to trial judges to place more weight on some parts of the evidence than on others (*Housen*, at para. 72; *Nelson*, at para. 38). Indeed, that is precisely their job. The question is not whether the Court of Appeal has found clear evidence supporting its preferred view of the case, but whether it has shown that the trial judge's findings are unsupported by the evidence. If it has not

réexamen général de la preuve. Mon collègue souscrit à l'approche de la Cour d'appel (par. 55-56, 61, 63, 65, 70 et 80-81), mais j'estime que préférer cette approche relève clairement de la « divergence d'opinions ». Il était loisible à la juge du procès de juger que tous les actes professionnels de Me Salomon — au cours d'une période de quatre ans — ne peuvent être amalgamés. Et je me permets d'ajouter que c'est de cette façon qu'il fallait aborder l'affaire. Comme l'exigent les principes de droit civil au Québec, la juge du procès analyse la preuve pour déterminer la « nature exacte de la faute » (*Laferrière*, p. 609). À juste titre, elle prend soin de ne pas trop simplifier et de ne pas confondre indûment les multiples mandats, relations professionnelles et placements dont il est question au cours de la période visée. Le « prisme » privilégié par la Cour d'appel, en revanche, n'est « global » qu'en ce qui a trait à la conduite de Me Salomon. Comme l'explique mon collègue, la portée du devoir de conseil d'un avocat varie grandement selon le contexte (par. 53). Cependant, dans la présente affaire, la Cour d'appel perd de vue certaines circonstances pertinentes, notamment l'étendue des mandats de Me Salomon et le rôle des autres personnes impliquées, ce qui donne lieu à une approche qui ne tient pas compte du rôle limité de Me Salomon à l'égard des placements qui ont mené aux pertes.

[132] Quoi qu'il en soit, indépendamment du bien-fondé de l'approche de la Cour d'appel, les conclusions de la juge du procès ne devraient pas être infirmées. D'abord, comme je l'ai noté, la Cour d'appel se fonde sur un réexamen général de la preuve afin de déceler les erreurs dont il est question, ce qui est contraire à l'arrêt *Housen* et à ceux rendus dans sa foulée. À mon avis, cela devrait suffire pour régler la question. Ensuite, je ne souscris pas à l'avis de mon collègue selon lequel la juge du procès tire ses conclusions « malgré la présence d'éléments de preuve montrant clairement » le contraire (par. 41). Toutefois, même si tel était le cas, cela ne constituerait pas en soi une erreur manifeste et déterminante. Les juges de première instance peuvent accorder plus d'importance à certains éléments de preuve plutôt qu'à d'autres (*Housen*, par. 72; *Nelson*, par. 38). De fait, il s'agit précisément de leur travail. La question n'est pas de savoir si la Cour d'appel a trouvé une

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done so, it is impermissibly reweighing the evidence. As this Court stated in the very first paragraph of *Housen*, an appellate court is *prohibited* "from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion" (emphasis added). In the instant case, the trial judge's findings regarding fault were available to her.

[133] I will now explain in greater depth why I am satisfied that there is no reviewable error with respect to fault. For that purpose, I will examine (1) Mr. Salomon's mandates, (2) his duty in recommending Triglobal and Mr. Papadopoulos, (3) his duty to advise and (4) his duty of loyalty.

(1) Mr. Salomon's Mandates

[134] The trial judge was justified in starting her analysis by circumscribing the scope of Mr. Salomon's mandates (paras. 120-31). While the precise scope of a mandate does not always limit a lawyer's duties (*Côté v. Rancourt*, 2004 SCC 58, [2004] 3 S.C.R. 248, at para. 6), it is certainly one of the main considerations for a judge when assessing professional liability (see, e.g., *Sylvestre v. Karpinski*, 2011 QCCA 2161, at para. 19 (CanLII); *Bessette v. Pharmacie Suzanne Payer inc.*, 2017 QCCS 2474, at paras. 90-92 (CanLII)). As Baudouin, Deslauriers and Moore explain:

> [TRANSLATION] Fault is established by reference to the type of obligation that is assumed, to its intensity (obligation of means or of result), and to the whole of the circumstances of the case.
>
> . . .
>
> Lawyers can, first of all, be held liable for any faults committed in advising their clients, where, for example,

preuve claire étayant le point de vue qu'elle privilégie, mais plutôt si elle démontre que les conclusions de la juge du procès ne sont pas étayées par la preuve. Si elle ne fait pas cette démonstration, le réexamen de la preuve par la Cour d'appel est inadmissible. Comme notre Cour l'indique au premier paragraphe de l'arrêt *Housen*, une cour d'appel *ne peut pas* « réviser la décision du juge de première instance dans les cas où il existait des éléments de preuve qui pouvaient étayer cette décision » (je souligne). Dans le cas qui nous occupe, il était loisible à la juge du procès de tirer les conclusions qu'elle a tirées concernant la faute.

[133] J'expliquerai maintenant plus en détail pourquoi je suis d'avis qu'il n'y a pas d'erreur révisable en ce qui a trait à la faute. Pour ce faire, j'examinerai (1) les mandats de Me Salomon; (2) son devoir quant à la recommandation de Triglobal et de M. Papadopoulos; (3) son devoir de conseil; et (4) son devoir de loyauté.

(1) Les mandats de Me Salomon

[134] La juge du procès est bien fondée à commencer son analyse en délimitant l'étendue des mandats de Me Salomon (par. 120-131). Bien que les devoirs d'un avocat ne se résument pas toujours à l'étendue précise de son mandat (*Côté c. Rancourt*, 2004 CSC 58, [2004] 3 R.C.S. 248, par. 6), celle-ci constitue certainement l'une des considérations principales dont le juge doit tenir compte pour évaluer la responsabilité professionnelle (voir, p. ex., *Sylvestre c. Karpinski*, 2011 QCCA 2161, par. 19 (CanLII); *Bessette c. Pharmacie Suzanne Payer inc.*, 2017 QCCS 2474, par. 90-92 (CanLII)). Les auteurs Baudouin, Deslauriers et Moore l'expliquent de la façon suivante :

> La détermination de la faute se fait par référence au type d'obligation assumée, à son intensité (obligation de moyen ou de résultat), et à l'ensemble des circonstances de l'espèce.
>
> . . .
>
> L'avocat, en premier lieu, peut être tenu responsable pour les fautes commises dans les conseils donnés à son

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the clients consult them to learn about their rights or about the legal consequences of a transaction. Although the duty to advise exists regardless of the nature of the mandate, the scope of the latter has an undeniable impact on liability. This means that it is necessary to specifically review the scope of the lawyer's mandate. The standard for comparison, once again, is that of the normally competent, prudent and diligent lawyer. [Emphasis added; footnotes omitted.]

client, lorsque, par exemple, il est consulté par celui-ci pour connaître ses droits ou encore les conséquences juridiques d'une transaction. Si l'obligation de conseil existe quelle que soit la nature du mandat, l'étendue de cette dernière a un impact indéniable sur la responsabilité. Il faut donc examiner de façon précise le cadre du mandat de l'avocat. Le standard de comparaison, encore une fois, est celui d'un avocat normalement compétent, prudent et diligent. [Je souligne; notes en bas de page omises.]

(J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile* (8th ed. 2014), at Nos. 2-136 and 2-138)

(J.-L. Baudouin, P. Deslauriers et B. Moore, *La responsabilité civile* (8e éd. 2014), nos 2-136 et 2-138)

[135] The trial judge noted that Mr. Salomon had had "no specific mandate" with regard to the respondents' investments (para. 130). This is a very significant — and, in my view, unchallenged — finding. Mr. Salomon was only occasionally consulted regarding the investment decisions, and always in the context of mandates related, *inter alia*, to the wills and trusts of Ms. Matte-Thompson's late husband Malcolm Thompson, the family business, the reorganization of the companies and the sale of their properties (trial reasons, at para. 129). In this respect, I disagree with my colleague's assertion that Mr. Salomon was "continually recommending financial products" (para. 59 (emphasis added)). In light of the trial judge's findings, such an assertion clearly overstates Mr. Salomon's role and the obligations he assumed, and skews the analysis on his liability. Moreover, in the absence of a reviewable error, it amounts to an impermissible reweighing of the evidence.

[135] La juge du procès indique que Me Salomon n'avait [TRADUCTION] « aucun mandat précis » en ce qui concerne les placements des intimées (par. 130). Cette conclusion est très importante, et me semble non contestée. Me Salomon n'était consulté qu'occasionnellement à l'égard des décisions en matière de placements, et seulement dans le cadre de mandats liés notamment aux testaments et fiducies de Malcolm Thompson, défunt mari de Mme Matte-Thompson, à l'entreprise familiale, à la réorganisation des sociétés et à la vente de leurs biens (motifs de première instance, par. 129). À cet égard, je suis en désaccord avec mon collègue lorsqu'il affirme que Me Salomon « recommanda[it] continuellement des produits financiers » (par. 59 (je souligne)). Vu les conclusions de la juge du procès, une telle affirmation exagère manifestement le rôle de Me Salomon et les obligations qu'il a assumées et fausse l'analyse relative à sa responsabilité. De plus, en l'absence d'erreur révisable, cette affirmation équivaut à une nouvelle appréciation inadmissible de la preuve.

[136] Given the absence of a specific and continuous mandate relating to the respondents' investments, it was appropriate for the trial judge to eschew an overly broad approach to liability. She instead narrowed her analysis down to Mr. Salomon's actual involvement in the various investments of Ms. Matte-Thompson and 166. I see no palpable error in that approach, quite the contrary.

[136] Étant donné l'absence de mandat précis et continu à l'égard des placements des intimées, il était opportun que la juge du procès évite d'adopter une approche trop large en ce qui concerne la responsabilité. Elle restreint plutôt son analyse à la participation réelle de Me Salomon aux différents placements de Mme Matte-Thompson et de 166. Je ne vois aucune erreur manifeste dans cette façon de procéder, bien au contraire.

[137] I pause to point out that the trial judge found that Mr. Salomon had from the outset been acting

[137] J'ouvre une parenthèse pour souligner que la juge du procès conclut que Me Salomon a agi, dès

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for both respondents. For instance, she noted that, in 2003, his legal opinion on the interpretation of Mr. Thompson's wills, in which he had discussed the goal of capital preservation, had been provided to both Ms. Matte-Thompson and 166 (paras. 44 and 122-23). It is thus not in dispute that Mr. Salomon had a duty to advise both respondents and a duty of loyalty to both of them. However, those duties were largely circumscribed by the very nature and scope of his mandates.

[138] Although Mr. Salomon did volunteer investment advice on several occasions, he did not purport to act as the respondents' financial advisor, nor did he assume the obligation to fashion, monitor or verify their investment strategy. Indeed, he referred Ms. Matte-Thompson and 166 to Triglobal and Mr. Papadopoulos precisely so that his clients could obtain investment advice and services from professionals in that field (trial reasons, at paras. 45 and 50). The respondents subsequently developed their own independent relationship with the recommended professionals (trial reasons, at paras. 211 and 288). With this in mind, the first question I will discuss is whether Mr. Salomon committed a fault in recommending Triglobal and Mr. Papadopoulos and in expressing confidence in them.[2]

(2) Mr. Salomon's Duty in Recommending Triglobal and Mr. Papadopoulos

[139] In my view, the Court of Appeal should not have interfered with the trial judge's finding that recommending Triglobal and Mr. Papadopoulos — and expressing confidence in them — had not in itself constituted a fault (trial reasons, at paras. 197 and 302-4). In keeping with its "global" approach to the case, the Court of Appeal did not address

[2] The trial judge did not address the initial referral to Triglobal and Mr. Papadopoulos (or the later expressions of confidence in them) in a separate part of the judgment. But it is clear from her analysis on causation that she distinguished such recommendations from the recommendation of specific investment products (see *inter alia* trial reasons, at paras. 302-4).

le début, pour les deux intimées. Par exemple, elle note que, en 2003, son avis juridique sur l'interprétation des testaments de M. Thompson, dans lequel il abordait l'objectif de préservation du capital, a été remis tant à Mme Matte-Thompson qu'à 166 (par. 44 et 122-123). Par conséquent, il est indéniable que Me Salomon avait un devoir de conseil et un devoir de loyauté envers les deux intimées. Toutefois, de tels devoirs étaient dans une large mesure circonscrits par la nature et l'étendue mêmes de ses mandats.

[138] Quoique Me Salomon ait effectivement donné de son propre chef des conseils en matière de placements à quelques reprises, il n'a pas prétendu agir à titre de conseiller financier des intimées ni assumé la responsabilité d'élaborer, de surveiller ou de vérifier la stratégie de placement de celles-ci. En fait, il a dirigé Mme Matte-Thompson et 166 vers Triglobal et M. Papadopoulos justement pour que ses clientes puissent obtenir des conseils et des services en matière de placements auprès de professionnels spécialisés dans ce domaine (motifs de première instance, par. 45 et 50). Les intimées ont par la suite développé leur propre relation indépendante avec les professionnels recommandés (motifs de première instance, par. 211 et 288). À la lumière de ces considérations, la première question que j'examinerai est celle de savoir si Me Salomon a commis une faute en recommandant Triglobal et M. Papadopoulos et en témoignant de sa confiance en eux[2].

(2) Le devoir de Me Salomon quant à la recommandation de Triglobal et de M. Papadopoulos

[139] À mon avis, la Cour d'appel n'aurait pas dû modifier la conclusion de la juge du procès selon laquelle le fait pour Me Salomon de recommander Triglobal et M. Papadopoulos — et de témoigner de sa confiance en eux — ne constitue pas en soi une faute (motifs de première instance, par. 197 et 302-304). Conformément à son approche « globale » à

[2] La juge du procès ne traite pas de la recommandation initiale de Triglobal et de M. Papadopoulos (ni des témoignages de confiance ultérieurs envers eux) dans une partie distincte du jugement. Cependant, son analyse sur le lien de causalité indique clairement qu'elle fait une distinction entre la recommandation des conseillers financiers et la recommandation relative à des produits précis de placement (voir notamment les motifs de première instance, par. 302-304).

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that recommendation separately, but considered it together with the recommendation of specific investment products. With all due respect, my understanding is that rather than reviewing the trial judge's reasons for errors, the Court of Appeal proceeded, from the outset, to reassess the case from another perspective.

[140] While the Court of Appeal did not distinguish explicitly between the referral and the specific investment advice, its reasons suggest that recommending Triglobal and Mr. Papadopoulos without first making inquiries of the Autorité des marchés financiers ("AMF") was in itself wrongful (paras. 70-72 and 117). The same suggestion can be found in my colleague's reasons (para. 59). This suggestion is at odds with the trial judge's reasons, as she found that Mr. Salomon's initial referral and later expressions of confidence in Triglobal and Mr. Papadopoulos had been reasonable at least until May 2007, when the *La Presse Affaires* article was published. For my part, I am satisfied that there is no palpable error in the trial judge's findings in that regard.

[141] It is common practice for lawyers to recommend other professionals to their clients. Indeed, as the appellants points out, it is sometimes their *duty* to recognize the limits of their competence and, where the circumstances so require, to consult other professionals or to advise their clients to consult such persons. Whenever they recommend other professionals, or express confidence in them, lawyers must meet the standard of a reasonably competent, prudent and diligent lawyer in the same circumstances. While they cannot be expected to guarantee the services of the recommended professionals, they nonetheless have an obligation of means.

[142] I agree with my colleague that the Quebec Court of Appeal correctly set out the applicable

l'égard de l'affaire, la Cour d'appel ne traite pas de cette recommandation séparément, mais l'examine en même temps que la recommandation concernant des produits précis de placement. En toute déférence, il me semble que la Cour d'appel, plutôt que de contrôler la décision de la juge du procès pour y déceler des erreurs, procède d'emblée à un réexamen de la preuve sous un autre angle.

[140] Bien que la Cour d'appel ne fait pas explicitement une distinction entre la recommandation initiale des conseillers financiers et les conseils précis en matière de placements, ses motifs tendent à indiquer que le fait pour Me Salomon d'avoir recommandé Triglobal et M. Papadopoulos sans avoir préalablement effectué des vérifications auprès de l'Autorité des marchés financiers (« AMF ») est erroné en soi (par. 70-72 et 117). Les motifs de mon collègue laissent entendre la même chose (par. 59), ce qui contredit les motifs de la juge du procès, puisqu'elle conclut que la recommandation initiale et les témoignages de confiance ultérieurs de Me Salomon envers Triglobal et M. Papadopoulos étaient raisonnables au moins jusqu'en mai 2007, au moment de la parution de l'article de *La Presse Affaires*. Pour ma part, je suis convaincue que les conclusions de la juge du procès ne comportent pas d'erreur manifeste à cet égard.

[141] Il est de pratique courante pour les avocats de recommander d'autres professionnels à leurs clients. D'ailleurs, comme le soulignent les appelants, il est du *devoir* des avocats de reconnaître les limites de leur compétence et, lorsque l'exigent les circonstances, de consulter d'autres professionnels ou de conseiller à leurs clients de consulter de telles personnes. Chaque fois qu'ils recommandent d'autres professionnels ou qu'ils expriment leur confiance en eux, les avocats doivent satisfaire à la norme de l'avocat raisonnablement compétent, prudent et diligent dans la même situation. Bien qu'on ne puisse s'attendre à ce qu'ils garantissent les services rendus par les professionnels qu'ils recommandent, ils ont quand même une obligation de moyens.

[142] J'estime, comme mon collègue, que la Cour d'appel du Québec énonce correctement les principes

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principles in *Harris (Succession), Re*, 2016 QCCA 50, 25 C.C.L.T. (4th) 1, at para. 22:

[TRANSLATION] A lawyer who, as in this case, recommends that a client consult another person must be convinced that the person is competent enough to adequately perform the mandate in question. His conviction must be based on a reasonably informed knowledge of the recommended person. In such matters, the circumstances are everything.

[143] In the instant case, the trial judge's decision is consistent with this approach even though it was rendered before *Harris*. The trial judge took into consideration the fact that Mr. Salomon had conducted "due diligence" in 2001 before retaining Triglobal's services for his own investments (paras. 34 and 133), that is, that he had inquired about the lawyers and accountants assisting Mr. Papadopoulos. He knew and respected many of them, which convinced him to invest with Triglobal. In the years that followed, Mr. Salomon referred family members, friends and clients to the firm, and was himself very pleased with the investment advice he received (trial reasons, at paras. 35 and 134). Further, the trial judge pointed out that "[Mr.] Salomon had no reason to suspect any wrongdoing from [Mr.] Papadopoulos or Triglobal" and that "Triglobal had the reputation of a first class investment firm [that was] very well-rated" before its implosion at the end of 2007 (paras. 302-3). As the Court of Appeal explained in *Harris*, at para. 28, courts must be careful not to assess recommendations in light of facts discovered subsequently. Mr. Salomon's confidence in the competence and probity of Triglobal and Mr. Papadopoulos was based on reasonable knowledge. Contrary to what my colleague asserts, it was not "blind confidence" (para. 60).

[144] It follows that, although further inquiries would have been advisable, especially given that Mr. Salomon went as far as to say that he perceived Mr. Papadopoulos to be "very conservative" when it came to capital preservation (trial reasons, at

applicables dans *Harris (Succession), Re*, 2016 QCCA 50, 25 C.C.L.T. (4th) 1, par. 22 :

L'avocat qui, comme en l'espèce, recommande de consulter une autre personne doit avoir la conviction que cette personne est compétente pour remplir adéquatement le mandat dont il est question. Sa conviction doit reposer sur une connaissance raisonnablement éclairée de la personne recommandée. En cette matière, tout est affaire de circonstances.

[143] En l'espèce, la décision de la juge du procès est conforme à cette approche, même si elle a été rendue avant *Harris*. La juge du procès tient compte du fait que Me Salomon a fait preuve de [TRADUCTION] « diligence raisonnable » en 2001 avant de retenir les services de Triglobal pour ses propres placements (par. 34 et 133), c'est-à-dire qu'il s'était informé quant aux avocats et aux comptables qui assistaient M. Papadopoulos. Il connaissait et respectait plusieurs d'entre eux, ce qui l'a convaincu de recourir aux services de Triglobal pour ses placements. Au cours des années suivantes, Me Salomon a recommandé la firme à des membres de sa famille, à des amis et à des clients et il était lui-même très satisfait des conseils en matière de placements qu'il a reçus (motifs de première instance, par. 35 et 134). La juge du procès souligne également que « [Me] Salomon n'avait aucune raison de soupçonner une quelconque conduite répréhensible de la part de M. Papadopoulos ou de Triglobal » et que « Triglobal avait la réputation d'être une firme de placement de premier ordre [qui était] très bien cotée » avant son implosion à la fin de 2007 (par. 302-303). Comme l'explique la Cour d'appel dans *Harris*, par. 28, les tribunaux doivent se garder de juger des recommandations à la lumière de faits découverts subséquemment. La confiance de Me Salomon en la compétence et la probité de Triglobal et de M. Papadopoulos reposait sur une connaissance raisonnable. Contrairement à ce qu'affirme mon collègue, il ne s'agit pas de « confiance aveugle » (par. 60).

[144] Il s'ensuit que, bien que des vérifications supplémentaires de la part de Me Salomon eurent été souhaitables, d'autant plus qu'il est allé jusqu'à dire qu'il considérait M. Papadopoulos comme étant [TRADUCTION] « très conservateur » en matière de

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para. 49), Mr. Salomon acted as a reasonably competent, prudent and diligent lawyer in the circumstances. While it may be true that contacting the AMF would have been preferable, omitting to do so did not amount to a fault given the reputation of the firm and Mr. Salomon's own familiarity with Triglobal's services.

[145] Moreover, recommending Triglobal and Mr. Papadopoulos did not in itself require Mr. Salomon to double-check whether the investment advice they gave was appropriate. As the appellants point out, the very purpose of a referral is generally to have the client consult a professional whose areas of expertise differ from those of the referring lawyer. It would defeat that purpose to require a referring lawyer, as a general rule, to monitor the advice given by the professionals he or she recommended.

[146] I am concerned that a conclusion to the contrary would impose an excessive burden on many lawyers (and other professionals) who routinely recommend other trusted professionals. In my view, this would imply that making systematic inquiries of professional orders and other regulatory bodies would generally be required before another professional could be recommended, and that monitoring and verifying the recommended professional's advice might subsequently be required. This would go too far. Professionals might become overcautious and avoid making recommendations altogether, which would be a disservice to their clients.

[147] I would instead say that lawyers should make such inquiries as will enable them to acquire reasonable knowledge of professionals they recommend unless they already have relevant experience dealing with them. I would add that, as in other contexts, not every professional "error" made in making such inquiries — or in failing to make them — will amount to a fault if the lawyer's conduct does not depart from the standard expected of a reasonably competent, prudent and diligent professional (see *Roberge v. Bolduc*, [1991] 1 S.C.R. 374, at pp. 427-28; *Phillips*

préservation de capital (motifs de première instance, par. 49), Me Salomon a agi comme l'aurait fait un avocat raisonnablement compétent, prudent et diligent dans les circonstances. Même s'il est sans doute vrai qu'il aurait été préférable que Me Salomon communique avec l'AMF, son défaut de le faire ne constitue pas une faute étant donné la réputation de la firme et le fait que les services de Triglobal lui étaient familiers.

[145] De plus, Me Salomon n'était pas tenu, du seul fait qu'il a recommandé Triglobal et M. Papadopoulos, de vérifier si les conseils en matière de placements que ces derniers ont donnés étaient appropriés. Comme le soulignent les appelants, l'objectif même d'une telle recommandation est généralement que le client consulte un professionnel dont les domaines d'expertise sont différents de ceux de l'avocat. Ce serait contraire à cet objectif d'exiger, en règle générale, que l'avocat vérifie les conseils donnés par les professionnels qu'il ou elle a recommandés.

[146] Je crains qu'une conclusion contraire imposerait un fardeau excessif à de nombreux avocats (et à d'autres professionnels) qui recommandent couramment d'autres professionnels en qui ils ont confiance. À mon avis, cela signifierait qu'ils seraient généralement tenus de faire systématiquement des recherches auprès d'ordres professionnels et d'autres organismes de réglementation avant de recommander un professionnel, et que la surveillance et la vérification des conseils donnés par celui-ci pourraient ultérieurement être exigées. Cela irait trop loin. Les professionnels pourraient faire preuve d'une prudence excessive et éviter complètement de faire des recommandations, ce qui ne rendrait pas service à leurs clients.

[147] Je dirais plutôt que les avocats devraient faire des recherches sur les professionnels qu'ils recommandent afin d'en avoir une connaissance raisonnable, à moins qu'ils n'aient déjà eu une expérience de collaboration pertinente avec eux. J'ajouterais que, comme dans d'autres contextes, toutes les « erreurs » professionnelles relatives à ces recherches — ou à l'omission d'en faire — ne constitueront pas une faute si la conduite de l'avocat respecte la norme à laquelle se conformerait un professionnel raisonnablement compétent, prudent et diligent (voir *Roberge*

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v. Naamani, 1998 CanLII 9332 (Que. Sup. Ct.), at paras. 66-67).

[148] In the case at bar, Mr. Salomon already had reasonable knowledge of Triglobal and Mr. Papadopoulos as a result of his personal experience. With the benefit of hindsight, failing to take further steps was very unfortunate, but it does not in itself make him liable.

[149] In saying this, I am well aware that this case is not merely about a referral. The trial judge found that Mr. Salomon's involvement was not limited to the initial recommendation in 2003, but that he also went on to provide wrongful advice regarding specific investment products (paras. 198-99). However, the principles from *Harris* are nonetheless relevant to the assessment of Mr. Salomon's conduct, and applying them properly leads to the conclusion that it was open to the trial judge to find that recommending Triglobal and Mr. Papadopoulos did not in itself constitute a fault.

[150] This is true not only of the initial referral, but also of the later expressions of confidence. I see no ground for intervening in the trial judge's findings that Mr. Salomon's confidence remained reasonable until at least the publication of the *La Presse Affaires* article in May 2007 and that, although he may have been "overly reassuring" to Ms. Matte-Thompson at times, this does not suffice to establish liability (trial reasons, at paras. 301-4). Up to the time when Mr. Salomon should reasonably have begun to doubt the probity or competence of Triglobal and Mr. Papadopoulos, it was just as appropriate for him to reaffirm his confidence in them as it had been for him to recommend them on day one. Likewise, it was open to the trial judge to find that Mr. Salomon had no duty either to withdraw his recommendation or to investigate Triglobal and Mr. Papadopoulos. As the trial judge found, to Mr. Salomon, "there was no indication of anything illegal or unethical occurring at Triglobal up until May 2007" (para. 304).

c. Bolduc, [1991] 1 R.C.S. 374, p. 427-428; *Phillips c. Naamani*, 1998 CanLII 9332 (C.S. Qc), par. 66-67).

[148] Dans l'affaire qui nous occupe, Me Salomon connaissait raisonnablement bien Triglobal et M. Papadopoulos en raison de son expérience personnelle. En rétrospective, l'omission de prendre des mesures supplémentaires paraît très malencontreuse, mais ne suffit pas en soi à entraîner la responsabilité de Me Salomon.

[149] Je suis toutefois consciente que la présente affaire ne se résume pas à la simple recommandation de professionnels. La juge du procès conclut que le rôle joué par Me Salomon ne se limitait pas à la recommandation initiale faite en 2003, mais qu'il avait également donné des conseils erronés au sujet de produits de placement précis (par. 198-199). Cependant, les principes énoncés dans *Harris* sont tout de même utiles pour évaluer la conduite de Me Salomon, et leur application correcte mène à la conclusion que la juge du procès pouvait conclure que le fait de recommander Triglobal et M. Papadopoulos ne constituait pas en soi une faute.

[150] Cette conclusion vaut non seulement pour la recommandation initiale des conseillers financiers, mais aussi pour les témoignages de confiance ultérieurs. Je ne vois aucune raison de modifier les conclusions de la juge du procès selon lesquelles la confiance de Me Salomon était raisonnable au moins jusqu'à la parution de l'article de *La Presse Affaires* en mai 2007, et que, bien qu'il ait pu avoir été [TRADUCTION] « excessivement rassurant » envers Mme Matte-Thompson à quelques reprises, cela ne suffit pas à établir sa responsabilité (motifs de première instance, par. 301-304). Jusqu'au moment où Me Salomon aurait raisonnablement dû commencer à douter de la probité ou de la compétence de Triglobal et de M. Papadopoulos, il était tout aussi fondé à réaffirmer sa confiance en eux qu'il était en droit de les recommander le premier jour. De même, il était loisible à la juge du procès de conclure que Me Salomon n'avait aucune obligation de retirer sa recommandation ou de faire des recherches sur Triglobal et M. Papadopoulos. Comme le conclut la juge du procès, pour Me Salomon, [TRADUCTION] « rien ne donnait à penser que Triglobal avait fait quoi que ce soit d'illégal ou de non éthique avant mai 2007 » (par. 304).

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[151] In this regard, I wish to comment on the "gifts" Mr. Papadopoulos made to Mr. Salomon in May and June 2006 and, later, in February 2007. The trial judge found that Mr. Papadopoulos had wanted to help Mr. Salomon renovate his apartment. For that purpose, he had proposed that Mr. Salomon incorporate a company that could issue invoices for "financial consulting" services. Mr. Salomon accepted, and later received $28,000 through that company without having rendered any services (trial reasons, at paras. 142-46; C.A. reasons, at para. 104). My colleague is of the view that Mr. Papadopoulos's willingness to request fake invoices was sufficient to raise "obvious concerns as to the general probity of the individual" (para. 77). I agree that such a scheme is troubling in many respects. However, as the trial judge noted, regardless of whether the scheme constituted tax fraud, it had "no connection to the investments made by the [respondents]" (para. 147). This means that Mr. Papadopoulos's gifts were arguably insufficient to set off alarms with respect to the potential misappropriation of the respondents' investments and to undermine Mr. Salomon's confidence in Triglobal and Mr. Papadopoulos.

[151] À cet égard, j'aimerais formuler des commentaires quant aux « cadeaux » que M. Papadopoulos a donnés à Me Salomon en mai et juin 2006, et plus tard en février 2007. La juge du procès conclut que M. Papadopoulos a voulu aider Me Salomon à rénover son appartement. À cette fin, il a proposé à Me Salomon de constituer une société qui pourrait facturer des services de « consultation financière ». Me Salomon a accepté cette proposition et a ensuite reçu, sans avoir rendu de services, 28 000 $ par l'entremise de cette société (motifs de première instance, par. 142-146; motifs de la C.A., par. 104). Mon collègue est d'avis que le fait que M. Papadopoulos était disposé à demander de fausses factures suffisait à soulever « d'évidentes préoccupations quant à la probité générale de l'individu » (par. 77). Je conviens qu'un tel stratagème est troublant à bien des égards. Toutefois, comme le fait observer la juge du procès, indépendamment de la question de savoir s'il s'agit ou non d'une fraude fiscale, le stratagème n'avait [TRADUCTION] « aucun lien avec les placements faits par les [intimées] » (par. 147). Par conséquent, on peut soutenir que les cadeaux de M. Papadopoulos étaient insuffisants pour sonner l'alarme en ce qui a trait à de possibles détournements des placements des intimées et pour miner la confiance de Me Salomon en Triglobal et en M. Papadopoulos.

[152] That being said, I would agree that Mr. Salomon's reaction to the May 2007 *La Presse Affaires* article was inappropriate. As the trial judge found, Mr. Salomon failed to bring the article to his clients' attention despite the fact that it "raised serious doubts about the investments made through Triglobal in the iVest or Focus funds" (paras. 260-61). Accordingly, it might be argued that Mr. Salomon should have warned the respondents and recommended that they consult other financial advisors.

[152] Cela dit, je reconnais que la réaction de Me Salomon à la parution de l'article de *La Presse Affaires* en mai 2007 était inappropriée. Comme le conclut la juge du procès, Me Salomon a omis de porter l'article à l'attention de ses clientes malgré le fait que ce texte soulevait [TRADUCTION] « des doutes sérieux au sujet des placements faits par l'entremise de Triglobal dans les fonds iVest ou Focus » (par. 260-261). Par conséquent, on peut soutenir que Me Salomon aurait dû avertir les intimées et recommander qu'elles consultent d'autres conseillers financiers.

[153] There is little doubt that Mr. Salomon should have been more circumspect from that point onwards. For instance, it was probably inappropriate for him to state in July 2007 that he remained "very happy to have [his] investments performing so well with such controlled risk", especially given that the

[153] Il fait peu de doute que Me Salomon aurait dû faire preuve de plus de circonspection à compter de ce moment. Par exemple, il était probablement inapproprié que Me Salomon déclare, en juillet 2007, qu'il était toujours [TRADUCTION] « très heureux que [ses] placements aient un aussi bon rendement

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respondents were having difficulty retrieving their funds at the time (C.A. reasons, at para. 133). Even in December 2007, when Triglobal was on the brink of collapse and the fraud was about to be uncovered, Mr. Salomon was still reassuring Ms. Matte-Thompson about Mr. Papadopoulos's purported attempts to salvage the situation (C.A. reasons, at para. 138).

[154] However, even though these reassurances might have been wrongful, the trial judge did not see the need to linger on them. This is because she found that the loss had likely already been incurred by May 2007, which meant that there could be no causal link between faults committed by Mr. Salomon at that time and the injury (trial reasons, at paras. 304-5, 308 and 312-13). I will return to this finding in my discussion on causation.

[155] To sum up, I am of the opinion that the Court of Appeal did not identify a specific reviewable error in the trial judge's reasons in relation to Mr. Salomon's initial recommendation and later expressions of confidence. It follows that the Court of Appeal could not reassess the evidence as a whole on the basis of its preferred "global" view of the case (paras. 69-75).

(3) Mr. Salomon's Duty to Advise

[156] Again, the trial judge did not find that Mr. Salomon's conduct had been free of fault. She concluded that he had failed to act as a reasonably competent, prudent and diligent lawyer in recommending specific investment products (i.e., iVest and Manulife), especially in 2003 and 2004, and that in so doing, he had breached his duty to advise in three respects. First, he had failed to inform Ms. Matte-Thompson of the limits of his competence with respect to financial investments (trial reasons, at paras. 196-99). Second, he had recommended investment products without making any inquiries and without obtaining any information about their terms and conditions (trial reasons, at paras. 188-91). Third, he had recommended investing in an offshore hedge fund, iVest, which was inconsistent with his clients' primary goal

avec un risque aussi contrôlé », d'autant plus que les intimées avaient alors de la difficulté à retirer leurs fonds (motifs de la C.A., par. 133). Même en décembre 2007, alors que Trigobal était au bord de l'effondrement et que la fraude était sur le point d'être découverte, Me Salomon rassurait encore Mme Matte-Thompson au sujet des supposées tentatives de M. Papadopoulos de remédier à la situation (motifs de la C.A., par. 138).

[154] Toutefois, bien que de telles assurances puissent être qualifiées de fautives, la juge du procès n'a pas besoin de s'y attarder car elle conclut qu'en mai 2007, la perte avait probablement déjà eu lieu; il ne pouvait donc pas y avoir de lien de causalité entre les fautes commises à ce moment-là par Me Salomon et le préjudice (motifs de première instance, par. 304-305, 308 et 312-313). Je reviendrai à cette conclusion dans mon analyse du lien de causalité.

[155] En résumé, je suis d'avis que la Cour d'appel n'identifie pas d'erreur révisable précise dans les motifs de la juge du procès concernant la recommandation initiale de Me Salomon et ses témoignages subséquents de confiance. Il s'ensuit que la Cour d'appel ne peut pas réexaminer l'ensemble de la preuve sur le fondement de la vision « globale » de l'affaire qu'elle privilégie (par. 69-75).

(3) Le devoir de conseil de Me Salomon

[156] Encore une fois, la juge du procès ne conclut pas que la conduite de Me Salomon était irréprochable. Elle estime qu'il a omis d'agir comme l'aurait fait un avocat raisonnablement compétent, prudent et diligent lorsqu'il a recommandé des produits de placement précis (à savoir les fonds iVest et Manulife), notamment en 2003 et 2004, et que, en faisant cela, il a manqué à son devoir de conseil à trois égards. Premièrement, il a omis d'informer Mme Matte-Thompson des limites de sa compétence en matière de placements financiers (motifs de première instance, par. 196-199). Deuxièmement, il a recommandé des produits de placement sans faire de recherches et sans obtenir de renseignements sur les modalités de ces produits (motifs de première instance, par. 188-191). Troisièmement, il a recommandé un investissement dans un fonds

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of preserving capital (trial reasons, at paras. 193-94 and 198). These findings are not in dispute.

spéculatif à l'étranger, iVest, ce qui allait à l'encontre de l'objectif principal de préservation du capital de ses clientes (motifs de première instance, par. 193-194 et 198). Ces conclusions ne sont pas contestées.

[157] As my colleague explains, to the extent that a lawyer does provide advice, he must meet the standard of a reasonably competent, prudent and diligent lawyer in the same circumstances irrespective of the precise scope of his mandate (para. 54; see also C.A. reasons, at para. 44). In the case at bar, Mr. Salomon committed faults in volunteering investment advice even though such advice fell outside the limits of his mandates.

[157] Comme l'explique mon collègue, dans la mesure où un avocat donne des conseils, il doit respecter la norme à laquelle se conformerait un avocat raisonnablement compétent, prudent et diligent dans la même situation, quelle que soit l'étendue précise de son mandat (par. 54; voir aussi motifs de la C.A., par. 44). Dans l'affaire qui nous occupe, Me Salomon a commis des fautes en donnant de son propre chef des conseils en matière de placements même si de tels conseils ne faisaient pas partie de ses mandats.

[158] The Court of Appeal did not take issue with the trial judge's findings in this regard (see paras. 68-69). However, as I explained above, it concluded that the trial judge had played down the extent of Mr. Salomon's breaches of his duty to advise in finding (i) that he had provided wrongful investment advice to Ms. Matte-Thompson only (paras. 61, 65, 69 and 89); and (ii) that the faults had concerned only certain specific investment products and had occurred within a limited time frame rather than continuing until the end of 2007 (paras. 70-75 and 89). In the Court of Appeal's opinion, these two reviewable errors stemmed from the trial judge's distorting lens, that is, her failure to consider the case from a "global" perspective (paras. 50, 66 and 120).

[158] La Cour d'appel ne s'est pas dite en désaccord avec les conclusions de la juge du procès à cet égard (voir par. 68-69). Toutefois, comme je l'ai expliqué précédemment, elle conclut que la juge du procès minimise la portée des manquements de Me Salomon à son devoir de conseil en concluant que (i) Me Salomon a donné des conseils erronés en matière de placements à Mme Matte-Thompson seulement (par. 61, 65, 69 et 89); et que (ii) les fautes visaient seulement certains produits de placement précis et ont été commises pendant une période de temps limitée et non jusqu'à la fin de 2007 (par. 70-75 et 89). De l'avis de la Cour d'appel, ces deux erreurs révisables découlent du prisme déformant auquel a eu recours la juge du procès, à savoir son omission d'adopter une vision « globale » de l'affaire (par. 50, 66 et 120).

[159] I agree with my colleague that the Court of Appeal had some basis for concluding that Mr. Salomon had committed the same faults in respect of both respondents (paras. 56-57 and 62). The trial judge's assertion that "[Mr.] Salomon never acted as a professional providing financial advice to 166376" (para. 283) appears to be contradicted by her own factual findings to the effect that Ms. Matte-Thompson had consulted him both as an executor and a beneficiary of the trusts and as a director of 166 (para. 44). Indeed, Mr. Salomon's memorandum of September 13, 2003 recommending an investment in iVest was addressed directly to 166 (C.A. reasons, at paras. 49 and 59). And when the sale of 166's

[159] Je suis d'accord avec mon collègue pour dire que la Cour d'appel disposait de certains éléments sur lesquels se fonder pour conclure que Me Salomon a commis les mêmes fautes à l'égard des deux intimées (par. 56-57 et 62). L'affirmation de la juge du procès selon laquelle [TRADUCTION] « [Me] Salomon n'a jamais agi à titre de professionnel donnant des conseils financiers à 166376 » (par. 283) semble être contredite par ses propres conclusions de fait selon lesquelles Mme Matte-Thompson l'a consulté à la fois en qualité de liquidatrice de la succession et bénéficiaire des fiducies et d'administratrice de 166 (par. 44). De fait, le mémorandum daté du 13 septembre 2003 dans lequel Me Salomon recommandait

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properties was being contemplated in June 2005, Mr. Salomon reiterated his recommendation to invest the proceeds in Manulife or iVest. It therefore seems to me that, contrary to the trial judge's finding, Mr. Salomon gave the same wrongful investment advice to both respondents.

un investissement dans le fonds iVest était directement adressé à 166 (motifs de la C.A., par. 49 et 59). De plus, lorsque la vente des biens de 166 a été envisagée en juin 2005, Me Salomon a réitéré sa recommandation d'investir dans les fonds Manulife ou iVest. Par conséquent, il me semble que, contrairement à la conclusion de la juge du procès, Me Salomon ait donné le même conseil erroné en matière de placements aux deux intimées.

[160] But even if this error is assumed to be palpable, I fail to see how it affected the outcome of the case. As I will explain below in my analysis on causation, 166 did not rely at all on Mr. Salomon's investment advice after selling its assets in early 2006 (trial reasons, at paras. 288). Ms. Matte-Thompson decided on her own to invest the proceeds of the sale of 166's assets in Focus rather than in the products Mr. Salomon had initially recommended (i.e., Manulife and iVest). In this context, the trial judge's error cannot be said to have been "overriding" and, therefore, to have justified appellate intervention. Neither did it justify the Court of Appeal's conducting a broad reassessment of the evidence for the purpose of finding *other* potential errors.

[160] Cependant, même si cette erreur est tenue pour manifeste, je ne vois pas quelle incidence elle a eue sur l'issue de l'affaire. Comme je l'expliquerai plus loin dans mon analyse du lien de causalité, 166 ne s'est aucunement fiée aux conseils de Me Salomon en matière de placements après avoir vendu ses actifs au début de 2006 (motifs de première instance, par. 288). Madame Matte-Thompson a décidé de son propre chef d'investir le produit de la vente des actifs de 166 dans le fonds Focus, plutôt que dans les produits que Me Salomon lui avait initialement recommandés (c.-à-d. les fonds Manulife et iVest). Dans ce contexte, on ne peut affirmer que l'erreur de la juge du procès est « déterminante », et donc qu'elle justifie une intervention en appel. Elle ne permet pas non plus à la Cour d'appel de procéder à un réexamen général de la preuve afin de déceler d'*autres* erreurs potentielles.

[161] I also part ways with my colleague on the second purportedly reviewable error the Court of Appeal identified *after* delving into the record. I am satisfied that there was no basis for overturning the trial judge's finding that Mr. Salomon had committed faults only in recommending Manulife and iVest products, mostly in 2003 and 2004 (paras. 196-97), and that he was not at fault for the later investments in Focus. After all, he was not involved in the respondents' fateful decisions to invest in that particular product in 2006 (trial reasons, at paras. 210-15, 285-88 and 290-94).

[161] Je ne peux non plus me rallier à l'opinion de mon collègue concernant la deuxième erreur révisable que la Cour d'appel aurait relevée *après* avoir réexaminé le dossier. Je suis convaincue que rien ne justifiait d'infirmer la conclusion de la juge du procès selon laquelle Me Salomon a commis des fautes uniquement en recommandant des produits Manulife et iVest, en 2003 et 2004 principalement (par. 196-197), et qu'il n'a commis aucune faute en ce qui a trait aux placements ultérieurs dans le fonds Focus. Après tout, il n'a pas pris part aux décisions fatidiques des intimées d'investir dans ce produit en particulier en 2006 (motifs de première instance, par. 210-215, 285-288 et 290-294).

[162] In purporting to identify a palpable and overriding error, the Court of Appeal relied on its view that Mr. Salomon had committed continuous faults of omission in failing, from 2003 to 2007, to make

[162] Pour conclure à l'existence d'une soi-disant erreur manifeste et déterminante, la Cour d'appel se fonde sur le point de vue selon lequel Me Salomon a commis, de 2003 à 2007, des fautes d'omission continues en ne

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inquiries regarding Triglobal and Mr. Papadopoulos and to verify their investment products (paras. 70-72). This begs the question whether Mr. Salomon had an obligation to take such steps in regard to the later investments in Focus. As I mentioned above, the trial judge found that he had had no specific mandate to recommend or review investment products (para. 130), and this finding has not been challenged. Further, it was open to the trial judge to find that, on the facts of the case, Mr. Salomon had had no obligation to make inquiries of regulatory bodies before recommending Triglobal and Mr. Papadopoulos. It is thus unclear to me what obligations Mr. Salomon might have failed to fulfill.

[163] What, then, might underlie the view that Mr. Salomon had committed continuous faults of omission? The Court of Appeal seems to have considered that Mr. Salomon's [TRANSLATION] "interventions" with respect to the respondents' investments in Focus up until the end of 2007 also triggered a duty to advise and thus to make inquiries and conduct verifications (paras. 71 and 75). I agree that a lawyer's duty to advise generally includes obligations to inform the client of relevant facts, to explain available options and their implications, and to recommend a course of action (Gascon J.'s reasons, at para. 52). Yet the precise content of that duty is highly dependent on the circumstances, including the scope of the mandate, the obligations assumed by the lawyer and his or her areas of expertise (see *Côté*, at para. 6).

[164] In the case at bar, the trial judge thoroughly and carefully examined the role played by Mr. Salomon in 2006 and 2007 and, based on her assessment of the evidence, she drew the reasonable inference that Mr. Salomon had had no duty to advise his clients regarding their investments in Focus, and had certainly had no duty to double-check the respondents' investment decisions (paras. 213-14 and 285-88). Here again, the Court of Appeal did not pinpoint a specific "crucial" flaw in the trial judge's findings, but instead intervened on the basis of a mere difference of opinion.

faisant pas de recherches au sujet de Triglobal et de M. Papadopoulos et en ne vérifiant pas leurs produits de placement (par. 70-72). Cela soulève la question de savoir si Me Salomon avait l'obligation de prendre de telles mesures à l'égard des investissements ultérieurs dans le fonds Focus. Comme je l'ai déjà mentionné, la juge du procès conclut qu'il n'avait pas de mandat particulier pour recommander des produits de placement ou effectuer des vérifications à ce sujet (par. 130), conclusion qui n'est pas contestée. De plus, la juge du procès pouvait conclure, au vu des faits de l'affaire, que Me Salomon n'avait aucune obligation de faire des recherches auprès des organismes de réglementation avant de recommander Triglobal et M. Papadopoulos. Je ne vois donc pas très bien de quelles obligations Me Salomon ne se serait pas acquitté.

[163] Sur quel fondement pourrait donc reposer le point de vue selon lequel Me Salomon a commis des fautes d'omission continues? La Cour d'appel semble estimer que, jusqu'à la fin de 2007, les « interventions » de Me Salomon à l'égard des investissements des intimées dans le fonds Focus ont aussi déclenché un devoir de conseil et donc une obligation de faire des recherches et des vérifications (par. 71 et 75). Je conviens que le devoir de conseil de l'avocat inclut généralement l'obligation d'informer ses clients des faits pertinents, celle d'expliquer les options possibles et leurs conséquences et celle de recommander une ligne de conduite (motifs du juge Gascon, par. 52). Le contenu précis de ce devoir est toutefois hautement tributaire des circonstances, à savoir l'étendue du mandat, les obligations qu'assume l'avocat et ses domaines d'expertise (voir *Côté*, par. 6).

[164] Dans l'affaire qui nous occupe, la juge du procès examine attentivement et en détail le rôle joué par Me Salomon en 2006 et 2007 et, se fondant sur son appréciation de la preuve, tire l'inférence raisonnable que Me Salomon n'avait aucun devoir de conseil envers ses clientes en ce qui concerne leurs investissements dans le fonds Focus, et certainement aucune obligation de vérifier les décisions des intimées en matière de placements (par. 213-214 et 285-288). Là encore, la Cour d'appel ne relève pas de lacune « cruciale » précise dans les conclusions de la juge du procès, mais intervient plutôt en raison d'une simple différence d'opinions.

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[165] First, it is worth recalling the trial judge's uncontested factual finding that Mr. Salomon has not been consulted about the respondents' decisions to invest in Focus in 2006 and had not been involved in those decisions (see paras. 204-5, 210, 219-22 and 290-93).[3] He was not informed of them until after the fact. Although he did participate in meetings regarding the upcoming sale of 166's assets, there is no evidence that potential investments in Focus were discussed on those occasions. Further, he did not attend a key December 2005 meeting that dealt specifically with 166's investment strategy. In any event, an investment in Focus was not yet being contemplated at that time. At 166's request, Mr. Salomon drafted resolutions that authorized the opening of investment accounts for the sale proceeds, but those resolutions referred to Manulife and iVest, not to Focus (C.A. reasons, at para. 79).

[166] I believe it will be helpful to quote several paragraphs from the trial judge's reasons on the subject of 166's investments in Focus. These paragraphs clearly underline how limited Mr. Salomon's involvement and knowledge were:

> At the end of 2005 and the beginning of 2006, [Mr.] Salomon still had a lawyer-client relationship with Ms. Thompson. He was handling numerous matters that related to the wills and trusts and family businesses. He knew that the proceeds of the sale needed to be invested and was aware [Mr.] Papadopoulos was providing investment proposals to Ms. Thompson and her Ontario lawyers. However, [Mr.] Salomon did not participate in this investments strategy meeting. Although he received a copy of the proposal provided by [Mr.] Papadopoulos to Ms. Thompson, he was not part of the recommendations nor the discussions that related to the investment.
>
> [Mr.] Salomon argues that he had absolutely no involvement in 166376's decision to invest and that he knew nothing about it. The evidence establishes the contrary.

[3] My colleague overstates Mr. Salomon's role in the sale of 166's assets, at para. 13 of his reasons. In light of Ms. Matte-Thompson's own testimony, Mr. Salomon cannot be said to have "arranged" the sale (A.R., vol. 7, at pp. 2220-21).

[165] Premièrement, il convient de rappeler les conclusions de fait non contestées de la juge du procès selon lesquelles Me Salomon n'a pas été consulté au sujet des décisions des intimées d'investir dans le fonds Focus en 2006 et n'a pas pris part à ces décisions (voir les par. 204-205, 210, 219-222 et 290-293)[3]. Il n'a été informé de la décision qu'après coup. Bien que Me Salomon ait participé à des réunions sur la vente prochaine des actifs de 166, rien n'indique que de possibles investissements dans le fonds Focus aient alors fait l'objet de discussions. De plus, il n'a pas participé à la réunion clé en décembre 2005 qui portait expressément sur la stratégie de placement de 166. Quoi qu'il en soit, un investissement dans Focus n'était pas encore envisagé à ce moment-là. À la demande de 166, Me Salomon a rédigé des résolutions autorisant l'ouverture de comptes de placement pour le produit de la vente, mais celles-ci se rapportaient aux fonds Manulife et iVest, et non au fonds Focus (motifs de la C.A., par. 79).

[166] Je crois qu'il est utile de citer plusieurs paragraphes des motifs de la juge du procès portant sur les investissements de 166 dans le fonds Focus. Ces paragraphes démontrent clairement à quel point la participation et la connaissance de Me Salomon étaient limitées à cet égard :

> [TRADUCTION] À la fin de 2005 et au début de 2006, [Me] Salomon avait encore une relation d'avocat-client avec Mme Thompson. Il s'occupait de nombreuses affaires ayant trait aux testaments, fiducies et entreprises de la famille. Il savait que le produit de la vente devait être placé et que M. Papadopoulos faisait des propositions d'investissement à Mme Thompson et à ses avocats ontariens. Toutefois, [Me] Salomon n'a pas participé à cette rencontre sur la stratégie d'investissement. Même s'il a reçu une copie de la proposition que M. Papadopoulos a faite à Mme Thompson, il n'a pas pris part aux recommandations ni aux discussions au sujet du placement.
>
> [Me] Salomon fait valoir qu'il n'a aucunement participé à la décision de 166376 concernant l'investissement et qu'il ne savait rien à ce sujet. La preuve démontre le contraire.

[3] Mon collègue exagère le rôle de Me Salomon dans la vente des actifs de 166, au par. 13 de ses motifs. À la lumière du témoignage de Mme Matte-Thompson, on ne peut dire que Me Salomon a « organis[é] » la vente (d.a., vol. 7, p. 2220-2221).

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[Mr.] Salomon prepared the resolutions for the opening of the investment account for the executors and trustees. Prior to the investment, he was involved in the investment discussions related to the sale proceeds and the expected return required to meet Ms. Thompson's needs. He knew that 166376 was contemplating to invest a significant portion of the sale proceeds through Triglobal.

However 166376, through Ms. Thompson, intended to invest with Triglobal in Manulife and iVest, the same investment vehicle that had been previously recommended to Ms. Thompson in her personal capacity.

. . .

The exhibits filed and the evidence show that in the winter of 2006, [Mr.] Salomon was not aware of the exact amount invested by 166376 or in which vehicles it had been invested. Contrary to the first investment made personally by Ms. Thompson back in 2003, he was not consulted with respect to the investments contemplated by 166376 in Focus.

How could [Mr.] Salomon stop 166376 from entering into such a transaction when he was not even aware that such investment was being made?

The Court cannot conclude that [Mr.] Salomon failed to advise 166376 of the limit of his ability at the time 166376 made the investment because he never recommended the investment made in Focus. He only learned about it after the fact.

Although [Mr.] Salomon encouraged that the investment be made through Triglobal, he did not encourage 166376 to purchase the Focus fund in February 2006. The proposition and recommendations with respect to the investment were discussed in a strategy meeting with [Mr.] Papadopoulos, which [Mr.] Salomon did not attend. [Emphasis added; footnotes omitted; paras. 219-22 and 290-93.]

[167] Second, even when Mr. Salomon was finally made aware of the respondents' investments in Focus (in April 2006 in the case of 166, and in October 2006 in the case of Ms. Matte-Thompson), he did not provide any wrongful legal advice, recommendation or reassurance regarding that specific fund (trial reasons, at paras. 227-28, 236-37, 294 and 301), at

[Me] Salomon a préparé les résolutions pour l'ouverture du compte d'investissement pour les liquidateurs de la succession et les fiduciaires. Avant le placement, il a participé aux discussions concernant le placement du produit de la vente et le rendement attendu requis pour répondre aux besoins de Mme Thompson. Il savait que 166376 envisageait d'investir une grande partie du produit de la vente en recourant aux services de Triglobal.

Toutefois, 166376, par l'entremise de Mme Thompson, voulait investir auprès de Triglobal dans les fonds Manulife et iVest, le même véhicule d'investissement qui avait été recommandé antérieurement à Mme Thompson à titre personnel.

. . .

Les pièces produites et la preuve démontrent qu'à l'hiver 2006, [Me] Salomon n'était pas au courant du montant exact investi par 166376 ni des véhicules dans lesquels cette société avait investi. Contrairement au cas du premier placement fait personnellement par Mme Thompson en 2003, [Me] Salomon n'a jamais été consulté au sujet des investissements dans le fonds Focus envisagés par 166376.

Comment [Me] Salomon pouvait-il empêcher 166376 de faire une telle opération alors qu'il ne savait même pas qu'un tel investissement était en train d'être fait?

La Cour ne peut conclure que [Me] Salomon a omis d'informer 166376 de la limite de ses compétences au moment où 166376 a fait l'investissement parce qu'il n'a jamais recommandé l'investissement dans le fonds Focus. Il en a eu connaissance seulement après coup.

Bien que [Me] Salomon ait encouragé ses clientes à investir par l'entremise de Triglobal, il n'a pas encouragé 166376 à acheter le fonds Focus en février 2006. La proposition et les recommandations concernant le placement ont fait l'objet de discussions lors de la réunion sur la stratégie à laquelle a participé [M.] Papadopoulos, mais pas [Me] Salomon. [Je souligne; notes en bas de page omises; par. 219-222 et 290-293.]

[167] Deuxièmement, même lorsque Me Salomon a finalement été mis au courant des investissements des intimées dans Focus (en avril 2006 dans le cas de 166, et en octobre 2006 dans le cas de Mme Matte-Thompson), il n'a pas donné de conseil juridique erroné, il n'a pas fait de recommandation à celles-ci et ne les a pas rassurées au sujet de ce fond en

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least not until May 2007. In fact, the Court of Appeal did not point to any instance where Mr. Salomon had clearly recommended or endorsed Focus. The only example it gave was an email Mr. Salomon had received from Ms. Matte-Thompson on April 29, 2006, from which he had learned for the first time that 166 had invested in Focus:

Ken

I do need to talk to you as a friend…I am a bit nervous about my investment from the sale. I have had a difficult time getting info and only have received a note from Austin Harris at Focus ststing [*sic*] amt of funds invested and interest to date. I have no contract to know about details…looks like a loan but I was told it is not …where are funds invested? The letter states there are conditions re early repayment and trequest [*sic*] for early repayment… I have not been informed of any of this. I think it all happened too fast and maybe I was too trusting.... I think of bernie R and then the LaCroix scandal…I cannot afford to be caught in something that has not been fully explained. Perhaps I need to reconsider having all of my eggs in one basket. As a friend and confident [*sic*] I would like to talk to you…outside of business… [Emphasis added.]

(Quoted in C.A. reasons, at paras. 77-78, and in trial reasons, at paras. 227-28.)

[168] In response to Ms. Matte-Thompson's concerns about the "difficult time" she was having getting information about the fund, Mr. Salomon responded — without making any inquiries — that he was "certain that everything is ok". He also offered to discuss the matter further and then asked Mr. Papadopoulos to answer her questions (trial reasons, at para. 228).

[169] In my view, the Court of Appeal had no basis for overturning the trial judge's finding that Mr. Salomon's response did not constitute a fault

particulier (motifs de première instance, par. 227-228, 236-237, 294 et 301), du moins jusqu'en mai 2007. D'ailleurs, la Cour d'appel ne relève aucune occasion où Me Salomon aurait clairement recommandé ou cautionné le fonds Focus. Le seul exemple offert est le courriel que Me Salomon a reçu de Mme Matte-Thompson le 29 avril 2006, par lequel il a appris l'investissement de 166 dans le fonds Focus :

[TRADUCTION]

Ken

J'ai besoin de te parler en tant qu'ami…Je m'inquiète un peu de l'investissement que j'ai fait avec [le produit de] la vente. J'ai de la difficulté à obtenir de l'information et je n'ai reçu qu'une note d'Austin Harris de chez Focus indiquant le montant des fonds investis et les intérêts courus jusqu'à maintenant. Je n'ai aucun contrat qui me donnerait des détails…ça ressemble à un prêt, mais on m'a dit que ce n'en est pas un ...où sont investis les fonds? La lettre indique qu'il y a des conditions concernant le remboursement anticipé et la demande de remboursement anticipé... On ne m'a pas informée de cela. Je pense que tout est arrivé trop vite et que j'étais peut-être trop confiante... Je pense à bernie R et puis au scandale LaCroix... Je ne peux pas me permettre d'être prise dans quelque chose qui ne m'a pas été complètement expliqué. J'ai peut-être besoin de réfléchir à ma décision de mettre tous mes œufs dans le même panier. J'aimerais te parler en tant qu'ami et confident...à titre personnel... [Je souligne.]

(Cité dans les motifs de la C.A., par. 77-78, et dans les motifs de première instance, par. 227-228.)

[168] En réponse aux préoccupations de Mme Matte-Thompson concernant les « difficultés » qu'elle avait à obtenir des renseignements sur le fonds, Me Salomon a répondu — sans faire de recherches — qu'il était [TRADUCTION] « certain que tout [allait] bien ». Il a aussi offert d'en parler plus longuement et a ensuite demandé à M. Papadopoulos de répondre aux questions de Mme Matte-Thompson (motifs de première instance, par. 228).

[169] À mon avis, la Cour d'appel n'a aucune raison d'écarter la conclusion de la juge du procès selon laquelle la réponse de Me Salomon ne constitue pas

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(trial reasons, at paras. 296-300).[4] At the time, Ms. Matte-Thompson's main concern was about the difficulty she was having in obtaining information about 166's investments. In this regard, Mr. Salomon "did his best to get [Mr.] Papadopoulos to answer his clients" (see trial reasons, at paras. 228 and 299). As the trial judge pointed out, it might have been preferable for him to recommend that the respondents consult another professional to obtain a second opinion, but this does not mean that his conduct amounted to a fault (paras. 299-301). This finding of mixed law and fact is based on the trial judge's assessment of the evidence and is entitled to deference.

[170] Moreover, Ms. Matte-Thompson's email did not constitute a mandate to verify the propriety of 166's investments. She made clear that she was only asking for Mr. Salomon's opinion "outside of business", as a "friend" — words which are not included in the Court of Appeal's quotation of the email (para. 77). I wonder on what basis Mr. Salomon should have gotten involved, on his own initiative, in a review of the investment decisions the respondents had made with their financial advisors (see, e.g., *Sylvestre*, at paras. 16-19). As well, Mr. Salomon did say that he would be "happy to discuss [the matter] at any time", but it seems that Ms. Matte-Thompson preferred not to involve him further (trial reasons, at para. 230).

[171] It is also worth noting that Mr. Salomon knew he was not the only lawyer involved in the sale of 166's assets (trial reasons, at paras. 217-19). At the time, lawyers David Gemmill and Rod Farn were handling the Ontario legal aspects of the transaction. One of them, Mr. Gemmill, was also an executor of Mr. Thompson's estate (and Ms. Matte-Thompson's neighbour). Contrary to Mr. Salomon, Mr. Gemmill and Mr. Farn had had Triglobal's

[4] I note that the Court of Appeal erroneously found that Mr. Salomon knew, when he received the email, that 166 had invested *all* of the sale proceeds in Focus (para. 79). This is not what the email says, and there is no other evidence to that effect.

une faute (motifs de première instance, par. 296-300)[4]. À l'époque, la principale préoccupation de Mme Matte-Thompson concernait la difficulté qu'elle avait à obtenir des renseignements sur les placements de 166. À cet égard, Me Salomon a [TRADUCTION] « fait de son mieux pour que M. Papadopoulos réponde à ses clientes » (voir les motifs de première instance, par. 228 et 299). Comme le souligne la juge du procès, il aurait peut-être été préférable que Me Salomon recommande aux intimées de consulter un autre professionnel pour obtenir un deuxième avis, mais cela ne signifie pas que sa conduite constituait une faute (par. 299-301). Cette conclusion mixte de fait et de droit repose sur l'appréciation de la preuve par la juge du procès et commande la déférence.

[170] De plus, le courriel de Mme Matte-Thompson ne constituait pas un mandat de vérifier la régularité des investissements de 166. Celle-ci a précisé dans son courriel qu'elle demandait à Me Salomon son avis [TRADUCTION] « à titre personnel » en tant qu'« ami » — mots qui n'apparaissent pas dans l'extrait du courriel cité par la Cour d'appel (par. 77). Je me demande sur quel fondement Me Salomon aurait pu, de sa propre initiative, procéder à l'examen des décisions en matière de placements que les intimées avaient prises avec leurs conseillers financiers (voir, p. ex., *Sylvestre*, par. 16-19). De plus, Me Salomon a affirmé qu'il serait [TRADUCTION] « heureux de discuter [de l'affaire] à n'importe quel moment », mais il semble que Mme Matte-Thompson a préféré ne plus le solliciter pour ces questions (motifs de première instance, par. 230).

[171] Il est aussi utile de préciser que Me Salomon savait qu'il n'était pas le seul avocat ayant pris part à la vente des actifs de 166 (motifs de première instance, par. 217-219). À l'époque, les avocats David Gemmil et Rod Farn s'occupaient des aspects juridiques de l'opération en Ontario. L'un d'eux, Me Gemmill, était liquidateur de la succession de M. Thompson (et voisin de Mme Matte-Thompson). Mes Gemmill et Farn, contrairement à Me Salomon,

[4] Je remarque que la Cour d'appel conclut à tort que Me Salomon savait, lorsqu'il a reçu le courriel, que 166 avait investi *tout* le produit de la vente dans le fonds Focus (par. 79). Or, ce n'est pas ce qu'indique le courriel, et il n'y a aucune autre preuve en ce sens.

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investment proposals presented to them (trial reasons, at para. 219). I am not suggesting that they are to blame, but this might also help explain why, under the circumstances, Mr. Salomon did not consider that he had received a new legal mandate, especially given that he was being asked for his personal opinion as a "friend". He knew that lawyers were already involved in the investment strategy. This is an example of the Court of Appeal losing sight of relevant circumstances and placing undue emphasis on Mr. Salomon's behaviour.

[172] Overall, I see no reason to believe that the trial judge misapprehended the email's content and Mr. Salomon's response to it. I wish to be clear that a lawyer's "friendship" with a client does not give rise to any form of immunity. However, given the absence of a specific mandate, it was reasonable under the circumstances to find that Mr. Salomon's duties had not required him to verify 166's investments. Accordingly, the fact that Mr. Salomon conducted no inquiries or verifications cannot in itself justify the Court of Appeal's intervention.

[173] The Court of Appeal also criticized Mr. Salomon for certain [TRANSLATION] "communications that were seemingly more trivial" (para. 130). For instance, in the fall of 2006, at a time when Mr. Salomon knew that the respondents were still having difficulty obtaining information from Triglobal (trial reasons, at para. 248), he visited Mr. Bright in the Bahamas. He informed Ms. Matte-Thompson of his visit, which he had made while on vacation, and stated that Mr. Bright had become a resident there "in order to manage the Focus, Ivest and structured products funds", adding that "[a]ll is well". In retrospect, such an expression of confidence may appear misguided. However, the trial judge was entitled to find that, all things considered, those reassurances did not amount to a fault.

[174] At the time, Mr. Salomon was well aware of the communication problems between his clients and Triglobal (trial reasons, at para. 248). In fact, from April 2006 to the end of 2006, he tried

s'étaient vu présenter les propositions de placement de Triglobal (motifs de première instance, par. 219). Je ne suggère pas qu'on doive les blâmer, mais cette situation aide aussi à expliquer pourquoi, dans les circonstances, Me Salomon n'a pas jugé qu'il avait reçu un nouveau mandat juridique, d'autant plus qu'il se faisait demander son opinion personnelle en tant qu'« ami ». Il savait que des avocats participaient déjà à la stratégie de placement. Cet exemple illustre comment la Cour d'appel perd de vue les circonstances pertinentes et insiste indûment sur le comportement de Me Salomon.

[172] Somme toute, je ne vois aucune raison de penser que la juge du procès interprète mal le contenu du courriel et la réponse de Me Salomon. Je tiens à préciser que l'« amitié » entre un avocat et son client ne confère aucune forme d'immunité. Toutefois, étant donné l'absence de mandat précis, il était raisonnable dans les circonstances de conclure que Me Salomon n'était pas tenu, de par ses fonctions, de vérifier les placements de 166. Par conséquent, le fait que Me Salomon n'a fait aucune recherche ou vérification ne peut justifier à lui seul l'intervention de la Cour d'appel.

[173] La Cour d'appel critique aussi Me Salomon pour certaines « communications, d'apparence plus banale » (par. 130). Par exemple, à l'automne 2006, alors qu'il était au courant des difficultés qu'éprouvaient toujours les intimées à obtenir des renseignements de Triglobal (motifs de première instance, par. 248), Me Salomon a rendu visite à M. Bright aux Bahamas. Il a informé Mme Matte-Thompson de sa visite, qui a eu lieu pendant ses vacances, et a déclaré que M. Bright était devenu un résident des Bahamas [TRADUCTION] « afin de gérer les fonds Focus et Ivest et des fonds de produits structurés », ajoutant que « [t]out va bien ». En rétrospective, un tel témoignage de confiance peut paraître peu judicieux. Toutefois, la juge du procès était en droit de conclure que, tout bien considéré, de telles assurances ne constituent pas une faute.

[174] À l'époque, Me Salomon était bien au courant des problèmes de communication entre ses clients et Triglobal (motifs de première instance, par. 248). À vrai dire, d'avril 2006 à la fin de 2006, il essayait de

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to solve them by serving as a "conduit" in order to obtain more information about the nature and the status of 166's investments in Focus (trial reasons, at para. 249), especially for the purpose of helping the corporation's accountant complete the year-end financial statement (trial reasons, at paras. 240-44). Put another way, Mr. Salomon was cooperating with his clients' other advisors, which was arguably his professional obligation in such circumstances (see, e.g., s. 25 of the *Code of Professional Conduct of Lawyers*, CQLR, c. B-1, r. 3.1). As the trial judge explained, it might have been advisable to go further and recommend that the respondents consult another financial advisor. However, this omission does not necessarily amount to a fault, given that Mr. Salomon had not been confronted with any indicia of wrongdoing related to the respondents' investments other than communication issues (trial reasons, at paras. 299-302).

[175] The Court of Appeal's finding that Mr. Salomon should have taken it upon himself to advise the respondents against investing in Focus — given that his personal [TRANSLATION] "investment philosophy" favoured diversification — is surprising, to say the least (para. 84). First, the respondents did not view Mr. Salomon as their financial advisor (trial reasons, at paras. 283-84) and did not expect him to provide advice as to 166's investment strategy (trial reasons, at para. 288). Second, and more importantly, Mr. Salomon was not a qualified financial advisor, which means that it might have amounted to a *fault* for him to give investment advice about Focus, just as he committed faults by recommending iVest and Manulife. In this context, it was reasonable for the trial judge to find that Mr. Salomon had taken an acceptable — though admittedly not ideal — approach, that is, to help his clients obtain more information from their actual financial advisors.

les régler en agissant comme [TRADUCTION] « intermédiaire » pour obtenir plus d'information sur la nature des placements et sur la situation concernant les investissements de 166 dans Focus (motifs de première instance, par. 249), notamment pour aider le comptable de la société à préparer les états financiers de fin d'année (motifs de première instance, par. 240-244). Autrement dit, Me Salomon coopérait avec les autres conseillers de ses clientes, ce qui correspondait vraisemblablement à son obligation professionnelle dans de telles circonstances (voir, p. ex., l'art. 25 du *Code de déontologie des avocats*, RLRQ, c. B-1, r. 3.1). Comme l'explique la juge du procès, il aurait peut-être été souhaitable qu'il aille plus loin et qu'il recommande aux intimées de consulter un autre conseiller financier. Cependant, cette omission ne constitue pas nécessairement une faute étant donné que Me Salomon n'a eu vent d'aucun signe de conduite répréhensible en ce qui a trait aux placements des intimées, outre les problèmes de communication (motifs de première instance, par. 299-302).

[175] La conclusion de la Cour d'appel selon laquelle Me Salomon aurait dû se charger d'aviser lui-même les intimées qu'elles faisaient erreur en investissant dans le fonds Focus — vu que sa « philosophie de placement » personnelle préconisait la diversification — est pour le moins surprenante (par. 84). En premier lieu, les intimées ne tenaient pas Me Salomon pour leur conseiller financer (motifs de première instance, par. 283-284) et elles ne s'attendaient pas à ce qu'il fournisse un avis au sujet de la stratégie de placement de 166 (motifs de première instance, par. 288). En deuxième lieu, et surtout, Me Salomon n'était pas un conseiller financier qualifié, ce qui veut dire que le fait qu'il fournisse des conseils en matière de placements au sujet du fonds Focus aurait pu constituer une *faute* de sa part, tout comme il a commis des fautes en recommandant les fonds iVest et Manulife. Dans ce contexte, il est raisonnable de la part de la juge du procès de conclure que Me Salomon a adopté une approche acceptable — bien qu'elle n'était certes pas idéale — en cherchant à aider ses clientes à obtenir plus de renseignements auprès de leurs véritables conseillers financiers.

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[176] As I explained above, it is certainly arguable that from the time of the publication of the May 2007 *La Presse Affaires* article, Mr. Salomon's reassurances became negligent and that from then on he had an obligation to recommend that the respondents consult other financial advisors. However, even if it is assumed that Mr. Salomon committed a fault at that time, the trial judge found that it would have had no impact on the respondents' losses. Hence, if the trial judge made a palpable error by failing to properly consider Mr. Salomon's conduct after he had become aware of the *La Presse Affaires* article, that error would have no bearing on the outcome of the case.

[176] Comme je l'ai déjà expliqué, on peut certainement soutenir qu'à partir de la parution de l'article de *La Presse Affaires* en mai 2007, les assurances que Me Salomon a données à ses clientes constituent de la négligence, et qu'à partir de ce moment, il avait l'obligation de recommander aux intimées de consulter d'autres conseillers financiers. Toutefois, même si on suppose que Me Salomon a commis une faute à ce moment, la juge du procès conclut que celle-ci n'aurait eu aucune incidence sur les pertes des intimées. Par conséquent, si la juge du procès commet une erreur manifeste en omettant de tenir dûment compte de la conduite de Me Salomon après que ce dernier a pris connaissance de l'article de *La Presse Affaires*, cette erreur n'aurait aucune incidence sur l'issue de l'affaire.

[177] In sum, I am satisfied that there is in fact no palpable and overriding error in the trial judge's finding that Mr. Salomon's only fault relating to his duty to advise was to recommend *specific* investment products, i.e., iVest and Manulife, mostly in 2003 and 2004. Having carefully assessed the evidence, the trial judge was entitled to decide that failing to raise concerns about the respondents' investments in Focus while occasionally serving as a "conduit" between his clients and their financial advisors did not amount to a fault.

[177] En résumé, je suis convaincue que la juge du procès ne commet aucune erreur manifeste et déterminante en concluant que la seule faute de Me Salomon quant à son devoir de conseil a été de recommander des produits de placement *précis*, à savoir les fonds iVest et Manulife, principalement en 2003 et 2004. Ayant évalué attentivement la preuve, la juge du procès pouvait décider que l'omission de Me Salomon de soulever des préoccupations au sujet des investissements des intimées dans le fonds Focus, alors qu'il agissait à l'occasion comme « intermédiaire » entre ses clientes et leurs conseillers financiers, ne pouvait être qualifiée de faute.

(4) Mr. Salomon's Duty of Loyalty

(4) Le devoir de loyauté de Me Salomon

[178] I am also satisfied that the Court of Appeal erred in interfering with the trial judge's finding that Mr. Salomon had not breached his duty of loyalty to the respondents. Although Mr. Salomon was certainly a client and a friend of Mr. Papadopoulos, and did receive significant sums from him, support could be found in the record for the view that he was not in a conflict of interest. This finding is based on a careful weighing of the evidence, including oral evidence, and should not be disturbed absent a reviewable error. Here again, I come to the conclusion that the Court of Appeal failed to identify such an error and that it impermissibly reassessed the evidence as a whole.

[178] Je suis aussi convaincue que la Cour d'appel commet une erreur en infirmant la conclusion de la juge du procès selon laquelle Me Salomon n'a pas manqué à son devoir de loyauté envers les intimées. Certes, Me Salomon était un client et un ami de M. Papadopoulos et il a reçu d'importantes sommes d'argent de sa part, mais le dossier permettait de conclure qu'il n'était pas en conflit d'intérêts aux moments pertinents. Cette conclusion repose sur une appréciation minutieuse de la preuve, y compris la preuve testimoniale, et ne devrait pas être modifiée en l'absence d'erreur révisable. Encore une fois, j'arrive à la conclusion que la Cour d'appel ne relève pas la présence d'une telle erreur et qu'elle procède de façon inacceptable à un réexamen de l'ensemble de la preuve.

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[179] It is striking that the Court of Appeal did not point to *any* reviewable error but merely criticized the trial judge's supposedly restrictive approach to the principles of conflict of interest (para. 97; Gascon J.'s reasons, at para. 69). On that basis, the Court of Appeal proceeded to revisit the issue by applying the standard of correctness, as if a question of law had been identified. With respect, this shows a blatant disregard for the principle of appellate non-intervention.

[180] It is trite law that the analysis of an alleged fault, including one related to the duty of loyalty, involves a question of mixed fact and law. Where such a question arises, the appropriate standard is that of a "palpable and overriding error" unless a pure question of law can be readily extricated from it (*Housen*, at paras. 29-33). An extricable question of law generally concerns a mischaracterization of the applicable legal test or a failure to consider a *required element* of that test (*Housen*, at para. 36).

[181] Yet, in the instant case, the Court of Appeal did not assert — nor does my colleague do so — that the trial judge had made an extricable error of law. Indeed, no one has suggested that she failed to identify the correct legal principles applicable to the alleged fault related to the duty of loyalty (paras. 107-13 and 118-19). She properly recognized that, as a mandatary under the *Civil Code of Québec* ("*C.C.Q.*"), a lawyer is bound to "act honestly and faithfully in the best interests of the mandator" and to "avoid placing himself in a position where his personal interest is in conflict with that of his mandator" (art. 2138 para. 2 *C.C.Q.*; trial reasons, at para. 111). The trial judge also pointed to the rules applicable to conflicts of interest under the former Quebec *Code of ethics of advocates*, CQLR, c. B-1, r. 3, which at the relevant time informed the standard of a reasonably competent, prudent and diligent lawyer in such circumstances (see Baudouin, Deslauriers and Moore, at Nos. 2-1 to 2-2). And she summarized the general principles of civil liability, namely that a plaintiff has the burden of proving a fault, an injury and a causal link between the two. All in all, there is no error in her characterization of the applicable

[179] Il est frappant que la Cour d'appel ne mette pas en avant *une quelconque* erreur révisable mais qu'elle critique simplement la soi-disant approche restrictive de la juge du procès à l'égard des principes de conflit d'intérêts (par. 97; motifs du juge Gascon, par. 69). Sur ce fondement, la Cour d'appel procède au réexamen de la question en appliquant la norme de la décision correcte, comme si une question de droit avait été relevée. Avec égards, il s'agit d'un non-respect flagrant du principe de non-intervention en appel.

[180] Il est bien établi en droit que l'analyse d'une faute reprochée, notamment quant au devoir de loyauté, soulève des questions mixtes de fait et de droit. Lorsqu'une telle question se pose, la norme appropriée est celle de l'erreur manifeste et déterminante à moins qu'on puisse facilement isoler une pure question de droit (*Housen*, par. 29-33). Une question de droit isolable consiste généralement en une formulation erronée du critère juridique applicable ou en l'omission de tenir compte d'un *élément essentiel* de ce critère (*Housen*, par. 36).

[181] Pourtant, dans la présente affaire, la Cour d'appel ne soutient pas, et mon collègue n'affirme pas non plus, que la juge du procès commet une erreur de droit isolable. De fait, personne ne laisse entendre qu'elle omet de cerner les bons principes juridiques applicables à la faute reprochée liée au devoir de loyauté (par. 107-113 et 118-119). Elle reconnaît avec justesse que, en tant que mandataires au sens du *Code civil du Québec* (« *C.c.Q.* »), les avocats sont tenus d'« agir avec honnêteté et loyauté dans le meilleur intérêt du mandant » et d'« éviter de se placer dans une situation de conflit entre [leur] intérêt et celui de [leur] mandant » (art. 2138 al. 2 *C.c.Q.*; motifs de première instance, par. 111). La juge du procès rappelle aussi les règles applicables aux conflits d'intérêts prévues dans l'ancien *Code de déontologie des avocats*, RLRQ, c. B-1, r. 3, du Québec qui, à l'époque, servait à préciser la norme de l'avocat raisonnablement compétent, prudent et diligent dans de telles circonstances (voir Baudouin, Deslauriers et Moore, n°s 2-1 à 2-2). Elle résume aussi les principes généraux de la responsabilité civile, notamment celui voulant que le demandeur a le fardeau de prouver la faute, le préjudice et

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legal test, which is consistent with my colleague's own summary of the relevant principles (para. 71).

le lien de causalité entre les deux. Tout compte fait, sa description du critère juridique applicable, qui concorde avec le résumé des principes pertinents de mon collègue (par. 71), ne comporte aucune erreur.

[182] I would add that, in cases involving negligence, "it is often difficult to extricate the legal questions from the factual" (*Housen*, at para. 36). The analysis of an alleged conflict of interest, in particular, is inherently fact-based. For instance, a potential conflict might not have the same ramifications in the context of day-to-day business dealings as in that of a litigation case. Alleged conflicts must be assessed on a case-by-case basis. Not every potential violation of the duty of loyalty — including breaches of specific ethical rules — will give rise to an action in civil liability. In each case, the court must analyze the nature and the circumstances of the alleged conflict for the purpose of characterizing the violation and, if warranted, determining the appropriate remedy (*Côté*, at paras. 9-11 and 14). It follows that extricating an error of law should be reserved for exceptional cases in which the legal test has been mischaracterized, or one of its required elements disregarded.

[182] J'ajouterais que, dans les affaires où il est question de négligence, « il est souvent difficile de départager les questions de droit et les questions de fait » (*Housen*, par. 36). L'analyse d'un prétendu conflit d'intérêts, en particulier, est intrinsèquement factuelle. Par exemple, un éventuel conflit pourrait ne pas avoir les mêmes ramifications dans un contexte d'opérations commerciales courantes que dans le cadre d'un dossier relatif à un litige. Chacun doit être évalué au cas par cas. Ce ne sont pas tous les possibles manquements au devoir de loyauté — notamment les manquements à des règles de déontologie précises — qui donneront ouverture à une action en responsabilité civile. Dans chaque affaire, le tribunal doit analyser la nature et les circonstances du prétendu conflit afin de qualifier la contravention et de déterminer, le cas échéant, la réparation qui s'impose (*Côté*, par. 9-11 et 14). Il s'ensuit qu'on devrait considérer qu'il n'existe une erreur de droit isolable que dans les cas exceptionnels où le critère juridique a été mal qualifié ou lorsqu'on a fait totalement abstraction de l'un des éléments requis de ce critère.

[183] Given that the trial judge applied the correct legal principles, the next question is whether the Court of Appeal identified a palpable and overriding error. Plainly, it did not. It bears repeating that the Court of Appeal did not — nor does my colleague — state explicitly that the trial judge had made any such error. Rather, their conclusion is — as my colleague puts it — that the trial judge disregarded the "overwhelming evidence of Mr. Salomon's close personal and financial relationship with Mr. Papadopoulos on the basis that it did not lead to the conclusion that there was of a conflict of interest" (para. 81; see also para. 70; C.A. reasons, at paras. 97 and 109). That is not a reviewable error, but a disagreement over the weight to be given to the evidence. In my view, the trial judge properly considered the factors that could have cast doubt on Mr. Salomon's undivided loyalty and commitment to his clients, that is, his friendship with Mr. Papadopoulos and

[183] À supposer que la juge du procès applique les bons principes juridiques, la prochaine question qui se pose est de savoir si la Cour d'appel relève la présence d'une erreur manifeste et déterminante. Manifestement, la réponse est non. Il convient de rappeler que la Cour d'appel n'affirme pas expressément, et mon collègue non plus, que la juge du procès commet une telle erreur. Ils concluent plutôt, comme le dit mon collègue, que la juge du procès ne tient pas compte « de la preuve abondante des liens personnels et financiers étroits qu'entretenait Me Salomon avec M. Papadopoulos au motif qu'elle ne permet pas de conclure à l'existence d'un conflit d'intérêts » (par. 81; voir aussi par. 70; motifs de la C.A., par. 97 et 109). Il ne s'agit pas d'une erreur révisable, mais d'une divergence d'opinions quant à l'importance qu'il faut donner à la preuve. À mon avis, la juge du procès examine comme il convient les facteurs qui auraient pu soulever des doutes quant à la loyauté et

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their financial relationship, including the "gifts" or "commissions" he had received (see, e.g., trial reasons, at paras. 136-37, 142, 156-57 and 163). Having weighed various pieces of evidence, she came to the conclusion that, on the facts of the case, these factors were not enough to have placed Mr. Salomon in a position where his personal interest conflicted with that of his clients. That conclusion was open to her.

[184] First, support can be found in the evidence for the trial judge's conclusion that Mr. Salomon's friendship with Mr. Papadopoulos, once put in context, had not run counter to his duty of loyalty to the respondents. The trial judge found that Ms. Matte-Thompson had been well aware of the relationship from the beginning. Mr. Salomon had never attempted to hide it (trial reasons, at paras. 135-37). In fact, before making her final decision to invest with Triglobal, Ms. Matte-Thompson had asked for his impressions, "as long as it [didn't] cross any lines for [him]". I agree that, under certain circumstances, such a close personal relationship could certainly have placed Mr. Salomon in a conflict of interest regardless of the disclosure. But in this case, it should be borne in mind that Mr. Salomon had no specific mandate related to the investment strategy. As I explained above, until at least May 2007, he had no duty to advise his clients in that regard, and certainly no duty to double-check their investment decisions. Further, when the respondents decided to redeem their investments with Triglobal, they made a decision not to involve Mr. Salomon precisely because of his close relationship with Mr. Papadopoulos (trial reasons, at para. 266). Perhaps Mr. Salomon should have been more circumspect in his expressions of confidence in Mr. Papadopoulos. Yet it seems to me that, given Ms. Matte-Thompson's awareness of their personal relationship and Mr. Salomon's limited role in respect of the respondents' investments, it was open to the trial judge to find that the friendship itself had not placed Mr. Salomon in a conflict of interest.

au dévouement exclusifs de Me Salomon envers ses clientes, à savoir son amitié avec M. Papadopoulos et leur relation financière, notamment les « cadeaux » ou « commissions » qu'il a reçus (voir, p. ex., motifs de première instance, par. 136-137, 142, 156-157 et 163). Après avoir apprécié divers éléments de preuve, elle conclut que, vu les faits de l'affaire, de tels facteurs ne suffisent pas à placer Me Salomon dans une situation où son intérêt personnel entrerait en conflit avec celui de ses clientes. Elle pouvait tirer une telle conclusion.

[184] Premièrement, la preuve peut appuyer la conclusion de la juge du procès selon laquelle la relation d'amitié entre Me Salomon et M. Papadopoulos, une fois mise en contexte, n'était pas contraire à son obligation de loyauté envers les intimées. La juge du procès conclut que Mme Matte-Thompson était bien au courant, depuis le début, de l'existence de la relation. Maître Salomon n'a jamais tenté de la cacher (motifs de première instance, par. 135-137). D'ailleurs, avant de prendre la décision définitive de faire des placements auprès de Triglobal, Mme Matte-Thompson lui a demandé ses impressions, [TRADUCTION] « dans la mesure où [il se] sent[ait] à l'aise de le faire ». Je conviens que, dans certaines circonstances, une relation personnelle étroite aurait certainement pu mettre Me Salomon en conflit d'intérêts, indépendamment de la divulgation. Toutefois, dans la présente affaire, il ne faut pas oublier que Me Salomon n'avait aucun mandat visant précisément la stratégie de placement. Comme je l'ai déjà mentionné, il n'avait, du moins jusqu'en mai 2007, aucun devoir de conseiller ses clientes sur cette question, et certainement aucun devoir de vérifier leurs décisions en matière de placements. De plus, lorsque les intimées ont pris la décision de racheter leurs placements auprès de Triglobal, elles ont choisi de ne pas mêler Me Salomon à cette décision, justement en raison de ses liens étroits avec M. Papadopoulos (motifs de première instance, par. 266). Maître Salomon aurait peut-être dû faire montre de plus de circonspection dans ses témoignages de confiance envers M. Papadopoulos. Cela dit, comme Mme Matte-Thompson était au courant de leur relation personnelle et vu le rôle limité que Me Salomon a joué en ce qui concerne les placements des intimées, j'estime que la juge du procès pouvait conclure que la relation d'amitié à elle seule ne plaçait pas Me Salomon en situation de conflit d'intérêts.

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[185] Second, it was also open to the trial judge to find that, in light of their nature and timing, the payments received by Mr. Salomon had not placed him in a conflict of interest (paras. 157 and 164-65). The trial judge found credible Mr. Salomon's explanation for the two payments of $10,000 each made by Mr. Papadopoulos on May 16 and June 9, 2006 and the additional payment of $8,000 on February 6, 2007 (paras. 143-48). As I mentioned above, Mr. Salomon testified that the payments had been gifts to help him renovate his apartment at a time when he was having financial difficulties. The documentary evidence shows that the payments were transited through a corporation Mr. Salomon had set up, which issued invoices for "financial consulting" services. Mr. Salomon explained that those services had never been rendered. Contrary to what my colleague suggests, the trial judge did not disregard this evidence. In fact, she addressed it directly (para. 143).

[186] The trial judge also discussed two subsequent payments of $5,000 each that Mr. Salomon had received in October 2007, which were described as "comms" — for "commissions" — in one of Mr. Papadopoulos's emails (paras. 151-55; see also C.A. reasons, at paras. 105-7). The trial judge noted that Mr. Salomon had claimed that the payments represented redemptions of his own investments in Focus and that, even assuming they were in fact commissions, there was no evidence that they had been paid for referring the respondents. Most importantly, the trial judge stressed that the payments received in October 2007 could hardly amount to proof that Mr. Salomon had been paid commissions when he initially referred the respondents to Triglobal in 2003, or when the respondents invested in Focus in 2005 and 2006. Nor were they proof that the "gifts" received in 2006 had been commissions. There is nothing "palpably wrong" in that reasoning (see Gascon J.'s reasons, at para. 77).

[187] In this regard, I disagree that the trial judge erred in stating that there was no specific proof

[185] Deuxièmement, il était aussi loisible à la juge du procès de conclure que les paiements reçus par Me Salomon, compte tenu de leur nature et du moment où ils ont été faits, ne l'avaient pas non plus placé en situation de conflit d'intérêts (par. 157 et 164-165). La juge du procès juge crédible l'explication qu'a donnée Me Salomon à l'égard des deux paiements de 10 000 $ que M. Papadopoulos a faits, respectivement le 16 mai et le 9 juin 2006, et du paiement additionnel de 8 000 $ effectué le 6 février 2007 (par. 143-148). Comme nous l'avons vu, Me Salomon a déclaré que les paiements constituaient des dons pour la rénovation de son appartement, à une époque où il avait des difficultés financières. Il ressort de la preuve documentaire que les paiements ont transité par une société constituée par Me Salomon qui a établi des factures pour des services de « consultation financière ». Me Salomon a expliqué que ces services n'ont jamais été rendus. Contrairement à ce qu'affirme mon collègue, la juge du procès ne fait pas abstraction de cette preuve; elle en traite directement (par. 143).

[186] La juge du procès traite aussi des deux paiements subséquents de 5 000 $ chacun reçus par Me Salomon en octobre 2007, désignés sous le nom de « comms » — pour « commissions » — dans l'un des courriels de M. Papadopoulos (par. 151-155; voir aussi les motifs de la C.A., par. 105-107). Elle note que Me Salomon a soutenu que les paiements représentaient des remboursements de ses propres placements dans le fonds Focus et que, même en supposant qu'il s'agissait en fait de commissions, rien ne prouve qu'elles lui ont été versées parce qu'il a recommandé M. Papadopoulos aux intimées. Elle souligne surtout que les paiements reçus en octobre 2007 peuvent difficilement prouver que Me Salomon a reçu des commissions lorsqu'il a pour la première fois dirigé les intimées vers Triglobal en 2003, ou lorsque les intimées ont investi dans le fonds Focus en 2005 et en 2006. Ils ne permettent pas non plus de prouver que les « cadeaux » reçus en 2006 étaient des commissions. Il n'y a rien de « manifestement erron[é] » dans ce raisonnement (voir motifs du juge Gascon, par. 77).

[187] À cet égard, je ne suis pas d'accord pour dire que la juge du procès commet une erreur

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that Mr. Salomon and Mr. Papadopoulos had had a financial relationship that placed him in a conflict of interest when the respondents' investments were made (paras. 155, 160 and 163). In saying that, she was merely declining to infer from the fact that Mr. Salomon had received payments from Mr. Papadopoulos in October 2007 that he had been in a conflict of interest at all relevant times, including at the time of the referral four years earlier (trial reasons, at para. 156). Declining to draw an inference falls squarely within the purview of the trier of fact (see *St-Jean*, at para. 114; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 55; *Benhaim*, at paras. 93-94).

[188] In short, I accept that the trial judge's characterization of the payments of May and June 2006 as personal gifts was based on a reasonable assignment of weight to contradictory evidence, including oral evidence that she perceived to be credible. As this Court reiterated in *Housen*, at para. 58, "it was open to the trial judge to place less weight on certain evidence and accept other, conflicting evidence which the trial judge found to be more convincing". The fact that the Court of Appeal would have weighed the evidence differently, or drawn different inferences, does not justify its intervention.

[189] That said, assuming that the payments were not commissions, I agree with my colleague that receiving a personal gift, especially one of nearly $30,000 that is not disclosed, may raise "serious doubts regarding the independence of the lawyer" (para. 77). But once again, this will depend on the circumstances. In this case, Mr. Salomon received the gift in May and June 2006, a period in which he had no specific mandate regarding the investments. It is true that in the following months he served as an occasional "conduit" between the respondents and Triglobal, but his role was nonetheless limited, and he had no duty to verify the investments. Moreover, other lawyers were involved and were advising the respondents regarding their investment strategy. Indeed, when the respondents decided to gradually withdraw their funds from Triglobal, Mr. Salomon was largely kept out of the loop. Although I agree that

lorsqu'elle affirme qu'il n'y a pas de preuve précise de l'existence d'un lien financier entre Me Salomon et M. Papadopoulos qui plaçait Me Salomon en conflit d'intérêts au moment où les placements des intimées ont été faits (par. 155, 160 et 163). En disant cela, elle refuse simplement d'inférer, à partir du fait que Me Salomon a reçu des versements de M. Papadopoulos en octobre 2007, que Me Salomon était en conflit d'intérêts à tous les moments pertinents, y compris au moment de la recommandation initiale quatre ans plus tôt (motifs de première instance, par. 156). La décision de refuser de tirer une inférence relève entièrement du juge des faits (voir *St-Jean*, par. 114; *F.H. c. McDougall*, 2008 CSC 53, [2008] 3 R.C.S. 41, par. 55; *Benhaim*, par. 93-94).

[188] Bref, je reconnais que la description par la juge du procès des paiements faits en mai et juin 2006 comme étant des cadeaux personnels repose sur une appréciation raisonnable de la preuve contradictoire, notamment de témoignages oraux qu'elle juge crédibles. Comme notre Cour le réitère dans *Housen*, par. 58, « il était loisible [au juge de première instance] d'accorder un poids moins grand à certains éléments de preuve et à accepter d'autres éléments contradictoires, qu'il considérait plus convaincants ». Le fait que la Cour d'appel aurait apprécié différemment la preuve ou tiré des inférences différentes ne justifie pas son intervention.

[189] Cela dit, même si les paiements n'étaient pas des commissions, je souscris à l'opinion de mon collègue selon laquelle la réception d'un cadeau personnel, plus particulièrement d'un cadeau de près de 30 000 $ qui n'a pas été divulgué, peut soulever « de sérieux doutes quant à l'indépendance de l'avocat qui [l'a] reç[u] » (par. 77). Encore une fois, tout dépend des circonstances. En l'espèce, Me Salomon a reçu les cadeaux en mai et juin 2006, période au cours de laquelle il n'avait aucun mandat précis à l'égard des investissements. Il est vrai que dans les mois suivants, il a agi à l'occasion comme « intermédiaire » entre les intimées et Triglobal, mais son rôle était néanmoins limité et il n'avait aucune obligation de vérifier les placements. De plus, d'autres avocats étaient en cause et conseillaient les intimées au sujet de leur stratégie de placement. En fait, quand les intimées ont décidé de retirer graduellement leurs

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Mr. Salomon should have been more forthright about the gifts he had received from Mr. Papadopoulos, I am nevertheless satisfied that, given all the relevant circumstances, the Court of Appeal failed to identify a reviewable error in that regard.

fonds de Triglobal, Me Salomon a été en grande partie gardé à l'écart. Bien que je sois d'accord que Me Salomon aurait dû faire preuve de plus de transparence au sujet des cadeaux que M. Papadopoulos lui a faits, je suis néanmoins convaincue, compte tenu de toutes les circonstances pertinentes, que la Cour d'appel ne relève pas d'erreur révisable à cet égard.

[190] I acknowledge that the trial judge did not address certain aspects of the *professional* relationship between Mr. Salomon and Mr. Papadopoulos, especially the disclosure by the former of communications with Ms. Matte-Thompson (C.A. reasons, at paras. 87 and 101-3; Gascon J.'s reasons, at paras. 70 and 73) and the fact that he had cooperated extensively with Mr. Papadopoulos and Triglobal on at least one occasion (C.A. reasons, at paras. 98-100; Gascon J.'s reasons, at paras. 74-75). However, as a majority of this Court stressed in *Housen*, "the failure to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence" (para. 39). A trial judge does not have to discuss in detail every single fact alleged by the parties or every piece of evidence. The question here is not whether the trial judge brushed aside elements that the Court of Appeal (or this Court) deemed important, but whether those omissions might have affected her conclusions (*Van de Perre*, at para. 15; *Housen*, at para. 72). In my view, they did not.

[190] Je reconnais que la juge du procès ne traite pas de certains aspects de la relation *professionnelle* qui unissait Me Salomon et M. Papadopoulos, en particulier la divulgation par Me Salomon de communications qu'il a eues avec Mme Matte-Thompson (motifs de la C.A., par. 87 et 101-103; motifs du juge Gascon, par. 70 et 73) et le fait que Me Salomon a collaboré avec M. Papadopoulos et Triglobal à au moins une occasion (motifs de la C.A., par. 98-100; motifs du juge Gascon, par. 74-75). Toutefois, comme le soulignent les juges majoritaires de notre Cour dans *Housen*, « l'omission d'examiner en profondeur un facteur pertinent, voire ne pas l'examiner du tout, n'est pas en soi un fondement suffisant pour justifier une cour d'appel de réexaminer la preuve » (par. 39). Un juge de première instance n'est pas tenu de traiter en détail de chaque fait particulier allégué par les parties ou de chaque élément de preuve. La question en l'espèce n'est pas de savoir si la juge du procès écarte des éléments que la Cour d'appel (ou notre Cour) estime importants, mais plutôt si de telles omissions auraient pu avoir une incidence sur ses conclusions (*Van de Perre*, par. 15; *Housen*, par. 72). À mon avis, elles n'ont pas eu une telle incidence.

[191] While it may be true that Mr. Salomon's indiscretions amounted to breaches of his duty of confidentiality under the applicable rules of professional ethics, I am not convinced that they constitute evidence that Mr. Salomon was in a conflict of interest at all relevant times. For instance, I note the trial judge's finding that, when Mr. Salomon had informed Mr. Papadopoulos in April 2006 of Ms. Matte-Thompson's concerns, he had merely been doing "his best" to pressure Mr. Papadopoulos to respond to her questions (paras. 228 and 299). Given that he had not obtained her authorization to do this, the attempt was certainly misguided, but it does not necessarily reveal a conflict of interest. As to

[191] S'il est vrai que les indiscrétions de Me Salomon peuvent équivaloir à des manquements à son devoir de confidentialité prévu dans les règles d'éthique professionnelle applicables, je ne suis pas convaincue qu'elles démontrent que Me Salomon était en conflit d'intérêts à tous les moments pertinents. J'attirerais l'attention par exemple sur la conclusion de la juge du procès selon laquelle lorsque Me Salomon a fait part à M. Papadopoulos des préoccupations de Mme Matte-Thompson en avril 2006, il faisait simplement [TRADUCTION] « de son mieux » pour inciter M. Papadopoulos à répondre aux questions de sa cliente (par. 228 et 299). Comme il n'a pas obtenu l'autorisation de cette dernière pour ce faire,

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his forwarding of the August 2007 email concerning the respondents' intent to withdraw entirely from iVest and Focus, I agree that it appears to be a serious breach of Mr. Salomon's duties of loyalty to his clients and of confidentiality. As I explained above, I would tend to find that Mr. Salomon's conduct after the May 2007 *La Presse Affaires* article was wrongful. However, it may not have been enough to justify, retroactively so to speak, an inference that Mr. Salomon had been in a conflict of interest that began with the initial referral in 2003 and continued over time.

sa tentative était certes peu judicieuse, mais elle ne trahit pas nécessairement un conflit d'intérêts. De même, pour ce qui est du transfert du courriel d'août 2007 concernant l'intention des intimées de se retirer complètement des fonds iVest et Focus, je conviens que ce geste de Me Salomon semble constituer un manquement grave à ses devoirs de loyauté et de confidentialité à l'égard de ses clientes. Comme je l'ai déjà expliqué, je serais portée à conclure que la conduite de Me Salomon après la publication de l'article de *La Presse Affaires* en mai 2007 est erronée. Toutefois, cela n'est peut-être pas suffisant pour justifier, rétroactivement si je peux m'exprimer ainsi, l'inférence selon laquelle Me Salomon était en situation de conflit d'intérêts depuis la recommandation initiale en 2003.

[192] As for the claim that Mr. Salomon "teamed up" with Mr. Papadopoulos in March 2007 to prepare a report on the respondents' investments, Mr. Salomon's conduct on that occasion can be interpreted in different ways (Gascon J.'s reasons, at paras. 74-75; C.A. reasons, at paras. 98-100). At the time, Ms. Matte-Thompson was encountering serious communication issues with Triglobal. Mr. Salomon, with Ms. Matte-Thompson's knowledge, volunteered to help the financial advisors prepare a report that would contain all the information she sought, and in plain language. In this context, the fact that Mr. Salomon used the pronoun "we" in an email addressed to Mr. Papadopoulos is hardly determinative. Granted, it could raise doubts about Mr. Salomon's independence. But it could also indicate a good faith effort to cooperate with Triglobal for the purpose of solving what Mr. Salomon perceived to be essentially a problem of communication. Given that the trial judge is presumed to have made her findings on the basis of the entire record and that there were different inferences that might have been drawn from the communications at issue, I am satisfied that the fact that she failed to discuss this matter is not in itself sufficient to cast doubt on those findings.

[192] En ce qui concerne la prétention selon laquelle Me Salomon a « fait équipe » avec M. Papadopoulos en mars 2007 pour préparer un rapport sur les placements des intimées, la conduite de Me Salomon à cette occasion peut être interprétée de différentes manières (motifs du juge Gascon, par. 74-75; motifs de la C.A., par. 98-100). À l'époque, Mme Matte-Thompson avait de graves problèmes de communication avec Triglobal. Au su de Mme Matte-Thompson, Me Salomon s'est proposé pour aider les conseillers financiers à préparer un rapport qui contiendrait tous les renseignements qu'elle demandait, présentés de façon claire. Dans ce contexte, le fait que Me Salomon a employé le pronom « nous » dans un courriel adressé à M. Papadopoulos est difficilement déterminant. Certes, cet argument pourrait soulever des doutes sur l'indépendance de Me Salomon; toutefois, il pourrait aussi prouver les efforts que Me Salomon a faits de bonne foi pour coopérer avec Triglobal en vue de régler ce qu'il percevait comme étant essentiellement un problème de communication. Étant donné que la juge du procès est présumée tirer ses conclusions en se fondant sur l'ensemble du dossier, et que différentes inférences auraient pu être tirées des communications en question, je suis convaincue que le fait que la juge du procès omette de traiter de cette question est insuffisant en soi pour mettre en doute ses conclusions.

[193] Overall, the Court of Appeal identified no reviewable errors in the trial judge's analysis of the

[193] Dans l'ensemble, la Cour d'appel ne relève aucune erreur révisable dans l'analyse par la juge du

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alleged faults relating to the duty of loyalty. In saying this, I do not mean to trivialize Mr. Salomon's conduct. For lawyers, avoiding conflicts of interest is essential if they are to retain the independence they need in order to be entirely dedicated to their clients. When in doubt, they should generally err on the side of caution and disclose personal interests to their clients. In this case, Mr. Salomon should probably have been more transparent about the payments he had received from Mr. Papadopoulos. Nonetheless, the trial judge found that he had not been in a conflict of interest at the relevant times, that is, when he had recommended Triglobal and Mr. Papadopoulos and later reiterated his confidence in them. That finding is entitled to deference. I would agree, however, that the evidence strongly suggests that Mr. Salomon breached his duty of confidentiality and placed himself in a conflict of interest in the last few months of 2007. But by that time, it would likely have been impossible for the respondents to retrieve the funds. It follows that, even if Mr. Salomon did commit a fault at that point, he could not be held liable for the respondents' losses. This brings us to causation.

procès des fautes reprochées concernant le devoir de loyauté. Par cette affirmation, je ne cherche pas à banaliser la conduite de Me Salomon. Il est essentiel que les avocats évitent les conflits d'intérêts afin de conserver l'indépendance requise pour se consacrer totalement à leurs clients. En cas de doute, ils devraient généralement pécher par excès de précaution et déclarer leurs intérêts personnels à leurs clients. Dans l'affaire qui nous occupe, Me Salomon aurait probablement dû être plus transparent au sujet des paiements que lui a faits M. Papadopoulos. Néanmoins, la juge du procès conclut qu'il n'était pas en conflit d'intérêts aux moments pertinents, à savoir lorsqu'il a recommandé Triglobal et M. Papadopoulos et lorsqu'il a plus tard réitéré sa confiance en eux. Il convient de faire preuve de déférence à l'égard de cette conclusion. Je serais cependant d'accord pour dire que la preuve donne fortement à penser que Me Salomon a manqué à son devoir de confidentialité et s'est lui-même placé en situation de conflit d'intérêts dans les derniers mois de 2007, mais il était alors probablement déjà impossible pour les intimées de retirer les fonds. Il s'ensuit que même si Me Salomon a commis une faute à ce moment-là, il ne pouvait être tenu responsable des pertes des intimées. Cette conclusion nous mène à la question de la causalité.

B. *The Trial Judge Did Not Make a Palpable and Overriding Error With Respect to Causation*

(1) Principles of Causation

[194] A fundamental principle of civil liability is that a person is liable only for injuries *caused* by his or her own fault (*Lonardi*, at para. 32; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621, at para. 132). Baudouin, Deslauriers and Moore explain this as follows:

> [TRANSLATION] Logically, a person who commits an act that constitutes a fault cannot be held liable for damage that is unrelated to the fault or that he or she had nothing to do with. A certain causal connection is essential, and it therefore does not, despite what certain judicial decisions sometimes seem to suggest, coincide with the fault itself. . . .

B. *La juge du procès n'a pas commis d'erreur manifeste et déterminante en ce qui concerne le lien de causalité*

(1) Les principes de la causalité

[194] Selon un principe fondamental de la responsabilité civile, une personne ne peut être tenue responsable que des préjudices *causés* par sa faute (*Lonardi*, par. 32; *Hinse c. Canada (Procureur général)*, 2015 CSC 35, [2015] 2 R.C.S. 621, par. 132). Les auteurs Baudouin, Deslauriers et Moore l'expliquent comme suit :

> On ne peut logiquement tenir l'auteur d'un acte fautif responsable d'un dommage qui est sans relation avec la faute ou dans la réalisation duquel il n'est pour rien. La nécessité d'un certain lien causal est indispensable et ne se confond donc pas, malgré ce que certaines décisions de jurisprudence semblent parfois laisser entendre, avec la faute elle-même. . .

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The fact that a person has committed a fault and a victim has sustained damage does not necessarily mean that the person who committed the fault must be held liable for it. One example will suffice to illustrate this. A municipality that maintains its sidewalks or its roads poorly commits a fault in the sense that it does not act as would an informed, prudent and diligent municipality. If someone is injured, however, nothing in this fact alone makes it possible to automatically, and with certainty, connect the municipality's fault with the victim's injury. For that, a link must be established between the two circumstances. . . .

The Quebec courts maintain a distinction between fault and causation, stressing that on its own, the breach of a legal obligation that involves a basic standard of prudence leads, in theory, to a presumption of fault, but does not entitle one to compensation unless there is a sufficient causal connection with the injury. [Emphasis added; footnotes omitted; Nos. 1-665 to 1-666.]

[195] In civil liability matters, a *true* cause is established when the plaintiff proves that the injury is a "logical, direct and immediate consequence of the fault" (arts. 1607 and 1613 *C.C.Q.*; see, e.g., *Hinse*, at para. 132, citing *Parrot v. Thompson*, [1984] 1 S.C.R. 57, at p. 71). Put another way, the fault must have a *close* relationship with the injury (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 50, quoting Baudouin, Deslauriers and Moore, at No. 1-683; see also *Roberge*, at p. 442). It does not suffice to show that the fault increased the likelihood of the injury occurring if there is no evidence that the fault directly caused the injury either in whole or in part (*Dallaire v. Paul-Émile Martel Inc.*, [1989] 2 S.C.R. 419, at p. 425; *St-Jean*, at para. 116). The purpose of this directness requirement is to limit the scope of any remedy (see J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, eds., at No. 770).

[196] Once again, the analysis of causation raises a question of fact (*Lonardi*, at para. 41; *Benhaim*, at paras. 36 and 92). In seeking a causal link that is logical, direct *and* immediate, the trial judge must assess "the events leading to the damage, their sequence and their causal connection with the damage

Une faute peut, en effet, avoir été commise par une personne, un dommage subi par une victime, sans pour autant que l'auteur de cette faute doive en être tenu responsable. Un exemple suffit à illustrer ce fait. La municipalité qui entretient mal ses trottoirs ou ses chaussées commet une faute, en ce sens qu'elle ne se comporte pas comme une municipalité avisée, prudente et diligente. Si une personne se blesse, rien cependant, de ce seul fait, ne permet de relier, automatiquement et d'une manière sûre, la faute de la municipalité au préjudice subi par la victime. Il faut, pour le faire, établir un lien entre les deux phénomènes. . .

La jurisprudence québécoise maintient la distinction entre la faute et le lien de causalité, en soulignant que la seule violation d'une obligation légale qui énonce une norme élémentaire de prudence fait, en principe, présumer une faute, mais ne donne droit à indemnisation que s'il existe un lien de causalité suffisant avec le préjudice. [Je souligne; notes en bas de page omises; n°s 1-665 à 1-666.]

[195] Dans les affaires de responsabilité civile, une cause *véritable* est établie lorsque le demandeur prouve que le préjudice est une « conséquence logique, directe et immédiate de la faute » (art. 1607 et 1613 *C.c.Q.*; voir, p. ex., *Hinse*, par. 132, citant *Parrot c. Thompson*, [1984] 1 R.C.S. 57, p. 71). Autrement dit, la faute doit avoir un rapport *étroit* avec le préjudice (*Québec (Commission des droits de la personne et des droits de la jeunesse) c. Bombardier Inc. (Bombardier Aéronautique Centre de formation)*, 2015 CSC 39, [2015] 2 R.C.S. 789, par. 50, citant Baudouin, Deslauriers et Moore, n° 1-683; voir aussi *Roberge*, p. 442). En l'absence de toute preuve que la faute a directement causé le préjudice en totalité ou en partie, il ne suffit pas de démontrer que la faute a augmenté la probabilité qu'il y ait préjudice (*Dallaire c. Paul-Émile Martel Inc.*, [1989] 2 R.C.S. 419, p. 425; *St-Jean*, par. 116). Cette exigence du caractère direct du préjudice vise à limiter la portée de la réparation (voir J.-L. Baudouin et P.-G. Jobin, *Les obligations* (7e éd. 2013), par P.-G. Jobin et N. Vézina, dir., n° 770).

[196] Encore une fois, l'analyse du lien de causalité soulève une question de fait (*Lonardi*, par. 41; *Benhaim*, par. 36 et 92). En cherchant un lien causal qui soit logique, direct *et* immédiat, le juge du procès doit apprécier les « événements qui ont précédé le dommage, [. . .] leur succession dans le temps et

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suffered" on the basis of the evidence as a whole (see *Dallaire*, at pp. 425-26). As Baudouin, Deslauriers and Moore put it:

[TRANSLATION] The courts require that the victim prove a direct connection between the injury for which he or she claims compensation and the defendant's alleged fault. The directness of that connection is assessed primarily by a review of the fact situation in which the judge must weigh the respective influence of each of the events and circumstances linked to the accident. [Emphasis added; No. 1-697.]

[197] Various theories have been advanced to distinguish true causes, which may result in civil liability, from mere "conditions", that is, the circumstances or occasion of the injury (see, e.g., Baudouin, Deslauriers and Moore, at Nos. 1-669 to 1-677 and 1-687; M. Tancelin, *Des obligations en droit mixte du Québec* (7th ed. 2009), at Nos. 787-95; F. Lévesque, *Précis de droit québécois des obligations* (2014), at Nos. 463-67). In light of those theories, it may be helpful to inquire into whether the fault made the injury objectively possible, whether the injury was reasonably foreseeable *and* whether the sequence of events over time is sufficient to support the existence of a close relationship (see Baudouin, Deslauriers and Moore, at Nos. 1-683 and 1-697). However, while such guideposts from the academic literature may help in sifting through the facts, the analysis of causation remains a context-based exercise which does not lend itself to legal theorizing (see D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at Nos. 2962-63). As the Court of Appeal stated in *Stellaire Construction Inc. v. Ciment Québec Inc.*, 2002 CanLII 35591 (Que.), at para. 39, it is up to the trier of fact to [TRANSLATION] "'draw a line', or identify a 'breaking point', between the consequences that flow directly and immediately from the fault and the others" (footnotes omitted). In doing so, a trial judge is entitled to great latitude (Baudouin and Jobin, at No. 770).

[198] On appeal, given that causation essentially requires an assessment of facts, the trial judge's findings are owed deference and cannot be disturbed absent a palpable and overriding error.

[. . .] leur relation causale avec le préjudice subi » eu égard à l'ensemble de la preuve (voir *Dallaire*, p. 425-426). Pour reprendre les mots des auteurs Baudouin, Deslauriers et Moore :

Les tribunaux exigent que la victime fasse preuve d'un lien direct entre le préjudice dont elle réclame l'indemnisation et la faute qu'elle reproche au défendeur. Le caractère direct de ce lien est apprécié, avant tout, par l'examen de la situation de fait, au cours duquel le juge est amené à peser l'influence respective de tous les événements et circonstances ayant entouré l'accident. [Je souligne; nº 1-697.]

[197] Diverses théories ont été proposées pour distinguer les causes véritables, susceptibles de donner lieu à une responsabilité civile, des simples « conditions », c'est-à-dire les circonstances ou l'occasion du préjudice (voir, p. ex., Baudouin, Deslauriers et Moore, nos 1-669 à 1-677 et 1-687; M. Tancelin, *Des obligations en droit mixte du Québec* (7e éd. 2009), nos 787-795); F. Lévesque, *Précis de droit québécois des obligations* (2014), nos 463-467). À la lumière de ces théories, il peut être utile de chercher à savoir si la faute a rendu le préjudice objectivement possible, si le préjudice était raisonnablement prévisible *et* si la séquence des événements dans le temps est suffisante pour étayer l'existence d'un rapport étroit (voir Baudouin, Deslauriers et Moore, nos 1-683 et 1-697). Toutefois, si de telles balises doctrinales peuvent guider l'examen des faits, l'analyse du lien de causalité demeure une démarche contextuelle qui se prête mal à la théorisation juridique (voir D. Lluelles et B. Moore, *Droit des obligations* (2e éd. 2012), nos 2962-2963). Comme le déclare la Cour d'appel dans *Stellaire Construction Inc. c. Ciment Québec Inc.*, 2002 CanLII 35591 (Qc), par. 39, il appartient au juge des faits de « "tirer une ligne", ou [d']identifier le "point de rupture", entre les conséquences qui découlent directement et immédiatement de la faute et les autres » (notes en bas de page omises). Pour ce faire, le juge de première instance jouit d'une grande latitude (Baudouin et Jobin, nº 770).

[198] En appel, étant donné qu'une appréciation des faits est essentielle pour établir la causalité, il faut faire preuve de retenue devant les conclusions du juge du procès, et celles-ci ne peuvent être modifiées en l'absence d'une erreur manifeste et déterminante.

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(2) Application to the Case at Bar

[199] In my view, the Court of Appeal should not have interfered with the trial judge's conclusions regarding causation on the basis of the "distorting lens" metaphor (C.A. reasons, at para. 120). I am satisfied that there is no reviewable error in the finding that Mr. Salomon's only fault — recommending Manulife and iVest — had no bearing on the respondents' decisions to invest in Focus, and therefore on their losses. Granted, if palpable errors had been identified in the trial judge's findings regarding *fault*, they might have tainted the causation analysis, which, in turn, might have affected the outcome of the case. However, no such errors have been identified, and I see no other reason to disturb the trial judge's factual findings on causation. Even if it were assumed that Mr. Salomon committed a fault by recommending Triglobal and Mr. Papadopoulos, the fact remains that he was not involved in the respondents' decisions to invest in Focus. By then, the respondents were relying on their financial advisors, with whom they had developed their own relationship over a period of approximately three years. It was thus open to the trial judge to find that the fraud was the only true cause of the losses. This implies that Mr. Salomon's fault was too remote from the injury to be considered a *logical, direct and immediate* cause. For all intents and purposes, the chain of causation had been stretched beyond the breaking point.

(a) *The Recommendation of Triglobal and Mr. Papadopoulos*

[200] I cannot accept the Court of Appeal's conclusion that [TRANSLATION] "the [respondents] would never have invested their money with Triglobal had Mr. Salomon acted diligently and competently from the outset" (para. 121). As I explained above, there was no reviewable error in the trial judge's finding that the initial referral of the respondents to Triglobal and Mr. Papadopoulos (like the later expressions of confidence up until May 2007) was not wrongful (para. 302). Hence, independently of the causation

(2) Application à la présente affaire

[199] À mon avis, la Cour d'appel n'aurait pas dû modifier les conclusions de la juge du procès concernant le lien de causalité en se fondant sur la métaphore du « prisme déformant » (motifs de la C.A., par. 120). Je suis convaincue qu'il n'y a aucune erreur révisable dans la conclusion selon laquelle la seule faute commise par Me Salomon — soit d'avoir recommandé les fonds Manulife et iVest — n'a eu aucune incidence sur les décisions des intimées d'investir dans le fonds Focus et, par conséquent, sur leurs pertes. Certes, si on avait relevé des erreurs manifestes dans les conclusions de la juge du procès relatives à la *faute*, ces erreurs auraient pu entacher l'analyse du lien de causalité, ce qui, à son tour, aurait pu avoir une incidence sur l'issue de l'affaire. Or, de telles erreurs ne sont pas relevées, et je ne vois aucune autre raison d'infirmer les conclusions de fait de la juge du procès quant au lien de causalité. Même si on suppose que Me Salomon a commis une faute en recommandant Triglobal et M. Papadopoulos, il n'en demeure pas moins qu'il n'a pas participé aux décisions des intimées d'investir dans le fonds Focus. Les intimées se fiaient alors à leurs conseillers financiers, avec qui elles avaient établi leur propre relation sur une période d'environ trois ans. La juge du procès pouvait donc conclure que la fraude est la seule cause véritable des pertes, ce qui implique que la faute de Me Salomon est trop éloignée du préjudice pour être considérée comme sa cause *logique, directe et immédiate*. À toutes fins utiles, le lien causal a été étiré au-delà du point de rupture.

a) *Recommandation de Triglobal et de M. Papadopoulos*

[200] Je ne souscris pas à la conclusion de la Cour d'appel selon laquelle « jamais les [intimées] n'auraient investi auprès de Triglobal si, au départ, Me Salomon avait agi de manière diligente et compétente » (par. 121). Comme je l'ai déjà expliqué, il n'y a aucune erreur révisable dans la conclusion de la juge du procès selon laquelle la recommandation initiale de Triglobal et de M. Papadopoulos (comme les témoignages de confiance ultérieurs jusqu'en mai 2007) n'était pas fautive (par. 302). Par conséquent,

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issue, Mr. Salomon cannot be held liable with respect to the referral given that his conduct in making it was not wrongful.

[201] Even if it were assumed that Mr. Salomon committed a fault by recommending Triglobal and Mr. Papadopoulos, there would be no reviewable error in the trial judge's finding that the only true cause of the losses was the fraud itself (paras. 215 and 318). In reaching this conclusion, I am not relying on the principle of *novus actus interveniens*, that is, the notion that an independent event may break the direct causal link between the fault and the injury (*Lacombe v. André*, [2003] R.J.Q. 720 (C.A.), at paras. 58-59). Rather, I would say that it was open to the trial judge to find, on the basis of her assessment of the evidence, that the recommendation of Triglobal and Mr. Papadopoulos was not close enough to the injury to qualify as a *logical, direct and immediate* cause.

[202] It bears repeating that, before investing in Focus, the respondents had over a period of nearly three years established their own "good" relationship with Triglobal and Mr. Papadopoulos (trial reasons, at paras. 211 and 288). It was only then that they made the decision to transfer their funds, and they did so without involving Mr. Salomon. Here is a short summary of the sequence of events:

(a) In 2004, shortly after the initial referral by Mr. Salomon, Ms. Matte-Thompson invested $1,245,000 (over 90 percent of her personal funds) in a legitimate and appropriate vehicle, Manulife, on the recommendation of both Mr. Salomon and Triglobal (trial reasons, at paras. 178-81 and 200).

(b) At the time she made that investment, Ms. Matte-Thompson also filled out, directly with Triglobal, a client data form setting out her investment objectives (para. 181).

(c) In the following months, she made the decision to transfer $400,000 from Manulife to iVest. By that time, she was dealing directly with

indépendamment de la question de la causalité, Me Salomon ne peut être tenu responsable à l'égard de cette recommandation initiale puisque sa conduite à cet égard n'était pas fautive.

[201] Même en supposant que Me Salomon a commis une faute lorsqu'il a recommandé Triglobal et M. Papadopoulos, la juge du procès ne commet pas d'erreur révisable en concluant que la seule cause véritable des pertes est la fraude elle-même (par. 215 et 318). Pour parvenir à cette conclusion, je ne me fonde pas sur le principe du *novus actus interveniens*, soit le principe selon lequel un événement indépendant peut rompre le lien causal direct entre la faute et le préjudice (*Lacombe c. André*, [2003] R.J.Q. 720 (C.A.), par. 58-59). Je dirais plutôt que la juge du procès pouvait conclure, sur le fondement de son appréciation de la preuve, que la recommandation de Triglobal et de M. Papadopoulos n'a pas de lien suffisamment étroit avec le préjudice pour constituer une cause *logique, directe et immédiate*.

[202] Il convient de répéter qu'avant d'investir dans le fonds Focus, les intimées ont établi, sur une période de près de trois ans, leur propre « bonne » relation avec Triglobal et M. Papadopoulos (motifs de première instance, par. 211 et 288). Ce n'est qu'alors qu'elles ont pris la décision de transférer leurs fonds, et elles l'ont fait sans Me Salomon. Voici un résumé de la chronologie des événements :

a) En 2004, peu après la recommandation initiale par Me Salomon, Mme Matte-Thompson investit 1 245 000 $ (plus de 90 % de ses fonds personnels) dans un véhicule légitime et approprié, le fonds Manulife, sur la recommandation de Me Salomon ainsi que de Triglobal (motifs de première instance, par. 178-181 et 200);

b) Au moment où elle fait ce placement, Mme Matte-Thompson remplit aussi, directement auprès de Triglobal, un formulaire d'information sur les clients indiquant ses objectifs en matière de placements (par. 181);

c) Dans les mois suivants, elle prend la décision de transférer 400 000 $ du fonds Manulife au fonds iVest. Elle traite alors déjà directement

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Triglobal, and Mr. Salomon was not consulted (trial reasons, at paras. 201-2).

(d) In the fall of 2005, Ms. Matte-Thompson was "pleased" with her investments with Triglobal, so she decided — on the basis of her "good relation[ship]" with Mr. Papadopoulos — to invest the proceeds of the sale of 166's assets with the firm (trial reasons, at para. 288; A.R., vol. 7, at pp. 2603-4).

(e) In early 2006, Ms. Matte-Thompson, an "educated business woman", transferred funds, both her own and 166's, to Focus without consulting anyone outside Triglobal and without making any inquiries (trial reasons, at paras. 204-10 and 289).

(f) In April 2006 and in the following months, when Ms. Matte-Thompson began expressing concerns about the investments in Focus and asked for Mr. Salomon's opinion as a "friend" and "outside of business", it was primarily Mr. Papadopoulos who reassured her (see, e.g., trial reasons, at paras. 228, 233, 238 and 247).

[203] The trial judge had to draw a line somewhere. And she came to the conclusion that the fraud was the only true cause — and therefore that Mr. Salomon's recommendation of Triglobal and Mr. Papadopoulos was not a *logical*, *direct* and *immediate* cause — of the losses. By the time the respondents invested in Focus, they had formed their own opinion on their financial advisors' competence and probity which was not dependent on Mr. Salomon's initial recommendation or his subsequent reassurances. Contrary to the suggestion made by the Court of Appeal and by my colleague, this is not tantamount to saying that the fraud itself constituted a *novus actus interveniens*. Rather, it is the result of the trial judge's careful examination of the sequence of events that led to the injury. Although one may disagree with her assessment, the fact remains that a direct causal link must be broken at some point. Otherwise, any lawyer who makes a wrongful referral would become an insurer of the recommended professionals'

avec Triglobal et n'a pas consulté Me Salomon (motifs de première instance, par. 201-202);

d) À l'automne 2005, Mme Matte-Thompson est [TRADUCTION] « satisfaite » de ses placements auprès de Triglobal, de telle sorte qu'elle décide, compte tenu de sa « bonne relation » avec M. Papadopoulos, d'investir le produit de la vente des actifs de 166 auprès de sa firme (motifs de première instance, par. 288; d.a., vol. 7, p. 2603-2604);

e) Au début de 2006, Mme Matte-Thompson, une [TRADUCTION] « femme d'affaires instruite », transfère des fonds personnels ainsi que des fonds de 166 dans le fonds Focus, sans consulter personne d'autre que Triglobal et sans effectuer de recherches (motifs de première instance, par. 204-210 et 289);

f) En avril 2006 et au cours des mois qui suivent, quand Mme Matte-Thompson commence à exprimer des préoccupations au sujet des investissements dans le fonds Focus et demande l'avis de Me Salomon en tant qu'« ami » et « à titre personnel », c'est principalement M. Papadopoulos qui la rassure (voir, p. ex., motifs de première instance, par. 228, 233, 238 et 247).

[203] La juge du procès devait tirer une ligne quelque part. Ainsi, elle conclut que la fraude est la seule véritable cause des pertes, et donc que la recommandation de Triglobal et de M. Papadopoulos par Me Salomon n'est pas une cause *logique*, *directe* et *immédiate* des pertes. Au moment où les intimées ont investi dans le fonds Focus, elles avaient déjà formé leur propre opinion sur la compétence et la probité de leurs conseillers financiers, qui ne reposait pas sur la recommandation initiale de Me Salomon ou ses assurances ultérieures. Contrairement à ce qu'affirment la Cour d'appel et mon collègue, cette conclusion n'équivaut pas à dire que la fraude en soi constituait un *novus actus interveniens*. Elle découle plutôt de l'examen attentif par la juge du procès de la séquence des événements qui ont mené au préjudice. On peut être en désaccord avec son appréciation, mais il n'en demeure pas moins qu'un lien causal direct doit être rompu à un certain moment. Autrement, l'avocat qui fait

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services for years to come — with no end in sight. I am not suggesting that a referring lawyer will never be liable for a recommended professional's faults. In the instant case, for instance, the outcome might have been different if the respondents had not over time developed their own independent relationship with their financial advisors. Put simply, this depends on the circumstances, and no hard and fast rule can be stated. In the instant case, the trial judge was in the best position to assess causation, and she found that the only true cause was the fraud. I see no ground for interfering with that finding.

une recommandation erronée deviendrait garant des services des professionnels qu'il a recommandés pour les années à venir, pour une période indéterminée. Je ne dis pas qu'un avocat qui recommande un autre professionnel ne sera jamais responsable des fautes de ce dernier. Dans la présente affaire, par exemple, l'issue aurait pu être différente si les intimées n'avaient pas développé au fil du temps leur propre relation indépendante avec leurs conseillers financiers. En d'autres termes, la responsabilité dépend des circonstances et on ne peut énoncer une règle rigide et stricte. En l'espèce, la juge du procès est la mieux placée pour évaluer le lien de causalité et elle conclut que la seule cause véritable des pertes est la fraude. Je ne vois aucune raison de modifier cette conclusion.

[204] My colleague insists that the respondents were entitled to rely on Mr. Salomon's recommendation and his later reassurances because of their lawyer-client relationship and that their own "imprudence" — in deciding to transfer funds to Focus without consulting anyone and without making any inquiries — is therefore irrelevant (para. 90). This may sometimes be the case when a lawyer gives specific legal advice in his area of expertise, which the client cannot be expected to second-guess. However, I cannot accept that such a principle applies to the recommendation of another professional. The respondents could not assume that Triglobal and Mr. Padapopoulos would *always* conduct themselves as competent and prudent financial advisors and that all of their advice would be appropriate simply because Mr. Salomon expressed confidence in them.

[204] Mon collègue soutient que les intimées étaient en droit de se fonder sur la recommandation de Me Salomon et ses assurances ultérieures en raison de leur relation avocat-client et que leur propre « imprudence » — c'est-à-dire leur décision de transférer des placements dans le fonds Focus sans consulter qui que ce soit et sans faire de recherches — n'est donc pas pertinente (par. 90). Cela peut parfois être le cas lorsqu'un avocat donne un conseil juridique particulier dans son domaine d'expertise; on ne peut pas s'attendre à ce que le client remette en question un tel conseil. Je ne peux cependant pas accepter que ce principe s'applique à la recommandation d'un autre professionnel. Les intimées ne pouvaient pas supposer que Triglobal et M. Padapopoulos agiraient *toujours* comme des conseillers financiers compétents et prudents et que tous leurs conseils seraient appropriés simplement parce que Me Salomon a exprimé sa confiance en eux.

(b) *The Recommendation of iVest*

b) *Recommandation d'iVest*

[205] I will now turn to the faults that the trial judge did identify, which related solely to Mr. Salomon's specific recommendation of the Manulife and iVest funds. Yet, as we know, the respondents' losses stemmed mostly from their investments in Focus, a fund which Mr. Salomon had not recommended, about which he had not been consulted, and that he had had no duty to verify. More specifically, the respondents' decision to invest in Focus was taken

[205] J'examinerai maintenant les fautes que la juge du procès relève, lesquelles ont uniquement trait à la recommandation expresse de Me Salomon concernant les fonds Manulife et iVest. Or, comme nous le savons, les pertes des intimées découlent principalement de leurs investissements dans Focus, fonds que Me Salomon n'a pas recommandé, au sujet duquel il n'a pas été consulté et qu'il n'avait aucune obligation de vérifier. Plus précisément, la

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by Ms. Matte-Thompson without any input from Mr. Salomon. As the trial judge explained:

> Even if the Court concludes that [Mr.] Salomon was negligent when he reassured Ms. Thompson with respect to the iVest investments, such negligence does not have any causal link to the loss she suffered following her investments with Focus. The evidence shows that [Mr.] Salomon was never involved in the decision to transfer the investments into the Focus funds. He was not consulted and never provided any recommendations with regard to the security offered by the investments made with Focus.
>
> At the time the decision was taken to transfer Ms. Thompson's personal investments in Focus, she dealt directly with the financial advisor and most of the time [Mr.] Salomon was not involved. The evidence shows that by then, [Mr.] Papadopoulos had established a good relationship with Ms. Thompson directly and she did not discuss the investment proposals with [Mr.] Salomon.
>
> . . .
>
> . . . [T]he evidence shows that when the decision to invest 166376's money through Triglobal was made, Ms. Thompson had developed by then a good relation with [Mr.] Papadopoulos. She did not expect [Mr.] Salomon to provide her with investment strategies because she did not ask him to attend the meeting scheduled to discuss how the proceeds of the real estate sale should be invested.
>
> Furthermore, when Ms. Thompson received the wire instruction, she testified that she realized that the money was to be transferred to an offshore fund named Focus. Even though she was sceptical, Ms. Thompson, who was an educated business woman, transferred the funds without consulting anyone, including [Mr.] Salomon. The Court is of the view that she is the one who made an imprudent decision at the time. [Emphasis added; footnote omitted; paras. 210-11 and 288-89.]

[206] I am satisfied that there is no palpable error in these findings. This does not amount to "blaming the victims" as the respondents put it (R.F., at para. 97). Rather, the trial judge found that Mr. Salomon could

décision des intimées d'investir dans Focus a été prise par Mme Matte-Thompson sans aucun conseil de Me Salomon à cet égard. Comme l'a expliqué la juge du procès :

> [TRADUCTION] Même si la Cour conclut que [M^e^] Salomon a été négligent lorsqu'il a rassuré Mme Thompson au sujet des placements iVest, cette négligence n'a aucun lien causal avec la perte qu'elle a subie à la suite de ses investissements dans Focus. La preuve indique que [M^e^] Salomon n'a jamais participé à la décision de transférer les placements dans les fonds Focus. Il n'a pas été consulté et n'a jamais fait aucune recommandation en ce qui a trait à la sécurité offerte par les placements effectués auprès de Focus.
>
> Au moment où a été prise la décision de transférer les placements personnels de Mme Thompson dans Focus, cette dernière traitait directement avec le conseiller financier et la plupart du temps, [M^e^] Salomon n'était pas impliqué. La preuve démontre que [M.] Papadopoulos avait alors établi une bonne relation directement avec Mme Thompson et que celle-ci ne discutait pas des propositions de placement avec [M^e^] Salomon.
>
> . . .
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> . . . [L]a preuve montre que lorsqu'a été prise la décision d'investir l'argent de 166376 par l'entremise de Triglobal, Mme Thompson avait déjà établi une bonne relation avec [M.] Papadopoulos. Elle ne s'attendait pas à ce que [M^e^] Salomon lui propose des stratégies de placement parce qu'elle ne lui a pas demandé d'assister à la réunion prévue pour discuter de la façon dont le produit de la vente des biens réels devrait être investi.
>
> De plus, selon le témoignage de Mme Thompson, lorsqu'elle a reçu les directives concernant le virement, elle a réalisé que l'argent allait être transféré dans un fonds de placement à l'étranger du nom de Focus. Même si elle était sceptique, Mme Thompson, qui était une femme d'affaires instruite, a transféré les fonds sans consulter qui que ce soit, y compris [M^e^] Salomon. La Cour est d'avis que c'est elle qui a pris une décision imprudente à ce moment. [Je souligne; note en bas de page omise; par. 210-211 et 288-289.]

[206] Je suis convaincue que ces conclusions ne contiennent aucune erreur manifeste, ce qui ne revient pas à [TRADUCTION] « blâmer les victimes » comme l'affirment les intimées (m.i., par. 97). La

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not be held liable for investment decisions he had not taken part in, at least not on the basis that he had recommended *another* investment vehicle three years earlier. Yes, the record shows that he believed Focus to be "less risky" than iVest (C.A. reasons, at paras. 131-32 (emphasis deleted)), but he did not *say* so to the respondents. In short, the trial judge did not to see how giving wrongful investment advice regarding iVest could be a direct cause of losses occurring years later in Focus.

juge du procès conclut plutôt que Me Salomon ne peut pas être tenu responsable des décisions de placements auxquelles il n'a pas participé, du moins pas sur le fondement du fait qu'il a recommandé *un autre* véhicule de placement trois ans auparavant. Oui, le dossier indique qu'il croyait que le fonds Focus était [TRADUCTION] « moins risqué » que le fonds iVest (motifs de la C.A., par. 131-132 (soulignement omis)), mais il ne l'a pas *dit* aux intimées. En résumé, la juge du procès ne voit pas comment un conseil de placement erroné concernant iVest peut être une cause directe des pertes subies des années plus tard en raison de placements dans Focus.

[207] More specifically, the trial judge rejected the claim — espoused by the Court of Appeal (at para. 130) and by my colleague (at para. 87) — that Mr. Salomon's recommendation of Manulife and iVest induced an erroneous "climate of confidence" in all of Triglobal's products: "The Court fails to see how [Mr.] Salomon's reassurance in 2003 could lead to a general responsibility towards all the investment decisions taken without him" (paras. 212-13). While it is true that Mr. Salomon's reassurances with respect to iVest were not strictly limited to 2003, the fact remains that there was no reviewable error in that broad conclusion.

[207] Plus précisément, la juge du procès rejette la prétention — à laquelle souscrivent la Cour d'appel (par. 130) et mon collègue (par. 87) — selon laquelle la recommandation de Me Salomon concernant Manulife et iVest a induit chez les intimées un « climat de confiance » erroné à l'égard de tous les produits de Triglobal : [TRADUCTION] « La Cour ne voit pas comment les assurances données par [Me] Salomon en 2003 pourraient entraîner une responsabilité générale à l'égard de toutes les décisions de placements prises sans lui » (par. 212-213). Même s'il est vrai que les assurances données par Me Salomon en ce qui concerne iVest ne se limitent pas strictement à 2003, il reste que cette conclusion générale ne comporte aucune erreur justifiant une intervention en appel.

[208] Simply put, there is no evidence that Mr. Salomon's recommendation of iVest caused the respondents to invest in Focus. While my colleague asserts that Ms. Matte-Thompson relied on Mr. Salomon's "professional judgment concerning the investments she was contemplating" (para. 87), he cannot — nor could the Court of Appeal before him — pinpoint any oral or documentary evidence showing that the specific recommendation of iVest induced or encouraged the respondents to invest in Focus or, more generally, with Triglobal. In fact, it seems that Mr. Salomon's recommendation was not determinative even of Ms. Matte-Thompson's decision to invest in iVest itself (trial reasons, at para. 51).

[208] En clair, rien ne prouve que la recommandation de Me Salomon concernant iVest a fait en sorte que les intimées ont investi dans Focus. Bien que mon collègue soutienne que Mme Matte-Thompson s'est fiée au « jugement professionnel [de Me Salomon] quant aux placements qu'elle envisageait de faire » (par. 87), celui-ci ne peut — tout comme la Cour d'appel avant lui — préciser quels éléments de preuve testimoniale ou documentaire démontrent que la recommandation expresse concernant iVest a incité ou encouragé les intimées à investir dans Focus ou, de façon générale, auprès de Triglobal. En fait, il semble que la recommandation de Me Salomon n'ait même pas été déterminante quant à la décision de Mme Matte-Thompson d'investir dans iVest (motifs de première instance, par. 51).

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[209] At most, the Court of Appeal pointed to a passage from Ms. Matte-Thompson's cross-examination in which she explained that her "total mind set was that [she] was investing with Triglobal. . . . Whether the heading is Focus, whether the heading is iVest, whether the heading is Manulife, it was Triglobal" (C.A. reasons, at para. 76). In my view, this passage suggests that the key recommendation, the one that mattered to her, was the initial recommendation of Triglobal itself. But, as I explained above, that recommendation was neither wrongful nor close enough to have directly caused the losses. By contrast, Mr. Salomon's recommendation of iVest seemed to have been of secondary importance to Ms. Matte-Thompson.

[209] Tout au plus, la Cour d'appel souligne un passage du contre-interrogatoire de Mme Matte-Thompson dans lequel cette dernière explique que dans [TRADUCTION] « son esprit, [elle] investissait auprès de Triglobal. [. . .] Que le titre soit Focus, iVest ou Manulife, il s'agissait de Triglobal » (motifs de la C.A., par. 76). À mon avis, ce passage donne à penser que la recommandation clé, celle qui comptait pour elle, était la recommandation initiale de Triglobal elle-même. Cependant, comme je l'ai déjà expliqué, cette recommandation n'est pas fautive et n'a pas non plus de lien suffisamment étroit pour être la cause directe des pertes. En revanche, la recommandation de Me Salomon concernant iVest semble avoir eu une importance secondaire pour Mme Matte-Thompson.

[210] Overall, my understanding is that the Court of Appeal merely assumed, as does my colleague, that there was a direct causal link between Mr. Salomon's fault concerning iVest and the respondents' losses in Focus (C.A. reasons, at paras. 74-75 and 140). Accordingly, I cannot accept that the trial judge's rejection of the "climate of confidence" theory is grounded in a palpable and overriding error. Once again, all I see is a disagreement with the trial judge's assessment of the evidence and impermissible interference with her inference-drawing process.

[210] De façon générale, selon ma compréhension, la Cour d'appel suppose simplement, à l'instar de mon collègue, qu'il existe un lien causal direct entre la faute commise par Me Salomon concernant iVest et les pertes des intimées liées à leurs investissements dans Focus (motifs de la C.A., par. 74-75 et 140). Par conséquent, je ne peux admettre que le rejet par la juge du procès de la théorie du « climat de confiance » repose sur une erreur manifeste et déterminante. Encore une fois, je ne vois qu'un désaccord avec l'appréciation de la preuve par la juge du procès et une intervention inadmissible à l'égard de ses inférences.

[211] It was also open to the trial judge to reject the claim that Mr. Salomon's failure to verify the propriety of investing in iVest had directly caused the losses in Focus (C.A. reasons, at paras. 117-19; Gascon J.'s reasons, at paras. 88-89). As I understand it, the idea here is that, had Mr. Salomon conducted due diligence and warned the respondents that offshore hedge funds such as iVest were not appropriate investment vehicles for the preservation of capital, the respondents would have doubted the competence of Triglobal and looked for other — presumably more trustworthy — financial advisors. For one thing, this view does not account for the facts that Mr. Salomon was not even qualified to provide investment advice and that it was not his role to provide such advice. Perhaps more importantly, such a finding would amount to substituting mere speculation for

[211] La juge du procès pouvait aussi rejeter l'argument selon lequel le défaut de Me Salomon de vérifier l'opportunité des investissements dans iVest a directement causé les pertes liées aux placements dans Focus (motifs de la C.A., par. 117-119; motifs du juge Gascon, par. 88-89). Si je comprends bien, l'idée ici est que si Me Salomon avait fait preuve de diligence raisonnable et avait averti les intimées que les fonds spéculatifs à l'étranger comme iVest n'étaient pas des véhicules de placement appropriés pour la préservation du capital, celles-ci auraient douté de la compétence de Triglobal et auraient vraisemblablement cherché d'autres conseillers financiers, sans doute plus fiables. Or, ce point de vue ne tient pas compte du fait que Me Salomon n'était même pas qualifié pour donner des conseils en matière de placements et du fait qu'il ne lui appartenait

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evidence of an actual direct causal link (see *Waxman*, at para. 306). We do not know what might have happened had Mr. Salomon criticized Triglobal's iVest proposal. Triglobal might well have responded by proposing other investment options, which the respondents might have accepted. In this regard, it should be borne in mind that Ms. Matte-Thompson initially invested her largest amounts in Manulife, another product recommended by Triglobal which was an appropriate investment vehicle for her and was not part of the fraud (trial reasons, at paras. 51, 200 and 208-9). In short, the trial judge was certainly not required to draw the inference that Mr. Salomon's failure to perform due diligence concerning iVest had *directly caused* the respondents' losses.

(c) *Other Alleged Faults*

[212] I would like to add a quick word on the duties of loyalty and confidentiality. Even if it were assumed that Mr. Salomon committed faults with respect to them, I note that the Court of Appeal did not — nor does my colleague — point to any evidence of a causal link between such faults and the respondents' losses. Put simply, it is unclear how the alleged breaches of the duties of loyalty and confidentiality — such as Mr. Salomon's sharing of emails from the respondents with Mr. Papadopoulos — might have caused the losses. Yet proving breaches of a lawyer's professional duties does not suffice to establish civil liability in the absence of a causal link to an injury (see, by analogy, *Côté*, at para. 18; Baudouin, Deslauriers and Moore, at Nos. 1-666 and 2-143).

[213] Moreover, as I have mentioned a number of times in these reasons, if I were to conclude that Mr. Salomon did commit additional faults related to his duty to advise and his duties of loyalty and confidentiality *after* he had become aware of the May 2007 *La Presse Affaires* article, the outcome would be the same. The trial judge found that, on a balance of probabilities, the funds were no longer

pas de donner de tels conseils. Fait peut-être encore plus important, une telle conclusion équivaut à s'appuyer sur de simples conjectures au lieu d'une preuve de lien causal réel et direct (voir *Waxman*, par. 306). Nous ne savons pas ce qui se serait passé si Me Salomon avait critiqué la proposition de Trigobal d'investir dans le fonds iVest. Triglobal aurait peut-être proposé d'autres options de placements, qu'auraient pu accepter les intimées. À cet égard, il faut garder à l'esprit que Mme Matte-Thompson a initialement investi les sommes les plus importantes dont elle disposait dans Manulife, un autre produit recommandé par Triglobal, qui était un véhicule de placement approprié pour elle et qui n'a pas fait l'objet de la fraude (motifs de première instance, par. 51, 200 et 208-209). En résumé, la juge du procès n'était certainement pas tenue d'inférer que le défaut de Me Salomon de faire preuve de diligence raisonnable concernant iVest avait *directement causé* les pertes des intimées.

c) *Autres fautes relevées*

[212] Je tiens à ajouter quelques mots quant aux devoirs de loyauté et de confidentialité. Même en supposant que Me Salomon a commis des fautes à ces égards, je remarque que la Cour d'appel ne relève pas, et mon collègue ne le fait pas non plus, de preuve d'un lien causal entre ces fautes et les pertes des intimées. Autrement dit, il n'apparaît pas clairement de quelle façon les manquements reprochés aux devoirs de loyauté et de confidentialité — comme le fait que Me Salomon a transmis les courriels des intimées à M. Papadopoulos — auraient pu causer les pertes. Pourtant, il ne suffit pas de prouver qu'un avocat a manqué à ses devoirs professionnels pour établir une responsabilité civile; un lien causal avec le préjudice doit aussi être établi (voir, par analogie, *Côté*, par. 18; Baudouin, Deslauriers et Moore, nos 1-666 et 2-143).

[213] En outre, comme je le mentionne à quelques reprises dans les présents motifs, même si je devais conclure que Me Salomon a effectivement commis d'autres fautes relativement à son devoir de conseil et à ses devoirs de loyauté et de confidentialité *après* avoir eu connaissance de l'article de *La Presse Affaires* publié en mai 2007, l'issue serait la même. La juge du procès conclut, selon la prépondérance des

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recoverable by that time. This inference is based on the fact that, by June 2007, the respondents were already asking for a partial redemption of the funds, but to no avail (trial reasons, at paras. 312-13). Hence, any faults occurring after that date had no consequence on the losses. Such finding of fact is entitled to deference.

(d) *Conclusion on Causation*

[214] To sum up, I am satisfied that there is no reviewable error in the trial judge's findings on causation. The Court of Appeal's intervention was based on its preferred "global" approach to Mr. Salomon's conduct, which led it to completely reassess the evidence with respect both to potential faults and to their causal link to the respondents' losses. A difference of perspective — a preferred "lens" — is not enough to justify an appeal court's intervention in a trial judge's findings. It was open to the trial judge in this case to find that Mr. Salomon's actual faults — the recommendation of Manulife and iVest — had not caused the losses, at least not directly, given that the respondents had not relied on his recommendations when they invested in Focus. Likewise, even if it were assumed that the recommendation of Triglobal and Mr. Papadopoulos constituted a fault, the trial judge was entitled to find, on the facts of the case, that the only true cause of the losses was the fraud itself.

IV. Conclusion

[215] There is no doubt that lawyers should refrain from recommending other professionals lightly — especially given the trust and confidence they themselves may inspire in their clients. This does not mean, however, that the principles of civil liability should be relaxed so as to turn referring lawyers into guarantors of the recommended professionals. While I am sympathetic to the predicament in which the respondents find themselves, I am not convinced that Mr. Salomon is liable for their losses. Most

probabilités, que les fonds ne pouvaient plus être recouvrés à ce moment. Cette inférence repose sur le fait que les intimés demandaient déjà, en juin 2007, un remboursement partiel de leurs fonds, mais sans succès (motifs de première instance, par. 312-313). Par conséquent, les fautes commises après cette date n'ont eu aucune conséquence sur les pertes. Une telle conclusion de fait commande la déférence.

d) *Conclusion sur le lien de causalité*

[214] Pour résumer, je suis convaincue que les conclusions de la juge du procès concernant la causalité ne contiennent aucune erreur révisable. L'intervention de la Cour d'appel repose sur l'approche « globale » qu'elle privilégie quant à la conduite de Me Salomon, et cette approche la mène à procéder à une nouvelle appréciation complète de la preuve concernant les fautes possibles et leur lien causal avec les pertes des intimées. Un point de vue différent — le fait de privilégier un autre « prisme » — ne suffit pas à justifier la modification par une juridiction d'appel des conclusions d'un juge de première instance. En l'espèce, la juge du procès pouvait conclure que les fautes effectivement commises par Me Salomon, soit la recommandation de Manulife et d'iVest, n'a pas causé les pertes, du moins pas directement, étant donné que les intimées ne se sont pas fondées sur ses recommandations lorsqu'elles ont investi dans Focus. De la même façon, même en supposant que la recommandation de Triglobal et de M. Papadopoulos constitue une faute, la juge du procès pouvait conclure, sur le fondement des faits de l'affaire, que la seule véritable cause des pertes est la fraude elle-même.

IV. Conclusion

[215] Il ne fait aucun doute que les avocats doivent éviter de recommander d'autres professionnels à la légère, particulièrement en raison de la confiance qu'ils peuvent inspirer à leurs clients. Cela ne veut toutefois pas dire que les principes de la responsabilité civile doivent être assouplis de telle sorte que les avocats deviennent garants des professionnels qu'ils recommandent. Bien que je ne sois pas insensible à la situation difficile dans laquelle se trouvent les intimées, je ne suis pas convaincue que Me Salomon

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importantly, I am satisfied that the Court of Appeal did not identify reviewable errors in the trial judgment. Rather, it erroneously reweighed the evidence as a whole simply because it preferred to look at the case through a different "lens". Bearing in mind that the trial process must be afforded deference, this Court must intervene to restore the trial judge's findings. I would therefore allow the appeal with costs in this Court and in the courts below.

Appeal dismissed with costs, CÔTÉ J. *dissenting.*

Solicitors for the appellants: IMK, Montréal.

Solicitors for the respondents: Norton Rose Fulbright Canada, Montréal.

soit responsable de leurs pertes. Plus important encore, je suis d'avis que la Cour d'appel ne relève pas d'erreurs donnant ouverture à révision dans le jugement de première instance. Elle procède plutôt à tort à une nouvelle appréciation de l'ensemble de la preuve simplement parce qu'elle préfère examiner l'affaire à travers un « prisme » d'analyse différent. Comme il convient de faire preuve de déférence à l'égard de l'instruction du procès, notre Cour doit intervenir pour rétablir les conclusions de la juge du procès. Par conséquent, je suis d'avis d'accueillir le pourvoi avec dépens devant la Cour et devant les juridictions inférieures.

Pourvoi rejeté avec dépens, la juge CÔTÉ *est dissidente.*

Procureurs des appelants : IMK, Montréal.

Procureurs des intimées : Norton Rose Fulbright Canada, Montréal.

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TAB 3

CITATION: 2505243 Ontario Limited o/a ByPeterandPaul.com v. Princes Gate GP Inc. et al., 2021 ONSC 4649
COURT FILE NO.: CV-20-00644262
DATE: 20210705

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
2505243 Ontario Limited o/a ByPeterandPaul.com	)	*Randy Sutton*, *Robert Frank* and *Erica Anscheutz*, for the Plaintiff
Plaintiff	)	
– and –	)	
Princes Gate GP Inc. in its Capacity as General Partner of Princes Gates Hotel Limited Partnership	)	*Peter W.G. Carey*, *Paul E.F. Martin* and *Amanda Pilieci*, for the Defendant
Defendant	)	
	)	**HEARD:** March 1-5 and March 8-10, 2021

C. GILMORE, J.

TRIAL JUDGMENT

OVERVIEW

[1] This is a case in which both parties looked forward to a profitable working partnership based on their respective service industry skill sets. Unfortunately, the plan did not work out. The Defendant terminated the Plaintiff's contract and leases, and the Plaintiff has sued for damages.

[2] The undisputed facts in this case make it clear that each side had very different expectations and philosophical approaches to running a profitable hotel. Even if a termination had not occurred, it is unlikely that the parties could have worked together cooperatively in the long term. In short, it would be unrealistic for there to have been future business profits generated from what had become a toxic relationship.

[3] However, the Plaintiff spent millions of dollars on leasehold improvements with the expectation of running two profitable restaurants within the hotel. No matter what the reason for the breakdown of the commercial relationship, the hotel has benefitted and will benefit in the future

from those improvements. The hotel should be required to compensate the Plaintiff for its capital outlay with adjustments.

[4] The Plaintiff, 2505243 Ontario Limited o/a ByPeterandPaul.com ("250"), seeks damages in the amount of $12,758,000 for lost profits from the Defendant, Princes Gate GP Inc. ("the Hotel"). Alternatively, 250 seeks damages for $11,000,000, representing the Plaintiff's lost investment, breach of the Food and Beverage Services Agreement (the "FBA") and the Leases (defined below), breach of the duty of good faith and honest performance, and unjust enrichment.

[5] 250 seeks a further $2,100,000 for 250's liability to its former employees for termination pay, vacation pay and other amounts which may be owed under the *Employment Standards Act 2000*, S.O. 2000, c.41 ("the ESA").

[6] Finally, 250 seeks punitive and aggravated damages of $10,000,000 for breach of certain agreements and a breach of the duty of good faith and honest performance.

[7] The Hotel denies entitlement to damages of any kind and counterclaims for $2,000,000 for unpaid rents and services charges after applying any set offs.

[8] The main dispute between the parties centres on leases to two restaurants at the Hotel on Princess Boulevard at Exhibition Place in Toronto, and the FBA. 250 alleges that the Hotel purported to terminate the FBA and the Leases on the basis of alleged defaults.

[9] 250 further alleges that the Hotel acted in bad faith by insisting that 250 pay rent while the Hotel was shut down during the pandemic and refusing to reasonably assist it with applications for government rental assistance. The Hotel then replaced 250 with a new food and beverage service provider, Harlo, immediately after terminating the Agreements it had with 250, and coincident with its selection as one of two venues in Toronto selected as NHL hubs.

[10] The Hotel defends by alleging that 250 failed to provide the service it represented it could, took event deposits and used them for cash flow, and failed to pay rent and additional rent when required. 250 was in default of numerous provisions of the FBA and the leases which entitled it to terminate its Agreements with 250. 250 still owes the Hotel rent and other unreconciled amounts.

[11] The Hotel also denies that it acted in bad faith, and denies any intentional connection with the termination of the FBA and the Leases with the commencement of Harlo as a new food service provider. The Agreements were terminated due to 250's failure to pay rent.

The Parties, Witnesses and Agreed Facts

[12] Set out below are the agreed facts as between the parties and a general timeline of events:

(a) Princes Gates GP Inc., in its capacity as general partner of Princes Gates Hotel Limited Partnership, operates Hotel X Toronto (referred to as "the Hotel" in these reasons).

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(b) The Hotel is located at 111 Princes' Boulevard in the Exhibition Place grounds in Toronto, Ontario.

(c) The Hotel is incorporated under the laws of British Columbia.

(d) 250 is incorporated under the laws of Ontario. The common shares of 250 are owned by 2566345 Ontario Ltd. and the Eliopoulos 2018 Family Trust, 20% and 80% respectively.

(e) The FBA dated January 4, 2017 was executed by the Hotel and 250 on January 25, 2017. An Amending Agreement to the FBA was executed by the parties on March 16, 2018 ("the Amending Agreement"). 250 is listed as the Operator under the FBA and the Amending Agreement.

(f) The Garden Restaurant Lease dated January 4, 2017 was executed on January 25, 2017 ("the Petros Lease"). The Second Floor Restaurant Lease dated January 4, 2017 was executed on January 25, 2017 ("the Maxx's Lease") (together with the Petros Lease "the Leases").

(g) The FBA, the Amending Agreement, the Petros Lease, and the Maxx's Lease are collectively referred to in this Judgment as "the Agreements."

(h) On March 20, 2018, Hotel X officially opened. 250 began offering food and beverage services under the FBA in March 2018.

(i) 250 began operating Maxx's Kitchen in March 2018. 250 began operating Petros in September 2019.

(j) On March 17, 2020, the Ontario government declared a State of Emergency in response to the COVID-19 pandemic. On March 23, 2020, the Hotel closed to the public.

(k) On June 3, 2020, a Letter of Intent was signed between Harlo and the Hotel which was conditional on the dissolution of the Agreements.

(l) The Hotel terminated the Agreements on July 2, 2020.

(m) On July 9, 2020, it was announced that the Hotel would be one of the National Hockey League bubble hotels for the resumed NHL season which was set to begin on August 1, 2020.

(n) On July 14, 2020, the Hotel reopened its doors. It has remained open since then.

(o) On July 20, 2020, 250 commenced this action.

(p) None of the Agreements contain any provision requiring 250 to ensure that client deposits were applied solely and exclusively to the cost of the specific events to

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which they related. None of the Agreements contain any provision requiring 250 to maintain cash on deposit or other liquid investments equal to the amount of all client deposits paid to it.

(q) On September 9, 2020, the Hotel, along with other creditors, commenced a bankruptcy application seeking to have 250 involuntarily adjudged bankrupt.

(r) On October 9, 2020, the bankruptcy application was stayed in favour of the Notice of Intention filed by 250.

(s) On October 30, 2020, the Hotel filed its Statement of Defence and Counterclaim.

[13] Set out below is a table identifying the parties, witnesses and other persons mentioned during the course of the trial.

NAME	**TITLE**
PRINCES' GATE GP INC.	
Henry Kallan	President of Princes' Gate GP Inc., in its capacity as general partner of Princes' Gate Hotel Limited Partnership
Christopher Lambert	Former Managing Director, Hotel X
Fariyal Hasham	General Manager, Hotel X
Colleen Ross	Former General Manager, Hotel X
Budi Laksmono	Chief Financial Officer, Hotel X
Sanket Patel	Former Controller, Hotel X
Krishna Gaudel	Former Director of Finance, Hotel X
Adele Gutman	Vice President of Sales, Marketing and Revenue, Hotel X
Celso Thompson	Former Director of Sales and Marketing, Hotel X
Luke Nixon-Janssen	Former Director of Sales and Marketing, Hotel X
Saira Morris	Director of Sales and Catering, Hotel X
Matt Black	Director of Brand Management, Hotel X
Angela Racco	Director of Human Resources, Hotel X

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Meagan McDonald	Director of Guest Experience, Hotel X
2505243. ONTARIO LTD	
Peter Eliopoulos	Founder and President of Peter and Paul's Hospitality Group. Owner of 2505243 Ontario Ltd.
Dean Galanis	Owner of 2505243 Ontario Ltd.
Erin Breckbill	Vice President of Sales and Marketing of Peter and Paul's Hospitality Group
Anil Dash	Chief Financial Officer of Peter and Paul's Hospitality Group
Jacob Park	Director of Food and Beverage Operations/Hotel Division, Peter and Paul's Hospitality Group
Yannis Paravolos	Former Vice President of Operations/Hotel Division, Peter and Paul's Hospitality Group
Michelle Law	Accounting Manager at Peter and Paul's Hospitality Group
OTHER	
Angelo Raitsinis	President, Rose Hill Design/Build
Michael Kimel	Chairman, Harlo Entertainment
Brad Kinsella	Director, Escape Management Group
Joseph Sgro	General Manager and Partner, ZZEN Group of Companies

The Agreements and Background

[14] As set out in the agreed facts, 250 operated at the Hotel under the Agreements. The Agreements included the leases for Petros and Maxx's, and the FBA. Petros was a high-end restaurant, and Maxx's was intended for more casual dining for breakfast, lunch, and dinner service. The Agreements were signed in January 2017.

[15] The leases stipulated that each of Maxx's and Petros were required to pay a minimum rent which increased in year 3 and year 7. Each restaurant also paid 10% of gross receipts to the Hotel, where those receipts were in excess of specified amounts which were different for each restaurant. Additional rent was also charged to each restaurant as their share of common expenses with the Hotel.

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[16] The FBA provided that 250 would provide food and beverage services for Petros, Maxx's, banquets and conferences, the rooftop bar (sometimes referred to as the "Skybar"), the lobby bar, the patio, the Grab & Go restaurant (sometimes referred to as "Nespresso Café"), the staff cafeteria, the VIP lounge, the cinema concessions, and in-room dining.

[17] Mr. Dean Galanis testified on behalf of 250. He is a minority shareholder in 250 with over 35 years' experience in the restaurant industry. His evidence was that as early as 2014, 250 began planning for the construction of the two restaurants at the Hotel. There was a significant amount of planning, design, construction, and supply and materials management to get the restaurants ready for the Hotel opening. Mr. Galanis was integrally involved in the management of that construction.

[18] The Hotel opened in March 2018, and 250 began service under the FBA. Maxx's was also opened at that time. Petros was supposed to open within 180 days of the Hotel opening. There is a dispute about why there were delays in opening Petros, but suffice to say it did not open until September 2019. During periods of full operation, 250 employed over 200 people at the Hotel. According to the damages brief of 250, the capital expenditures of 250 for fixturing the restaurants and paying for uniforms was $7,124,524.

[19] There are several key disputes concerning the FBA. These relate to the payment of licence fees, the room rental revenue split, the payment of 250's share of gross receipts, and the performance of services. The relevant provisions are set out below in the excerpts below. The FBA identifies 250 as the "Operator" and the Hotel as "PGH".

> **4.1. Performance of the Services**
>
> (a) The Operator agrees to provide and perform the Services in a manner that is consistent with the highest standards established and maintained by PGH with respect to the Hotel as a first class transient hotel comparable to Four Season Hotel, Trump Hotel or the Hazelton Hotel in Toronto, Ontario. At all times through the Term, the Operator shall continuously, actively and diligently provide the Services in an up-to-date, and first-class, and reputable manner each day during such Business Hours as may be determined by PGH acting reasonably and in conjunction with the Operator. The Parties agree that "room service" to the Hotel Rooms will be provided on a 24 hour, 7 days a week basis.
>
> …
>
> (d) The Operator acknowledges that the performance of the Services will have a material impact on the ability of PGH to successfully operate the hotel as a first-class transient hotel comparable to the Four Seasons Hotel, the Trump Hotel and the Hazelton Hotel in Toronto, Ontario. Accordingly, the Operator acknowledges and agrees that its covenants and agreements to provide the Services at the times, in the manner and to the level and standards required by this Agreement was a material inducement to PGH

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entering into this Agreement with the Operator, that PGH relied on such covenants and agreements of the Operator in entering into this Agreement and that PGH would not have entered into this Agreement with the Operator in the absence of such covenants and agreements by the Operator. If at any time, in the sole opinion of PGH, the services are not being performed in compliance with the standards established and maintained by PGH with respect to the Hotel or in the event the Operator is not complying with the provisions of this Agreement, including, without limitation, this Article 4, the PGH Operational Requirements (as hereinafter defined) and Schedule "E", PGH shall provide written notice thereof to the Operator (a "Default Notice"). The Operator shall have a period of 60 days to remedy, to the satisfaction of PGH, all of the items of default referred to in the Default Notice, failing which PGH shall have the right to terminate this Agreement upon written notice to the Operator.

4.2 Covenants of the Operator

(a) In the court of the Operator's performance of the Services and use of the Facilities, the Operator covenants and agrees to do the following:

(i) Maintain such number of full time and part-time personnel, including hostesses, servers, bartenders, bus personnel, food prep and kitchen staff, and managers, to ensure that the Services are performed to the standards required by PGH and so as to maintain the highest standards established and maintained by the Landlord with respect to the Hotel.

5. Payments

5.1 In consideration of the rights and privileges herein granted, PGH and the Contractor agree to the following:

(a) **Payment of License Fees -** The Operator shall pay to PGH an amount equal to twenty-two and one-half percent (22.5%) of the Gross Receipts generated in each Accounting Period (the "Licence Fees"). The Licence Fees shall be paid to PGH at the same time that PGH provides to the Operator its bi-weekly statement of Gross Receipts for the immediately preceding Accounting Period. Licence Fees shall be payable bi-weekly on Monday of each second week during the Term including the Monday next following the end of the Term. The amount of each payment shall be equal to the amount determined by applying the percentage referred to in Section 5.1(a) to the aggregate of the Gross Receipts for the immediately preceding Accounting Period.

5.3 Rooftop Bar and Room Rental (RB+RR) revenue split – All revenue received for the Rooftop Bar event space rental (RB) as well as revenue received

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from Room Rental (RR) will be split 60% to PGH and 40% to the Operator. Price for RB+RR may be re-visited upon the written request of either PGH or the Operator and changed upon the mutual agreement of PGH and the Operator. For further clarity, it is agreed that there shall be no Licence Fees paid by the Operator on the forty percent (40%) of the RB and RR revenue that is allocated to the Operator.

17.1 Repairs and Maintenance

17.1 Operator Obligations

The Operator shall, at all times during the Term, at is own cost and expense, replace, repair, maintain and keep the Operator Built facilities….in a manner consistent with the highest standards established and maintained by PGH with respect to the Hotel….

21. Termination by PGH

21.1 Grounds for Termination

If any one or more of the following shall occur (each, an "Event of Default"), PGH may at its option terminate this Agreement by written notice of termination delivered to the Operator at its address set forth herein which notice shall be deemed to be given when received.

(a) The Operator fails to observe or perform any of its obligations under this Agreement… and the default continues for thirty (30) days….

Gross Receipts – means the total of all gross sales and receipts from all business conducted by the Operator upon or from the Hotel or the supply and performance of the Services, save and except gross receipts derived from the second floor restaurant owned by the Operator pursuant to the Second Floor Lease and gross receipts derived from the main floor Garden Restaurant and Lobby Bar operated by the Operator pursuant to the Ground Floor Lease…

[20] The FBA was amended in March 6, 2018. The amendments may be summarized as follows:

Food and Beverage Agreement

Licence fees with respect to banquet facilities and conference room facilities - 15% of the gross receipts in any year that are less than $15 million and 22.5% of the gross receipts in any year that are in excess of $15 million.

Licence fees with respect to the Rooftop Bar - 15% of the gross receipts in any year that are less than $5 million and 22.5% of the gross receipts in any year that are in excess of $5 million.

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> No licence fees with respect to supply of food and beverages to the hotel rooms, the Grab & Go or the Cinema Concessions.
>
> Rooftop bar event space rental, as well as revenue received from conference room rentals are split 60% to PG and 40% to 250.
>
> 250 was responsible to pay Hotel X for its share of utilities and taxes ("F&B Billback").

[21] Mr. Galanis agreed that the March 2018 amendment was beneficial to 250 as it meant 250 received a larger split of the Licence Fees. His evidence was that it represented a concession on the part of the Hotel of about $1M. Mr. Kallan, the President of the Hotel, agreed but was clear that the concession was made on the understanding that 250 would pay proper wages and benefits to its staff, maintain required levels of service, and hire appropriate staff and management. As will be set out below, the Hotel's position is that 250 never lived up to its commitments in this regard.

[22] Mr. Eliopoulos testified that the Amending Agreement was required because the original 22.5% licence fee payable to the Hotel was much too high when the Hotel was not making money. In any event, he and Mr. Kallas originally shook hands on 16.5% which was more aligned to the right percentage so the reduction to 15% was entirely reasonable.

[23] Mr. Christopher Lambert, the Managing Director of the Hotel, gave evidence that the real purpose of the Amending Agreement was to lower the Licence Fees payable by 250 to ensure it had sufficient funds to pay its employees at a level similar to other five-star hotels. As the Hotel sought to market itself in the "Comparative Set" ("CompSet") of other five-star hotels in Toronto such as the Four Seasons, the Shangri-la, the Ritz Carlton and the St. Regis, it was imperative that its employees were paid at the CompSet level.

History of the Alleged Breaches of the FBA and the Leases – The Issues

Readying for the Hotel Opening – A Rough Start

[24] Mr. Peter Eliopoulos is the President and Founder of the ByPeterandPaul ("BPNP" or "PNP") group of companies. 250 is one of BPNP's companies. Mr. Eliopoulos described BPNP as a family-run business which employs over 1,200 people. BPNP has 11 event venues and specializes in weddings, fundraisers, and corporate events. Mr. Eliopoulos has been in the event business for over 39 years.

[25] When Mr. Eliopolous met Mr. Henry Kallan, the owner of the Hotel, he was enthusiastic about his vision for the hotel and the promise of significant occupancy right from the start. He knew that Mr. Kallan wanted the Hotel to be the best in Toronto and at least on par with other five-star hotels in Toronto.

[26] Mr. Kallan is a self-made businessman who owns seven hotels throughout the world, including the exclusive and highly-rated Aria Hotel in Budapest. Mr. Kallan speaks five languages and has been in the hotel business his entire life. He has third-party food and beverage providers in all of his hotels except the Aria hotel. He told the Court that he has never had problems with his

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food and beverage providers until his dealings with 250. When Mr. Kallan first met Mr. Eliopoulos, he liked his energy and enthusiasm. Mr. Kallan was told and believed that 250 had the tools, connections, and experience to do the job and make money for the Hotel and 250.

[27] The Hotel is a very large property with over 400 rooms, a large fitness facility, 30,000 square feet of banquet space, a café and restaurants. The 250 team knew that this was a premiere property and that it was the biggest project that BPNP had ever taken on. It was also projected to be its most lucrative, generating revenues that would be double or triple those generated by BPNP's other venues. Mr. Kallan was careful to mention in his evidence that, although the Hotel was a premiere property, there was never any promise of guaranteed profits made to 250.

[28] Ms. Erin Breckbill is the Vice-President of Sales and Marketing for BPNP and has been with BPNP for 18 years. Her evidence was that Mr. Kallan came to tour some of BPNP's venues, attended one of their events, and sampled their catering. He was very impressed with BPNP's approach, service levels and food quality.

[29] Mr. Eliopoulos was very disappointed with how things started out with the Hotel. The fitness club, which was projected to have 2,700 members, opened with only 100 members. The Hotel opening was delayed by 2.5 years. 250 had several false starts which included ramping up and hiring employees for openings that were repeatedly delayed.

[30] Mr. Eliopolous reflected back on the business losses 250 suffered in 2018, 2019 and 2020. He had never been in a business that was not busy from day one due to corporate and catered events having to be booked far in advance. His evidence was that the consistently-delayed hotel opening, alongside an insufficient marketing plan on the part of the Hotel, led to 250 having to fund a fully-staffed food and beverage business and restaurants with minimal Hotel occupancy.

[31] Mr. Galanis agreed that the Hotel and 250 got off to a difficult start. Hotel occupancy was seriously affected by the Hotel opening delays resulting in a decrease in projected revenues. Since the Agreements with the Hotel were based on percentages, the Hotel's revenue stream from the Agreements flowed from 250's revenues. Both parties were negatively affected when the Hotel was below capacity.

[32] Ms. Colleen Ross, the former General Manager of the Hotel, testified for 250. She worked for the Hotel from March 2016 and was terminated in 2018. She described the many challenges in readying the Hotel for opening. First, there were design shortcomings which did not allow for sufficient office space or storage. Second, without a firm opening date it was very difficult to find and hire staff. Third, with respect to construction, change orders were not signed off in a timely manner and the General Contractor changed mid-stream. Cellphone service was also problematic in the Hotel due to many "dead zones."

[33] Ms. Ross also testified that the occupancy rate on opening was very low because the public lacked confidence in the Hotel opening and little advance marketing or sales were done. The Hotel had a marketing director, Mr. Celso Thompson, whom Ms. Ross described as capable and enthusiastic, but he lacked independence as he took direction from Mr. Kallan and Ms. Gutman (in New York), and was often unable to make decisions on his own.

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[34] Ms. Breckbill also testified about the operational challenges at the Hotel. 250 was not consulted about the layout of food and beverage service areas. The banquet areas and Skybar lacked sufficient kitchen and prep space. The elevators were often under construction or not working.

The Staffing and Management Issues

[35] The real problems between the parties began a mere nine months after the opening of the Hotel.

[36] On January 3, 2019, the Hotel wrote to 250 outlining concerns with the FBA and the Leases. The complaints in the January 3, 2019 letter alleged various breaches of the FBA and the Leases, and may be summarized as follows:

a. 250 had failed to achieve the "highest standards" operational threshold in the FBA by failing to ensure it had adequate and trained employees and managers to deliver services. Temporary personnel and turnover created a lack of consistency.

b. 250 failed to hire an HR Manager for its employees at the Hotel.

c. 250 had undertaken minimal marketing of its banquet facilities and restaurants thereby resulting in revenues far below those anticipated.

d. Mr. Eliopoulos had made disparaging remarks about the Hotel and its operation, and instructed 250's employees not to cooperate with the staff at the Hotel. Further, Mr. Eliopoulos had also used profane language when speaking with hotel employees.

e. 250 attempted to divert prospective banquet business to affiliate businesses of 250.

[37] Mr. Kallan described the concerns as a problem with "the overall culture and the way they managed their people."

[38] 250 responded to the January 3, 2019 letter on January 7, 2019, expressing outrage at the allegations of breaches and reminding the Hotel that it was underperforming and that 250 had provided "unmortgaged capital" to fixture the restaurants believing in the Hotel X vision. 250 pointed out that the promised hotel spa had not yet been constructed and that the fitness club with a projected 2,700 members only had 100 members. 250 reiterated that the Hotel insisted that 250 retain a full complement of staff when the hotel's occupancy levels were less than 20%. 250 complained it had lost $1M in the previous nine months.

[39] The Hotel's position, as expressed by Mr. Lambert, was that staff turnover with 250 was simply too high and that the outlets (meaning the restaurants, Skybar, Grab & Go, the VIP lounge and room service) were not properly managed. Managers were actually working in the outlets as opposed to managing them. Mr. Lambert explained that if a hotel wants to be at the top of the CompSet, a consistently high level of service and food quality is key. Mr. Lambert had learned the importance of this during his eight years with the Four Seasons Hotel. His view was that 250's

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inadequate management style and high turnover created inconsistencies that affected the quality service the Hotel sought to deliver.

[40] Tensions between 250 and the Hotel continued. 250's Food and Beverage Director, Mr. Jacob Park, agreed that there were communication challenges between 250 and the Hotel. His instructions from Mr. Galanis and Mr. Eliopoulos were that staff were to report issues to their immediate supervisors, who in turn would consult with him as the Director. The concern expressed by Mr. Galanis, Mr. Eliopoulos and Mr. Park in their evidence was that they did not want staff to receive inconsistent messaging from the Hotel.

[41] Mr. Yannis Paravolos testified on behalf of 250. He was the Vice President of Operations and the General Manager of Food and Beverage for 250 from early 2016 to October 2018. He was hired before the Hotel opened to ensure appropriate staff were hired, trained and ready for food services for the Hotel opening. He explained that 250's approach to staffing at the hotel was to hire the best talent they could find and use a selective and thorough recruitment process. Ms. Breckbill agreed that 250's team was both experienced and senior. It was frustrating when the Hotel interfered with 250's operations as the Hotel did not have the same level of experience with food and beverage operations.

[42] Mr. Paravolos did not agree that there was any lack of cooperation by 250 towards the Hotel. He described 250's performance as "excellent" in the circumstances given the challenges with the opening of the Hotel.

[43] Ms. Ross agreed that 250 was cooperative with the Hotel. She had a daily briefing with 250's management and felt they met food and beverage expectations. Their leadership team were all food and beverage professionals.

[44] Mr. Paravolos prepared an organizational management chart before the Hotel opened. The chart contained positions that were not yet filled but would be based on demand. He explained that several job fairs were held to hire staff for the Hotel opening. However, each time the opening was delayed they would lose potential hires. They did occasionally use agency services for staff because they had a difficult time attracting hourly wage workers. 250 did not like doing this as it was actually more expensive. But given the low occupancy and business demand, it simply made sense to fill in with agency services as needed.

[45] Mr. Kallan was shown Mr. Paravolos' organization chart during his testimony. His evidence was that many of the positions in the organizational chart were never filled. His view was that250 lacked proper oversight for its outlets. It lacked management structure and reporting lines. Mr. Park was a good manager but unable to make decisions on his own. Mr. Kallan begged 250 to hire an HR manager. That never happened. Mr. Kallan did not agree with Mr. Paravolos that positions would be filled as demand grew. His philosophy was that the entire staff and management structure had to be in place to attract and retain business.

[46] The organization chart that Mr. Paravolos created was updated several times as the Hotel progressed towards opening. The chart he created in June 2018 was intended to reflect staffing for a completed hotel with 80% occupancy. It was based on the $30M in revenue that Mr. Kallan

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suggested would be the minimum 250 could expect when the Hotel opened. However, Mr. Paravolos was clear that they never earned anything close to that level of revenue while he was there.

[47] The Hotel complained from the start that 250's employees had been going to the Hotel's HR manager when they had a concern, and that this arrangement was not acceptable. Mr. Galanis agreed that the organization chart included 250 having an HR manager. An HR manager was never hired. Mr. Eliopoulos' evidence was that he did not believe in HR managers. He felt it best that the manager of that department dealt directly with employees when there were difficulties.

[48] The lack of an HR manager was raised on multiple occasions by the Hotel after the January 3, 2019 letter. It was the view of the Hotel that 250 could not effectively manage a staff of over 200 people without an HR manager. The Hotel's witnesses all testified that 250 committed to hiring an HR manager but never did. According to Mr. Lambert, this was frustrating for the Hotel management and led to food and beverage service issues because there was no designated person overseeing each outlet.

[49] Ms. Angela Racco has been the HR Director at the Hotel since March 2017. She was provided with a copy of the organization chart. She was also concerned about the lack of an HR manager within the 250 organization. Occasionally 250 employees came to her with concerns because 250 management was not responding to them and there was confusion about whom they were supposed to go to with their concerns.

[50] The Hotel offered a new employee orientation. Over time, the number of 250 employees that attended the new employee orientation dwindled. Ms. Racco speculated that this was because it was not encouraged by 250, which did not want their employees to be given information about wage and benefits entitlements. She was critical of 250's employee training program which consisted of a day or two of job shadowing.

[51] It was pointed out to Mr. Kallan that there was no requirement that 250 hire an HR manager in any of the Agreements. Mr. Kallan understood this, but said that 250's organization chart included an HR Manager and that 250 committed to hiring one. Mr. Kallan's view was that one could not run a business like 250 with 200 employees without an HR manager.

[52] Mr. Park's evidence was that he met daily with Hotel staff to ensure coordination and that service levels were met. There were challenges though. Because of the low occupancy rates at the Hotel, business levels were not what was expected. Some staff left because they were not getting the hours they needed. Scheduling was another challenge. Staff were scheduled based on occupancy rates and historical data. Often the Hotel would upgrade guests or give them access to the VIP lounge without letting 250 know. This created scheduling and service issues.

[53] Mr. Lambert's evidence was that the Hotel did not view Mr. Park as the right person to lead the entire food and beverage operation. He lacked authority to make decisions and was constantly having to run decisions by 250's ownership. Mr. Lambert felt that Mr. Park was better suited as the Banquets Manager. According to Mr. Lambert, these types of conflicts concerning 250's management were constant.

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[54] Ms. Racco's evidence was that 250's management had nice people but that they were ineffective and lacked autonomy. There were a lot of issues about Mr. Park because the Hotel felt he could not continue in the job if he did not have the authority to make decisions without the approval of Mr. Galanis or Mr. Eliopoulos.

[55] Ms. Racco was directed to the minutes of several senior leadership meetings which set out that 250 was continuing to hire staff. In particular, the minutes of the February 25, 2020 meeting reflected that Mr. Park was actively recruiting an HR manager. Ms. Racco agreed that Mr. Park had come to her office and told her that he had interviewed some candidates, however the position was never filled because of the Hotel shutdown.

[56] It was pointed out to Mr. Kallan that he had his own management turnover issues at the Hotel. For example, he initially hired Colleen Ross as the Managing Director, but she was terminated in the fall of 2018. He then promoted Mr. Lambert to that position, only to have Mr. Lambert - leave in October 2020. He was replaced with another Hotel employee, Fariyal Hasham. It was put to him that in less than three years there were three different Managing Directors.

[57] Mr. Kallan did not see it that way. Ms. Ross had conflicts with other employees, and it was better that she left, but the parting was amicable. Mr. Lambert left for a job that was closer to his home and family. Mr. Lambert and Ms. Hasham were not changes to management, they were promotions from within the Hotel. He viewed it as being only one real change in three years.

[58] Mr. Kallan was also asked about the turnover of his Director of Sales (four people in two years, plus Ms. Gutman filling in for a few months). Again, he only viewed this as two changes and not four because the current Director of Sales, Saira Morris, was promoted from within the Hotel.

Further Tensions in the Relationship Between the Hotel and 250

[59] 250 was critical of the Hotel's Managing Director, Mr. Lambert, whom it blamed for fostering an "us. v. them" attitude and inciting whispered discussions about ousting 250 from the Hotel. Mr. Galanis agreed that he and Mr. Eliopoulos never saw eye to eye with Mr. Lambert, although he never heard Mr. Eliopoulos swear at Mr. Lambert as was alleged by the Hotel.

[60] Mr. Lambert told the Court that there was a "learning curve" with respect to 250 and the Hotel working together. His view was that 250 did not have experience in the luxury hotel industry. When the Hotel tried to set expectations and help with food and service quality, 250 took this as an affront and pushed back. There were many, many meetings between 250 and the Hotel to try to maintain communication channels.

[61] Mr. Eliopoulos agreed that matters occasionally became heated between 250 and the Hotel. He did not deny that he told Mr. Lambert to "fuck off" on more than one occasion. His evidence was that Mr. Lambert was completely unwilling to work with 250. Mr. Park testified that he heard both Mr. Eliopoulos and Mr. Kallan use colourful language at various times.

[62] Mr. Lambert confirmed that Mr. Eliopoulos had told him to "fuck off" on more than one occasion and recalled a 10-minute tirade in which Mr. Eliopoulos yelled at him, told him he did

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not know what he was doing, and called him a "fucking idiot." Mr. Lambert told the Court that he did not receive any form of apology from Mr. Eliopoulos after this incident. According to Mr. Lambert, this was just the way Mr. Eliopoulos behaved.

[63] Mr. Lambert complained that Mr. Eliopoulos would at times get very loud, drunk, and "in your face" at the Hotel. His behavior instilled a permissive culture within 250 that led to complaints from staff about management. This was yet another reason why the Hotel insisted that 250 hire an HR Manager.

[64] Mr. Park described Mr. Lambert as intimidating. He testified that Mr. Lambert told him on more than one occasions that if 250 did not meet their demands he would fire Mr. Park and "kick them [250] out." Mr. Park found this stressful.

[65] Ms. Ross described Mr. Lambert's relationship with 250 as adversarial and tense. She was puzzled as to why Mr. Lambert was hired as the Hotel's Managing Director when his experience was in accounting and not hotel management.

[66] Mr. Lambert denied the allegations related to both his behavior and that of Mr. Kallan. Mr. Lambert has a CPA designation and significant experience in the hotel industry. He described Mr. Kallan as an approachable and respectful employer. He felt the workplace at the Hotel was safe and harassment free.

[67] However, Mr. Park's evidence was that Mr. Kallan's leadership style was intimidating. He put down Mr. Eliopoulos and called him a drunk. He told Mr. Park more than once that the Hotel wanted nothing to do with Mr. Eliopoulos because he was crazy. He insisted that Mr. Park hire and fire certain people without input from 250. On December 12, 2019, Mr. Kallan told Mr. Park he had to fire a certain employee who worked in the Skybar whom he described as a "prick" and that if he did not, he would terminate the Agreements with 250 and lock them out. Mr. Kallan told the Court that this particular Skybar employee, Stephane, had done more damage than any other staff member hired by 250. 250 kept him on for a short time after this incident and only until they could replace him.

[68] Mr. Park protested that he was beset with constant complaints from Mr. Lambert and Mr. Kallan, and felt they were trying to pit him against 250. On one occasion, Mr. Park told Mr. Kallan that he had a wife and children because Mr. Kallan insisted he was gay. Mr. Park set out many of these complaints in an email to Mr. Eliopolous and Mr. Galanis dated February 3, 2020. Mr. Lambert's evidence was that Mr. Kallan was not homophobic and employed an openly gay Executive Housekeeper without any issues. Mr. Kallan denied making any such statements to Mr. Park and testified that Mr. Park's evidence was simply "complete nonsense and garbage."

[69] Mr. Park also recalled a meeting with Mr. Kallan in January 2020 in which Mr. Kallan threatened that 250 should either "fucking deliver" or get out. Mr. Kallan testified that it was very sad that Mr. Eliopoulos had forced his employees to go to such lengths to lie in order to keep their jobs.

[70] Mr. Paravolos described an incident in which there was a complaint by TD after a corporate event they held at the Hotel. A meeting took place between Hotel management, 250's management,

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and two representatives from TD. During that meeting, Mr. Kallan suddenly told the TD representatives that someone at TD (not anyone at that meeting) had been rude to him and he did not want him back at the Hotel. He went on to say that the individual reacted angrily towards Mr. Kallan probably because he was gay. Mr. Paravolos was not involved beyond that and did not know what occurred as a result of Mr. Kallan's comment. Mr. Kallan denied any comment related to the TD employee's sexual orientation, but he did not deny that the employee had been rude to him and that he told TD he would prefer not to deal with that individual in future.

[71] Ms. Ross was aware of the TD event incident and testified that TD blacklisted the Hotel from future business as a result. Mr. Kallan was not aware that TD had taken this position.

[72] Mr. Kallan was directed to a letter from Parkdale Legal Services to Ms. Angela Racco, dated February 24, 2021, regarding hotel employee Ms. Evelina Tihomirova. Ms. Tihomirova has worked at the hotel since June 2019 and was originally hired by 250. She was moved from one location to another in the Hotel because it was an "open secret" amongst Hotel staff that Mr. Kallan did not like Ms. Tihomirova's appearance. The letter sets out that "she drew derision from Mr. Kallan because she deviated from traditional beauty standards that Mr. Kallan upheld as prerequisites for front-facing female employees." The letter goes on to say that Mr. Kallan would tell Hotel management that Ms. Tihomirova should be fired.

[73] Mr. Kallan had never seen this letter and denied that he said anything of the kind. Ms. Racco confirmed in her evidence that she had received the letter but that the Hotel had not responded to it. Mr. Kallan's evidence was that s. 4.13 of the FBA permitted him to relocate employees based on appearance. He temporarily moved Ms. Tihomirova because she had a mole on her face. He described it as a "condition" which meant she had to be relocated until the condition was "dealt with." Mr. Kallan was clear that personal appearance and grooming are part of the overall ambiance of a restaurant. He testified that his request to move the employee was not personal, he was just being helpful.

[74] Ms. Racco denied that there was any discrimination at the Hotel based on sex, gender or sexual orientation. She described the Hotel employee roster as very diverse.

[75] Mr. Kallan was directed to a letter to him from Mr. Eliopoulos dated January 7, 2019. Mr. Eliopoulos makes reference to Mr. Kallan insisting that the manager of Maxx's, Mr. Colin DeLima, be removed because he did not like his "look." It was alleged that Mr. Kallan said that the employee looked "stupid" and stated "that Indian guy looks like an idiot, get him out of here now, we should not have people like this in my hotel."

[76] Mr. Kallan denied making these statements but offered that Mr. DeLima looked very unkempt. He testified that the rest of the statements attributed to him were simply a "jumble of exaggeration" typical of Mr. Eliopoulos.

[77] Ms. Ross agreed that that the Hotel tended to foster an "us vs. them" attitude rather than a "we" approach. During a meeting at Stanley Barracks at which Mr. Lambert, Ms. Racco and Mr. Kallan were present, Ms. Ross heard Mr. Kallan say that as soon as 250 had finished their leasehold improvements, he would be terminating their contract. Mr. Kallan vehemently denied this

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allegation in his evidence. He said he made concessions to 250 that cost him almost $2M. It would make no sense for him to make such threats.

[78] Ms. Breckbill described the Hotel's leadership team as "people on the wrong seats on the bus." Leadership team members had been recruited from three-star express hotels which were not in the CompSet. Mr. Lambert had been promoted to oversee Hotel operations when his experience was in accounting. The Hotel leadership was ineffective and worked against 250 with a dictatorship-type approach. It was a difficult working relationship.

Marketing Issues

[79] Ms. Breckbill explained that there had been much confusion about marketing issues since the opening of the Hotel. Initially 250 was advised by the Hotel that it would not be involved in marketing and it was only to provide food and beverage services. As time went on, however, it was clear that the Hotel needed marketing support so meetings would be set up with them to try to assist. Mr. Kallan and his team only had experience marketing boutique hotels and this property was very different.

[80] Ms. Breckbill was alarmed at the low occupancy of the Hotel at the start and explained that on opening there were times when occupancy was below 10%. While 250 was doing well with wedding and special event bookings, the Hotel was not doing well with their corporate event bookings. As a result of Ms. Breckbill's concern, she began to arrange meetings with Ms. Ross, Mr. Kallan, Mr. Eliopoulos and Mr. Thompson. 250 was worried that the Hotel's representation that it would be one of busiest in Toronto was not coming to fruition. The Hotel consistently reassured 250 that they were on top of these issues.

[81] Mr. Lambert's evidence was that it would take about three years for the hotel to achieve full capacity because large group events booked six to 18 months out. Occupancy in 2019 was up to 56%, although Mr. Lambert agreed that occupancy in the CompSet of established Hotels would have been in the range of 75%.

[82] Ms. Breckbill described the Hotel's approach to marketing as "complicated." This was because their senior marketing management was based out of New York as was Mr. Kallan. Overall, Ms. Breckbill's view was that the Hotel had a confused and mediocre approach to marketing, using influencers and social media to attract transient hotel guests with little or no focus on attracting large corporate events.

[83] Ms. Breckbill told the Court that the Hotel had a marketing team of only four people when it should have had eight or ten people. The Hotel's original Director of Sales and Marketing, Mr. Celso Thompson, left in June 2018 and his position remained vacant for a year. The Hotel attempted to recruit a replacement but had difficulty because of the Hotel's reputation. They finally filled the position in January 2019, but the new Marketing Director lasted only seven months. When that individual left, the Hotel promoted from within. In Ms. Breckbill's view, the person promoted was far too junior for the job.

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[84] Contrary to the Hotel's assertions, Ms. Breckbill testified that 250 did market itself by way of Open Houses, the Petros grand opening, social media, influencers, corporate gatherings at Skybar and Petros and many crossover events with the Hotel.

[85] The Hotel was insistent that 250 had an obligation to market its banquet facilities and the bars and lounges in the Hotel. In a letter to 250 dated February 18, 2019, the Hotel stated:

> PGH [the Hotel] demands that the Operator [250] provide, on or before April 19, 2019, and on an ongoing basis detailed reports as to the promotional and marketing activities undertaken by the Operator with respect to the banquet facilities, the bars and the lounges at the Hotel. The continued failure of the Operator to undertake such promotional and marketing activities constitutes a default under the Agreement.

[86] While it is clear that there is no requirement in the Agreements that 250 do the marketing described above, Mr. Lambert told the Court that this was not an unreasonable request given that the income from the outlets was for their mutual benefit.

The Delayed Opening of Petros and the Rose Hill Issues

[87] On the issue of the delayed opening of Petros, Mr. Galanis' evidence was that the Hotel engaged 250's main contractor, Rose Hill Design Build ("Rose Hill"), and then assigned it to complete the Hotel spa. Notwithstanding the delay caused by this unilateral action on the part of the Hotel, 250 committed to an opening date for Petros.

[88] Mr. Kallan denied that any of the problems related to the delay in opening Petros were related to the Hotel spa. It is true that the spa used Rose Hill as their General Contractor, but it used entirely different trades from 250.

[89] Mr. Eliopoulos was shown an email dated March 11, 2019 from Mr. Angelo Raitsinis, the President of Rose Hill, to Mr. Kallan. In that email, Mr. Raitsinis recounted a conversation between he and Mr. Eliopoulos in which Mr. Eliopoulos accused Rose Hill of being the cause of the delay of the Petros opening and purported to fire Rose Hill. Mr. Raitsinis took the position that the delays were attributable to 250. He set out a list of 10 items including payment delays to Rose Hill and trades, last minute design changes, 250's inexperienced designer, incorrect drawings, major communication issues and repeated requests for meetings and documents which remained unsatisfied. Mr. Raitisinis testified that an HVAC union strike in 2019 also contributed to the delays.

[90] Mr. Raitsinis testified that he wrote the March 11, 2019 email because Mr. Eliopoulos met with him and purported to fire him when Petros was 2/3 complete as a consequence of the alleged spa-related delays. After Mr. Raitsinis sent the email, Mr. Galanis asked to meet with him and asked him to come back and resume work on Petros.

[91] Mr. Raitsinis agreed to resume work on Petros, but he sent an email to Mr. Galanis on August 30, 2019 complaining that he had not been paid in 17 months and would have to stop work on the project. He agreed that he had only sent the relevant invoices to 250 a few weeks prior and

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that was because of an accounting issue at his end. Mr. Raitisinis copied Mr. Kallan on this email, who then called Mr. Eliopoulos and told him to pay Rose Hill.

[92] Mr. Eliopoulos then called Mr. Raitsinis and was upset that the email had been copied to Mr. Kallan. He called Mr. Raitsinis "a motherfucker", suggested he could make his business suffer due to his connections, and said that Mr. Raitsinis should watch himself. Mr. Raitsinis took this as a threat.

[93] Mr. Kallan was concerned about the financial issues between 250 and Mr. Raitsinis. Mr. Raitsinis claimed that 250 owed him over $200,000 while Mr. Galanis insisted they only owed him $13,000. While Mr. Kallan was not directly involved in this dispute, he was concerned that within months of opening there were already allegations that 250 was having financial difficulties. He intervened to ensure the project was completed as he did not want to have any liens registered against the Hotel and it was in everyone's interest to ensure Petros opened as quickly as possible.

[94] Mr. Raitsinis sent another demand letter to 250 on July 17, 2020 for the outstanding balance of over $209,000. His evidence at trial was that he has now been paid some of the outstanding amount, and is now owed $120,000. $20,000 of the amount paid to him was in the form of a credit for BPNP's restaurants and event spaces. Mr. Raitsinis preferred not to be paid in this manner but felt he had no choice. His evidence was that it was possible that Mr. Kallan told him to write the demand letter to 250.

[95] Mr. Raitsinis was shown an aged payables list from 250 which showed that Rose Hill was owed $13,000. He disagreed and insisted he had all the invoices for the work done for 250. He also agreed he had not produced those invoices.

[96] Mr. Raitsinis agreed that there were times that the Hotel also owed him money for projects he was working on for them. At one point, he was owed as much as $900,000 for several months.

Guest Experience

[97] Mr. Park's evidence was that every hotel has a process in place to monitor guest satisfaction. The Hotel used a system called "Revenate." Mr. Park noted that the Hotel rarely focused on positive reviews related to the restaurants or other food and beverage services. They focused only on the negative reviews.

[98] When a complaint was received that related to 250, Mr. Park would meet with Meghan McDonald, the Hotel's Customer Experience Manager. Mr. Park did not always agree with the way that the Hotel handled complaints. Rather than thoroughly investigating the problem so that it could be fixed, the Hotel was quick to give out "freebies" such as vouchers for Skybar or a complimentary night at the Hotel. If a complimentary room was given in relation to a 250 complaint, the charge was always billed back to 250.

[99] The Revenate program would combine all online reviews of the Hotel and the restaurants into weekly scorecards. Revenate showed a 92% positive rating for the Hotel. Mr. Park was quick to point out that a customer's Hotel experience always included food and beverage in some form (room service, restaurant dining, events or banquets), so the Hotel's positive rating was in part

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attributable to 250. A guest at the Hotel would not be aware that 250 and the Hotel were two different entities.

[100] Mr. Park was taken through some very positive reviews of events such as the following outstanding review from a corporate client:

> Welcome dinner at "The view" were just simply outstanding. Great food, great view, great bar and great service. Jessica, Enza, Karen, Chef and Fabien, you were on top of all details with the kitchen staff, what an amazing dinner you provided. Our guests can't stop talking about it. This dinner is definitely the one to talk about for years to come.

[101] Mr. Park agreed that the restaurant reviews of Maxx's and Petros were also aligned with the CompSet. He agreed that Revenate summaries for Maxx's were not consistent, although they trended higher in 2020. The Revenate summaries for Petros were also somewhat inconsistent, although they generally trended higher than Maxx's.

[102] Mr. Lambert testified that he felt 250 did not take customer complaints as seriously as the Hotel. When Meghan McDonald was hired by the Hotel, 250 resisted her working with their managers even though the majority of complaints related to Maxx's restaurant. Mr. Lambert's view was that 250 simply wanted to move on when it received a complaint, whereas the Hotel sought to respond right away and change the course of the complaint, sometimes resulting in the customer withdrawing the complaint completely.

[103] Mr. Kallan's evidence is that 250 never took complaints seriously and basically ignored Meghan McDonald. She had been hired by Mr. Kallan (at the Hotel's expense) to deal with the complaints about 250, but Mr. Eliopoulos' view was always that 250 was doing a great job and there was nothing to worry about.

[104] Mr. Kallan was shown a series of positive Trip Advisor reviews and a breakdown of 347 complaints between March 2018 and March 2020. Mr. Kallan agreed that there would always be complaints in his business. The issue was the manner in which they were handled. His evidence was that 250 did not follow up on complaints and simply maintained they were doing a great job.

[105] Mr. Kallan also agreed that the Hotel had dropped from its previous fourth place ranking to sixth place for Toronto Hotels in Toronto. Mr. Kallan was clear that this had no correlation to 250's termination. His evidence was that, with restaurants shut down and his hotel really only having one full year of operation (2019), sixth place was a great achievement.

[106] As noted above, Ms. Hasham has been the General Manager of the Hotel since September 2018. She has been in the Hotel industry for 25 years. Her evidence was that the Hotel's policy regarding complaints is to respond within 24 hours. Unfortunately, 250 did not have such a policy. They simply ignored complaints. When a negative review was posted, the Hotel attempted to track down Mr. Park and have him deal with it, but he was unresponsive. Ms. Hasham suspected this was because Mr. Park was simply stretched too thin.

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Server Gratuities and Event Deposits

[107] For all banquet and corporate events at the Hotel, there was a mandatory 20% service charge added to every bill. The Hotel had understood that 15% of that 20% was being allocated as a gratuity to servers, porters, and bar staff by 250. Indeed, according to the evidence of Mr. Lambert, this is why the Licence fees payable to the Hotel by 250 had been reduced from 22.5% to 15% by way of the Amending Agreement. The Management at the Hotel assumed that 250 was paying gratuities at the 15% level from the time the Amending Agreement was signed in March 2018.

[108] In October 2019, the Hotel and 250 jointly funded an employee survey. When the results of that survey were published, the Hotel discovered that 250 was paying out a gratuity of only 11.25% to its serving staff. The Hotel's position was that this was contrary to Section 6 of the Amending Agreement, which required 250 to provide compensation packages to its employees at the Hotel "equal to or better than the average provided by five-star hotels in downtown Toronto."

[109] Mr. Lambert expressed concern about the gratuity issue. He was concerned about the comments from employees in the survey saying they were being "short changed." There were also other concerns for the Hotel such as employee turnover, Hotel reputation within the CompSet, and the possibility of unionization. He felt the Hotel needed to act quickly to rectify the situation.

[110] Ms. Racco testified that she was certain that she had discussed the issue of gratuities with Mr. Paravolos and that he understood the 15% flow through to banquet staff. She was unclear as to how there could have been a disconnect on this issue. Ms. Racco told the Court that 11.5% is definitely not within the CompSet range, and the lowest she has seen is 12%.

[111] Mr. Kallan was genuinely concerned by the survey results and his discovery that 250 was only paying 11.5% gratuities. He felt misled and troubled that 250 was in blatant breach of the March 2018 Amending Agreement. 250 had led the Hotel to believe they were paying their employees a 15% gratuity. While he conceded that the FBA did not specifically reference a required gratuity percentage for banquet staff, it was always implied that employees would be paid as much or more than CompSet employees. He referred to Section 6 of the Amending Agreement which specifies that:

> The Operator agrees to select and provide compensation packages (wages and benefits) for its employees working at the Hotel equal to or better than the average provided by five-star hotels in downtown Toronto.

[112] Mr. Kallan's evidence was that if 250 did not understand their obligations under Section 6 of the Amending Agreement they could have asked for clarification.

[113] 250's position was that the employee compensation package had been approved from the start by the Hotel's HR Director Angela Racco, and that this arrangement was transparent and well known to the Hotel. Ms. Racco denied that the Hotel was aware of this until the results of the survey became available.

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[114] Mr. Galanis agreed that 11.25% was probably less than the gratuity paid to servers in other five-star hotels in Toronto, and that there was nothing in writing that was given to the Hotel confirming what gratuity 250 had been paying.

[115] Mr. Eliopoulos' evidence was that he was not sure that 11.25% was below the rate paid by other five-star hotels. He told the Court that each hotel has a different pay structure and some hotels have unionized staff, so it is hard to compare. Mr. Eliopoulos at his discovery on January 26, 2021 agreed that 11.25% was below the rate of other five-star hotels in Toronto. He testified that at trial he was changing his answer because after talking to other people in the industry he was not sure his answer on discovery was correct.

[116] Mr. Parvolos' agreed that a 15% gratuity is the average. He added that the Hotel insisted they pay top wages to ensure that high quality staff could be maintained. For example, the Hotel insisted that starting hostesses be paid $22 per hour. Mr. Paravolos thought this was excessive, as it was a pay rate similar to long established and often unionized hotels. He thought that high quality staff could be attracted at $19 per hour. However, they agreed to the Hotel's demands to pay the top rates.

[117] The Hotel wrote to 250 on December 6, 2019 demanding that they increase the gratuities and that failing to do so would be treated as a default under the Agreement. Following this letter, a negotiation took place whereby 250 agreed to increase the gratuity to its employees so long as the Hotel gave up its portion of the 5% of the 20% administration fee collected on banquet room rentals and on food and beverage. 250 agreed that if the Hotel gave up those amounts it would commence paying a gratuity of 14% as of December 1, 2019 and 15% as of April 1, 2020.

[118] Negotiations continued between the parties on these issues, and this led to a meeting with Mr. Kallan, Mr. Eliopoulos, Mr. Galanis and Ms. Racco on December 18, 2019. In his letter to Mr. Kallan of December 23, 2019, Mr. Eliopoulos summarized the parties' discussions about going forward as follows and requested that they be kept confidential:

a. 250 requested that out of the 20% administration fee charged for catering and banquet events, 14 % would be given to staff as of December 1, 2019 and 15% as of April 1, 2020. The Hotel would no longer receive any portion of the gratuity on F & B and room rental for such events.

b. The room rental fees for banquet and catering was revised from 60% to 250 and 40% to the Hotel, to 85% to 250 and 15% to the Hotel.

c. In return for the revised administration fee, 250 agreed to hire a Director of Banquets, an HR Manager, an F & B Director, a Director of Catering, and address various uniform issues as requested.

[119] By way of letter dated February 3, 2020, the Hotel generally agreed with these conditions so long as 250 hired the agreed-upon managers within 30 days. Further, Maxx's, Petros, in-room dining, and the Skybar were to have a dedicated department head and assistant managers with coverage seven days a week. The Hotel required a written commitment to these hirings signed by

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Mr. Galanis and Mr. Eliopoulos. Failure to hire the required management personnel would constitute a default under the FBA and grounds for termination.

[120] Mr. Kallan expressed his considerable frustration with 250 on the gratuity issue. Staff had been deprived of their proper compensation for 18 months, and when 250 was asked to comply with their clear obligations their response was always to ask for something in return.

[121] The Hotel also continued with its requirement that 250 spend $100,000 on marketing its restaurants in 2020, based on a marketing plan approved by the Hotel. Finally, the Hotel required an agreement for a 30-day cancellation policy for eight different areas in the Hotel that 250 was using for storage. Of note in this letter is the Hotel's position that it would continue to hold event deposits owing to 250 until it agreed to the terms sought. The Hotel gave 250 a deadline of February 7, 2020 to agree to its terms.

[122] These discussions coincided with a disagreement between the parties regarding the receipt of deposits paid for banquets and catering.

[123] As per the Amending Agreement, 250 was owed 85% of all gross receipts from banquets and catering (which included deposits) under $15M worth of sales, and 77.5% of all gross receipts for sales over $15M. 250's portion of the gross receipts was to be paid to them every second Monday as per s. 5.1 of the FBA.

[124] When a banquet event is sold, a contract is signed and a deposit paid. Often more than one deposit is paid as the event date approaches. The event contract is between the Hotel and customer. Therefore, in the event of a cancellation, the Hotel was responsible for returning the deposit.

[125] On November 11, 2019, the Hotel unilaterally changed the arrangement for payment of deposits to 250. Rather than paying out 250's share as received, the Hotel did not pay out 250's share of deposits until two weeks prior to the event. Mr. Lambert told the Court that the Hotel was not in breach of the FBA in doing this because gross receipts under that Agreement were not "earned" until the event took place. He agreed that 250 received no advance notice of the Hotel's decision to change how it paid out deposits to 250 but the decision to do so was Mr. Kallan's. He also agreed that the sudden change in payment of deposits would have impacted 250's cashflow.

[126] However, the reasons for changing the payment terms of the deposits were based on more than just the Hotel's rights under the FBA. Mr. Lambert's evidence was that the Hotel had serious concerns about 250's financial viability. They were not making required repairs around the hotel, they were cutting corners, not paying suppliers, and using the event deposits for construction on Petros. By November 2019, 250 had over $1M in event deposits. Given 250's request to commence negotiations to dissolve the Agreements, the Hotel was concerned about its liability to repay deposit cancellations if 250 left.

[127] Mr. Kallan explained that the change in how deposits were paid out to 250 was the result of several converging factors. Mr. Kallan recalled having a conversation with Mr. Galanis about how 250 intended to promote Petros. Mr. Kallan became concerned when Mr. Galanis told him that 250 had no money for any such promotion. Mr. Kallan then found out that 250 had not paid its additional rent since May 2019, used its deposit money to fixture Petros, and had outstanding

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accounts with trades. He was concerned that 250 might not survive. Since catering contracts were made between the client and the Hotel, Mr. Kallan was concerned that if 250 continued to receive the deposits upfront and then suddenly left, the Hotel would have all of the exposure with respect to cancellations and ensuring the events went forward. Mr. Kallan agreed that he instructed Mr. Laksmono not to pay 250 anything from that point forward. It was a business decision that was made based on the circumstances.

[128] Mr. Kallan testified that he understood that 250 was taking the position that the Hotel was in breach of the Agreements for failing to pay out deposits biweekly as part of gross receipts. He disagreed. His evidence was that he did not interpret the Agreements that way. In fact, his position was that technically he was not required to pay 250 until the event had taken place. Initially, he agreed to pay out their share of the deposits upfront to help them out with cash flow as they ramped up their business. However, when he found out they were using the deposits to build out Petros he became concerned about the Hotel's exposure. He became aware that 250 owed money to many suppliers and he was also concerned about liens being registered against the Hotel, although he agreed that no liens had actually been registered by any of 250's contractors.

[129] Mr. Lambert was directed to Section 7 of the Amending Agreement. Under that section, 250 was required to return all advance deposits to the Hotel in the event of a termination of the Agreement. When asked why it was necessary to withhold deposits from 250 given the wording of that section, he testified that it was Mr. Kallan's decision to change the deposit arrangements, not his.

[130] Mr. Lambert was also directed to an email he sent to Mr. Kallan on August 30, 2017, in which he stated that his interpretation of the FBA was that deposits were included in gross receipts and that therefore 250 was entitled to receive its share every second Monday. Mr. Lambert's evidence at trial was that he no longer holds this view. His revised view was that deposits form part of gross receipts only when they are earned. Mr. Kallan's evidence was that Mr. Lambert was simply wrong about his interpretation of that section of the FBA.

[131] The Hotel used the retained deposits as a bargaining tool. For example, the Hotel wrote to 250 on January 3, 2020 and demanded that 250 commit to hire certain management positions within 30 days. If it did so, the Hotel would release deposits for events coming up within the next 30 days.

[132] A February 3, 2020 letter led to a further meeting with Mr. Kallan and Mr. Eliopoulos on February 12, 2020. Mr. Eliopoulos wrote to Mr. Kallan on February 13, 2020 expressing that he was "beyond frustrated" after the February 12, 2020 meeting. He was very concerned that Mr. Kallan was blaming 250 for the Hotel's number four rating on Trip Advisor. Mr. Eliopoulos reiterated that 250 had agreed to hire more management staff and revise the gratuity arrangements, and that event deposits which had been held back by the Hotel and owing to 250 should be released immediately. Mr. Eliopoulos suggested that the parties immediately commence negotiations to dissolve their contracts.

[133] Unbeknownst to 250, Ms. Racco recorded the February 12, 2020 meeting. Part of the recording was played during the trial. The Court heard Mr. Kallan tell Mr. Eliopoulos that he

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agreed that 250 was entitled to the event deposits but that only if it fixed the outstanding issues would the deposits be paid to it. Mr. Kallan testified that he was also very frustrated at this point. It had been more than a year since his first letter to Mr. Eliopoulos in January 2019, yet they were still rehashing the same issues. Management issues remained a problem, as well as proper marketing of Petros and Maxx's. Mr. Kallan told the Court that he would have agreed to a compromise of releasing the deposits 30 days before the event date but 250 had to live up to its commitments.

[134] It was suggested to Mr. Kallan that he had flip flopped on his position regarding the deposits. His initial evidence was that he changed the payment schedule for deposits because of concerns about Hotel exposure and how 250 was using the deposit money. However, in the February 12, 2020 meeting he stated that if 250 fixed its management issues he would resume payment of the deposits. He was reminded that 250 was hiring new management staff and had increased the gratuity payments as requested. His response was that 250 had still not hired an HR manager and they still had not lived up to commitments made two years prior.

[135] Mr. Kallan gave evidence that he was always the one giving in. He agreed to give up percentages of administrative revenue that cost him money so that he could continue to work with 250, gave it office space at no charge, and accommodated Mr. Eliopoulos for 4.5 months free of charge at the Hotel while the restaurants were being built. In return, Mr. Eliopoulos seemed to imply that he was doing Mr. Kallan a favour by complying with the Agreements.

[136] The recording from the February 12, 2020 meeting made it clear that Mr. Eliopoulos became agitated during that meeting. He complained that he had paid $400,000 in rent for Petros before it even opened. He complained that he had invested $8M in restaurants for a hotel that was delayed three years in opening. He said that Hotel X did not respect 250 or its staff and that it was holding back $1M in deposits that were rightfully owed to it. He suggested that it was perhaps time to think about parting ways.

[137] There was considerable disagreement amount the precise amount of deposits owed and withheld.

[138] Mr. Budi Laksmono, the Hotel's CFO, was shown a spreadsheet prepared by 250 which showed that during December 2019 the Hotel collected $781k in deposits. Mr. Laksmono agreed that prior to the change in practice in November 2019, 250 would have received $563k of this amount net of any cancellations. He agreed that, based on the spreadsheets he was shown, and not accounting for any cancellations, 250 should have received a further $320k in January 2020, $476k in February 2020 and $495k in March 2020. 250 acknowledged when questioning Mr. Laksmono that five events actually occurred before the end of March and the deposit amounts would have been paid to 250. However, Mr. Laksmono agreed that as of the end of March 2020, and apart from events held and any pandemic impact, over $1.7M would have been paid to 250 in event deposits had the Hotel not changed its practice of withholding the amounts.

[139] The additional rent and other charges were reconciled as between 250 and the Hotel in mid-March, but 250 was not paid its share of event deposits at that point. Mr. Laksmono was asked why this was the case. His evidence was that he knew there had been discussions about 250 leaving

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and 250 still having commitments to live up to with respect to hiring staff. He agreed that if the staffing issues had been dealt with, he likely would have received instructions from management to pay out the event deposits to 250 but he was not sure of this.

[140] Mr. Galanis' evidence was that prior to November 11, 2019 there had been no issue with the Hotel paying 250 its event deposits as a share of gross receipts every two weeks. Mr. Galanis was clear that it is standard in the industry to use deposits to fund cashflow. He explained that this is because the cost of an event is not just incurred on the day it is held. Planning and resources are devoted to the event from the date the event contract is signed. Mr. Galanis agreed that as of the date the Agreements were terminated, 250 had $611,000 in deposits for events which had not yet occurred.

[141] Mr. Eliopoulos sent a follow-up letter after the February 12, 2020 meeting demanding a return of the withheld deposits, complaining that 250 could not continue to be bullied by the Hotel and "adhere to the unreasonable asks." The letter requested that negotiations begin immediately with a view to dissolving the Agreements. His evidence was that he was not the only one talking about terminating the Agreements. Mr. Kallan had told him many times that if he did not like the arrangement with the Hotel, 250 should leave.

[142] As a result of Mr. Eliopoulos' letter, a meeting was held on February 20, 2019 between Mr. Kallan, Mr. Eliopoulos and Mr. Galanis. Mr. Galanis' evidence was that the purpose of that meeting was to discuss an amicable dissolution of the contracts. The meeting did not go well. Mr. Eliopoulos did not deny that at that meeting he suggested that the Hotel begin looking for a new food and beverage provider.

[143] In a follow-up letter from Mr. Eliopoulos to the Hotel, he requested that negotiations towards the dissolution of the contracts commence immediately and be completed by March 31, 2020.

Did 250 Want to Dissolve the Agreements or Not?

[144] As is made clear from the above, the parties had several discussions about terminating their relationship throughout this time. It is worth repeating some of those discussions below.

[145] Mr. Galanis agreed that after receipt of the January 3, 2020 letter, he and Mr. Eliopoulos discussed a number of options including leaving the Hotel. They even drafted a letter to that effect, but never sent it. Mr. Eliopoulos testified that he and Mr. Galanis had many discussions about the low occupancy and what he described as an "unreasonable" management group at the Hotel.

[146] Mr. Galanis told the Court that he had heard things to the effect that the Hotel wanted 250 out. He could not recall whom he had heard this from. Mr. Lambert denied that anyone in the Hotel management threatened to terminate the Agreements. The focus was always on trying to get 250 to improve.

[147] These issues had been discussed by the parties on several occasions prior to 2020. In early 2019, a meeting about the Hotel's concerns was requested by 250, and was held on January 23, 2019. The results of the meeting were positive based on the summary of the meeting in the January

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25, 2019 letter of Mr. Lambert. Mr. Eliopoulos responded on February 8, 2019 expressing concern that the January 25, 2019 letter did not accurately reflect what occurred at the January 23, 2019 meeting. 250 set out its views on the various issues as well as a further list of concerns mostly related to chargebacks to which they did not agree. Nonetheless, Mr. Eliopoulos concluded the letter by confirming he wanted to work with the Hotel on a marketing plan to make Hotel X the "best hotel in the city."

[148] In that February 8, 2019 letter to the Hotel, Mr. Eliopoulos stated:

> Henry, I want to express clearly that our intent is to stay in partnership with PGH [the Hotel] and move forward in a positive direction. We feel we are excellent operators and providers of food and beverage, and based on your occupancy levels we have done an outstanding job managing the daily fluxes and the challenges this operation poses, including the financial burden of the low occupancy.

[149] However, issues such as staffing, marketing, the delayed opening of Petros, occupancy levels and threatened terminations by the Hotel for alleged breaches of the Agreements led to Mr. Eliopoulos writing to the Hotel on March 8, 2019 that:

> I would like to stress that termination is not the solution we seek and in the event that we cannot reach an immediate mutual resolution then we suggest we proceed to arbitration.

[150] The months that followed this letter were very busy ones for both the Hotel and 250. However, tensions rose again after the results of the October 2019 employee survey were published and the Hotel discovered that 250 had been underpaying server gratuities.

[151] The negotiations with respect to changes to the gratuities are set out above. It was these events that triggered the important correspondence between the parties in February 2020. Mr. Eliopoulos remained extremely upset about the Hotel's change of position in November 2019 that they would retain event deposits until two weeks prior to the event. He became even more frustrated when the withholding of deposits was used to leverage commitments from 250 such as the demand to hire certain staff in the Hotel's letter of February 3, 2020.

[152] As set out above, the February 3, 2020 letter led to the February 12, 2020 meeting which was recorded by Ms. Racco. The transcript of that meeting revealed that Mr. Kallan was quite frank about the fact that he wanted certain "issues" fixed before he would release the deposits to 250. It was during this meeting that Mr. Eliopoulos began expressing the possibility of parting ways with the Hotel. Mr. Lambert described the February 12, 2020 meeting as very lengthy and emotional, with Mr. Eliopoulos becoming very agitated at the end and saying he wanted to dissolve the Agreements.

[153] The February 12, 2020 meeting was next followed by a letter from 250 to Mr. Kallan on February 13, 2020 demanding that the deposits be released. After expressing his frustration and stating that the parties were at an impasse after the February 12 meeting, Mr. Eliopoulos writes: "We would like to immediately begin the negotiation to dissolve our contracts."

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[154] The Hotel was very concerned by the February 13, 2020 letter. This was the first time that 250 had sent a written request to negotiate a dissolution of the Agreements. The Hotel could not function without a food and beverage operator and had to start thinking about options if 250 wanted to leave.

[155] The next meeting, as set out above, took place a week later. Mr. Eliopoulos met with Mr. Kallan on February 20, 2020 to once again discuss the issues between the parties. Mr. Kallan testified that he was clear with Mr. Eliopoulos that he was prepared to negotiate an amicable exit, but Mr. Eliopoulos was of the view that Mr. Kallan should find a new food and beverage operator.

[156] The February 20, 2020 meeting led to a further letter from Mr. Eliopoulos on February 24, 2020, in which he requested that negotiations to dissolve the Agreements should commence immediately and be completed by March 31, 2020. Mr. Kallan described this letter as "talking about nothing" and said that Mr. Eliopoulos had "lost his way." Mr. Kallan was looking for proposals but 250 was giving them nothing.

[157] Mr. Lambert further responded to 250's February 12, 2020 letter on February 27, 2020. This letter is pivotal in this case, in that the parties each interpreted the contents of it differently which, in part, led to the within Action. 250 viewed the letter as simply another recitation of the issues between the parties but an expression of an intention to continue to work together. The Hotel viewed it as the commencement of negotiations to dissolve the parties' contracts with a specific request for a proposal from 250 as to how to end the parties' relationship.

[158] The following paragraph is key in terms of the parties' differing views on the intent of the February 27, 2020 letter:

> **Negotiations to dissolve your contracts**
>
> We note from your letters dated February 15, 2020, and February 24, 2020, that you would like to immediately begin a negotiation to dissolve your contracts. **We would prefer that you remain as Operator and Tenant in the hotel and focus on creating and sustaining a culture and management structure that enables you to perform the services at the level required. This has always been our objective**. However, we are open to discussions if you insist. Any discussions would be on the strict basis the hotel is not in default of any of its contracts with PnP, and that PnP has a desire to leave on a voluntary basis. Your request for a meeting to discuss the dissolution of your contracts is premature. We request that you provide to us for our review any specific proposals that you may have with respect to the requested dissolution of the contracts. We can have a meeting with you once we have seen and reviewed your specific proposals.
>
> …If it is in fact your preference to dissolve your contracts with the Hotel on a voluntary basis, please provide us with your specific proposals at your earliest convenience.

[159] The evidence of Mr. Galanis and Mr. Eliopoulos was that the Hotel made it clear in the February 27, 2020 letter that they wanted to continue to work with 250. As a result, they did not

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think it was necessary to make any proposals for dissolution since it was left to 250 to do so if it was "their preference" to dissolve the Agreement. Mr. Galanis' view was as a result of their election not to dissolve the Agreements, 250 carried on with business as usual.

[160] Ms. Breckbill agreed. Her evidence is that while she was aware that Mr. Eliopoulos and Mr. Galanis expressed on more than one occasion that they wanted to dissolve the Agreements, they never really wanted to leave the Hotel. The problem was that the Hotel had their backs against the wall and was holding money that belonged to 250. Ms. Breckbill recalled a meeting she had with Mr. Kallan and Mr. Eliopoulos on March 4, 2020. She remembered this because March 4 is her birthday. She recalled that Mr. Eliopoulos told Mr. Kallan that he wanted to work things out and stay at the Hotel. Mr. Eliopoulos made no reference to this meeting in his evidence. Mr. Kallan testified that the meeting never happened.

[161] Evidence of business continuing "as usual" was presented by 250 in the form of an email from Mr. Laksmono to Mr. Dash on March 13, 2020 in which the Hotel agreed to release $159,000 in gross receipts owing to 250 in exchange for March rent and intimating that a cheque would be written to clear any difference. Mr. Dash's evidence was that the Hotel and 250 would often operate this way by "swapping out" outstanding amounts owed by each and clearing the difference. Mr. Galanis concurred that financial matters were often resolved this way between 250 and the Hotel.

[162] More evidence of "business as usual" was that in March 2020, 250 paid its basic rent, and on March 11, 2020, Mr. Galanis responded to Ms. Gutman telling her that 250 was working aggressively on putting a new management structure in place.

[163] On March 26, 2020, there were email exchanges about a banquet event planned at Petros in September 2020.

[164] On May 1, 2020, Mr. Park and Mr. Black exchanged emails about a marketing plan for reopening the Hotel.

[165] The difficulty with 250's position that things were "business as usual" after the February 27, 2020 letter was that this was not clearly expressed to the Hotel. While it was true, according to Mr. Lambert, that the Hotel did not want 250 to leave, the Hotel wanted 250's proposals right away so it could move forward. The Hotel was left in limbo with no response to the February 27, 2020 letter in either February or March 2020. By then, the pandemic had hit and the Hotel was even more concerned about ensuring they had a food and beverage operator in place for reopening in July 2020.

[166] In April 2020, after the Hotel had closed down due to the pandemic, Mr. Galanis wrote to Mr. Kallan confirming that 250 would not be in a position to pay rent until normal business resumed. Mr. Lambert responded on April 19, 2020, advising that rent was due and asking for 250's position on their February 27, 2020 letter with respect to the dissolution of the Agreements.

[167] On June 4, 2020, a follow-up letter was sent to 250 from Mr. Lambert. He requested a response to the Hotel's letters of February 27, 2020 and April 19, 2020 with respect to 250's

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position stated in February 2020 that it wanted to dissolve the contracts. The Hotel also demanded rent for April, May and June 2020.

[168] Mr. Galanis testified that he was surprised to receive this letter given the representations in the Hotel's February 27, 2020 letter that it wanted to continue working with 250 and the ongoing discussions concerning an application for government rental subsidy programs.

[169] Mr. Eliopoulos responded to Mr. Lambert on June 12, 2020, indicating that 250 was prepared to resume operations when the Hotel reopened on July 15, 2020. He was hopeful that the parties could work toward compromises. Mr. Eliopoulos emphasized that all parties must act reasonably given the pandemic and the Hotel closure with respect to any outstanding rent. He stated that he felt the Hotel was not being reasonable in refusing to assist 250 with its rental subsidy application.

[170] Mr. Eliopoulos also stated as follows in his June 12, 2020 email:

> To be clear, we intend to continue to work with you and fulfill our contractual obligations, and while we expressed certain frustrations in February as a result of PGH's actions, we are ready to discuss a path forward. I am hopeful we can move forward amicably and take this opportunity to refresh and revive our relationship in a positive direction with both parties acting reasonably.

[171] Mr. Kallan responded to Mr. Eliopoulos by way of his June 14, 2020 letter. His position was that the email from Mr. Eliopoulos was the first time the Hotel had received a formal response to their February 27, 2020 letter, and he was surprised given what he asserted was 250's stated intention to terminate the relationship with the Hotel and that 250 had suggested the Hotel find a new food and beverage operator. Mr. Kallan indicated that the Hotel "has been moving forward accordingly so as to minimize the impact to our operations while we prepare to re-open…" Mr. Kallan suggested a without-prejudice Zoom meeting between the parties to discuss the terms of 250's departure.

[172] Mr. Galanis expressed confusion about this letter. He was surprised to hear from the Hotel that they were looking for a new operator when their February 27, 2020 letter requested that they continue to work together. Mr. Galanis stated that the Hotel had no right to terminate their Agreements because the Hotel was in default as well, by failing to pay 250 their event deposits.

[173] The Zoom meeting took place on June 17, 2020. However, in a mid-trial ruling date March 5, 2020, I determined that the contents of the Zoom meeting and two related letters and phone calls were without prejudice as requested by Mr. Kallan and their contents were therefore privileged. As such, no reference will be made to that information in this judgment.

[174] In a June 26, 2020 email from Mr. Eliopoulos to Mr. Kallan marked "with prejudice", he confirmed a willingness to resume operations at the Hotel on July 15, 2020 and repeated his request for the Hotel's cooperation in applying for government assistance for outstanding rent.

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[175] Mr. Lambert expressed confusion about this email. There was no offer to pay rent and no proposal or compromise that would have changed the Hotel's position that it wanted to move forward with a dissolution of 250's Agreements, just as 250 had requested in February 2020.

The Pandemic Shutdown and its Effect on the Parties

[176] The discussions about dissolving the contracts, as described above, coincided with the arrival of the COVID-19 pandemic and subsequent lockdowns.

[177] On March 23, 2020, the Hotel shut down due to the pandemic. There was very little notice given to 250 and no consultation. Mr. Kallan testified that although he was not in Toronto at that time, he was certain that there must have been discussions with 250 about the closure.

[178] On April 7, 2020, Mr. Galanis sent a letter to Mr. Kallan confirming that he had received an invoice for April's rent. He explained that 250 could not pay rent as it had no revenue given the closure and the Hotel's refusal to allow take-out services at even a basic level. 250 complained it had received inadequate written notice of the closure and that it would not be in a position to pay rent until business resumed.

[179] The April 7, 2020 letter did not contain any proposals with respect to the dissolution of the Agreements as the Hotel had requested in its February 27, 2020 letter. Mr. Eliopoulos testified that when the pandemic hit, there was chaos in the banquet and event business. Clients were calling non-stop to ask about cancellation or deferral of their event. After the closure, he was not focused on responding to the Hotel's request for proposals about dissolution of the Agreements.

[180] The April 7, 2020 letter provoked a written response from Mr. Lambert on April 19, 2020. Mr. Lambert reminded Mr. Galanis that the restaurant leases made it clear that payment was due even in the event of circumstances beyond the control of the landlord or the tenant. Mr. Lambert suggested that 250 consider other options, including government loans and subsidies and that 250 had "an obligation to engage your landlord to explore options." The Hotel did not accept 250's position that it could not pay rent during the Hotel closure. Mr. Lambert requested a response to the February 27, 2020 letter discussed above.

[181] The evidence of Mr. Galanis was that 250 could have operated in-room dining, take-out, patio service and some limited inside dining in July 2020 when the hotel was permitted to open. When they approached the Hotel about doing this, they were refused. The Hotel's position, as stated in the letter of April 19, 2020 from Mr. Lambert, was that take-out options could be explored but only if 250 paid its rent.

[182] 250 lost significant revenue as a result of the Hotel's refusal to make any accommodation to allow some sources of revenue for 250 during the closure. Mr. Galanis estimated that 250 could have earned in the range of $1.2M during that period for take-out service and patio service plus any in-room dining. The Hotel's position was that if 250 paid its rent, it would have permitted take-out and other arrangements upon reopening such as in-room dining and patio service.

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[183] It was suggested to Mr. Galanis that 250 could have paid the outstanding rent by way of transfers from the other BPNP companies. They had provided capital to 250 in the past when needed. Mr. Galanis did not disagree that this was possible, but said that 250 was owed money from gross receipts and was entitled to rental subsidies, and that these options should have been used before any money would be paid from other sources.

[184] Mr. Dash was taken to 250's March 2020 bank statement showing $450,000 in branch-to-branch transfers. Mr. Dash testified that some of those amounts could have been deposits but agreed that some of those transfers came from related companies and that, with permission, he did make transfers to 250 from the related companies when needed.

[185] Mr. Eliopoulos' evidence was that it was not simply that he did not want to pay the rent. The Hotel owed 250 money and 250 owed the Hotel money. If the Hotel had cooperated with 250 to get a rent subsidy and the subsidy had been declined, Mr. Eliopoulos said he would have paid the rent. Since there were always ongoing discussions between him and Mr. Kallan, he never anticipated that Mr. Kallan would lock him out for non-payment of rent without a telephone call or discussion in advance.

[186] Mr. Park's evidence was that after the Hotel shutdown he remained in constant contact with Hotel management. He was hoping that 250 would be permitted to do take-out service and patio dining. He contacted the Hotel's Director of Marketing & Revenue, Mr. Matt Black, on May 1, 2020 to see what 250 could do to assist with any reopening plans. Mr. Black responded the same day confirming that a phased reopening was planned starting June 1, 2020. He said he would get back to Mr. Park the following week with more information. An email from Mr. Lambert to Hotel department heads confirmed that the reopening was pushed to July 15, 2020. No information was provided to Mr. Park that the Hotel was in negotiations with a new service provider or that 250 should not make preparations for the reopening.

[187] Mr. Park wrote to Mr. Lambert on July 2, 2020 (the morning of the termination letter) and made enquiries about information in the media that the Hotel had been chosen as one of the NHL hubs. He was excited about this news and was looking forward to making preparations for it. Mr. Lambert responded shortly thereafter, indicating that he did not have all the information yet about the hub but that certain key staff members would need to be brought back.

[188] Mr. Lambert did not mention the termination letter or make any indication that the Hotel had, by that point, signed a Letter of Intent with Harlo. He explained to the Court that no decision had been made by the NHL at that point. Actual negotiations with the NHL did not commence until July 10, 2021.

[189] Mr. Lambert denied that there was an intention on the part of the Hotel to deliberately remove 250 such that Harlo would be in place in time for the NHL bubble. Mr. Lambert's evidence was that all of the Hotel's negotiations had been directly with the NHL and he had no reason to believe Harlo had any influence in that regard.

[190] Mr. Laksmono testified that he had a meeting with a representative from Harlo on May 19, 2020 in order to introduce himself. He conceded that he knew of the possibility of Harlo taking

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over as the new food and beverage operator at that point. However, he was not part of the negotiations of the contract with Harlo and his evidence was it was not his responsibility to communicate any information about the potential of a new food and beverage operator to Mr. Dash or any of the 250 team.

Disagreements about CECRA

[191] All parties agree that there were discussions about 250 making an application under the Canada Emergency Commercial Rent Assistance program ("CECRA") subsidized by the Canadian government. The program was introduced to provide relief to small businesses experiencing hardship during COVID-19. It provided unsecured forgivable loans to property owners for the months of April, May and June 2020. The program was subsequently extended. The program provided a forgivable loan to the landlord of 50% of the rent; the tenant paid 25% of the rent, and the landlord was required to forgive 25% of the rent for the period. The application was made for the aggregate rent for April, May and June, 2020. The eligibility requirements for the program are set out below:

- The property owner had to own commercial property occupied by one or more impacted small business tenants. An "impacted small business tenant" was defined as being a tenant that paid no more than $50,000 per month in gross monthly rent for each rental location (with a valid lease), generated no more than $20M in gross annual revenues calculated on a consolidated basis, and have experienced at least a 70% decline in pre-COVID-19 revenues;

- The property owner had to enter a binding rent reduction agreement for April, May and June 2020, reducing the tenant's rent by at least 75% including a moratorium on eviction for the period in which the loan proceeds were to be applied.

- The property owner was required to provide an attestation confirming their information and attesting to their eligibility as well as agreeing to the terms of the loan agreement.

- The tenant was required to sign an attestation as to their eligibility for the program.

- The owner had to agree that the 25% rent to be forgiven would not be recoverable.

- If the tenant provided false or misleading information in their attestation, the tenant could be responsible for all rent forgiven under the lease.

[192] Mr. Dash testified that had 250 been permitted to continue operations at the Hotel, the CERS ("Canada Emergency Rent Subsidy") would have been available to it after CECRA expired in September 2020. That subsidy was available directly to renters without the participation of the landlord. A tenant who is approved for the subsidy is protected from eviction for 12 weeks from the date of approval and each new approval thereafter.

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[193] Mr. Dash prepared a chart for a CERS calculation for 250 for the period of September 27, 2020 to January 16, 2021.[1] Based on his calculations using a fixed rent plus an estimate of additional rent, 250 would have qualified for between $146,000 to $202,000 in subsidies depending on the percentage of the subsidy.

[194] Mr. Dash's evidence is that he has applied for CERS for BPNP's other companies and consistently received it simply by certifying the required documents as the company's CFO.

[195] Also available to 250 would have been the Canada Emergency Wage Subsidy ("CEWS") initially available from March 15, 2020 to June 6, 2021, which provided a subsidy of 75% of wage remuneration to eligible entities up to a maximum of $847 per week. Mr. Dash's evidence is that he applied for this subsidy for other BPNP entities and received it. He applied for and received the subsidy for the period of time 250's employees were working at the Hotel prior to July 2, 2020.

[196] Mr. Dash also explained the Regional Relief and Recovery Fund ("RRRF"). This benefit provides small businesses with interest-free loans repayable over five years up to $1M. There is also the Highly Affected Sectors Credit Availability Program ("HASCAP") which provides a bank loan of up to $1M with a low interest rate and repayable over 10 years. Mr. Dash's evidence was that he had applied for and received both of these loans for the other BPNP locations and that had 250 been able to remain at the Hotel it would have applied for and received these loans as well.

[197] A significant amount of evidence was given in this trial about the proposed CECRA application by 250. Mr. Galanis and Mr. Dash testified that 250's annual gross revenue was under the $20M threshold and monthly gross rents for the restaurants were under $50,000. Their revenue drop in the relevant months had been 100%. 250 therefore qualified for the CECRA rental assistance.

[198] Both Mr. Galanis and Mr. Dash were clearly frustrated at the Hotel's position that 250 did not qualify for the program. Their evidence was that the Hotel had improperly included gratuity income and HST into 250's gross revenue which put them over the threshold. 250's expert also opined that 250 would have qualified for CECRA. The expert's evidence will be more fully examined below.

[199] Mr. Lambert, who is a CPA, testified that since CECRA was based on gross revenue, adjustments for items such as gratuities would result in a net revenue number which was not permitted under the program. Mr. Kallan took a similar view and did not agree with 250's expert. He called the evidence given by 250's expert "a joke" and "100% wrong." He testified that he could not change the numbers when 250 filed an HST return showing their revenues exceeded $21M. 250's attempt to deduct gratuities and licence fees would result in net revenue, not gross. Mr. Kallan said he was not prepared to lie to the government to help 250.

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[1] Tab 17 of Anil Dash's Witness Brief.

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[200] Mr. Eliopoulos' evidence was that it appeared that the Hotel was working against them and spent their time trying to prove why 250 would not qualify rather than helping to show how they would.

[201] Mr. Dash explained that 250 owned the MICROS point of sale system which was installed at the Hotel. All food and beverage revenue that went through the point-of-sale system was collected by the Hotel. HST collected on all revenue was collected on 250's HST number. Every two weeks the Hotel would pay 250 its share of the revenue. 250 would remit HST which included the Hotel's share of HST collected on point of sale. The Hotel would then pay 250 its share of HST upon proof that 250 had filed the HST return.

[202] The problem with this arrangement was that because of the tensions between the parties, the Hotel stopped paying its share of HST to 250 in February and March 2020. They still owe 250 $175,000 for February and March 2020 HST. Mr. Lambert confirmed in his evidence that Mr. Kallan had instructed the Hotel management in February not to pay out the HST to 250 given the Hotel's concerns about 250's financial viability. Mr. Lambert further confirmed that HST owing to 250 was never kept in a separate account and was therefore used to fund operations.

[203] According to Mr. Dash, the problem created by this HST arrangement was that 250's HST returns were higher than they should have been. This meant that the 2019 HST returns showed 250's gross revenue at over $21M. The Hotel relied on this, in part, in refusing to cooperate with 250 in applying for CECRA. Mr. Dash expressed concern that HST returns are not intended to reflect revenues as HST is a tax on supplies. Further, 250's HST returns were inflated due to its remittance of the Hotel's HST.

[204] Mr. Lambert's evidence was that the Hotel tried to cooperate with 250 on this issue. However, 250 did not provide the Hotel with any Financial Statements or Corporate Tax Returns. The Hotel only had the HST returns to rely on and they clearly showed that 250's gross revenue exceeded the CECRA threshold. He reiterated to the Court that the Hotel was willing to assist 250 with its application so long as it met the eligibility requirements and went so far as to say it would have been unreasonable for the Hotel not to cooperate if 250 had qualified for the program.

[205] Mr. Lambert was shown a copy of 250's Financial Statements ending December 31, 2019. The revenue was shown as $17,557,618. Mr. Lambert agreed that was below the CECRA threshold and that if he had received these documents in May or June, he would certainly have reviewed them. He agreed that there were challenges in completing Financial Statements for all businesses (including the Hotel) due to pandemic shutdowns. However, if the 250 had paid their rent and asked for extra time to put together their financials, he might have considered that, but he received no communication from 250.

[206] Mr. Dash was asked why he did not take steps when his view was that the Hotel's HST-remitting practice was incorrect. He testified that he went along with it even though he did not agree with it in order to comply with what the Hotel wanted. Further, he had checked with CRA whose position was that as long as they were receiving the correct remittances they were not concerned.

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[207] Mr. Laksmono emailed Mr. Dash on May 1 and May 5, 2020 requesting information about 250's income with respect to qualifying for CECRA. On May 6, 2020, Mr. Laksmono sent an email to Mr. Dash setting out that he had run the numbers for 250 and that their revenues surpassed the $20M mark and that 250 would not qualify for CECRA. He suggested that the April and May rent be paid. The discussions between the accountants continued throughout May with Mr. Dash insisting that the Hotel was not basing 250's income on the proper information.

[208] On May 23, 2020, Mr. Lambert emailed Mr. Dash advising that if 250 was insisting they qualified for CECRA they would need to provide the 2019 financials for 250 reviewed by an independent CPA. Mr. Galanis and Mr. Dash agreed that no such independent review was ever sent to the Hotel. They maintained their position that such a review was not required under CECRA.

[209] 250's position on their qualification for CECRA is clearly set out in the email from Mr. Dash to Mr. Laksmono dated May 21, 2020. Mr. Dash was concerned as the deadline for the application was August 31, 2020. 250's witnesses testified that the Hotel was uncooperative on the issue of CECRA and refused to listen to 250's point of view. In any event, given the pandemic and the resulting delays in both the Hotel and 250 completing their 2019 Financial Statements, it was completely unrealistic to expect any form of independent review of those statements in the time frame demanded by the Hotel.

[210] Mr. Lambert testified that there were three tenants in the Hotel. The Hotel did not work with the other tenants to obtain CECRA relief. He mentioned that the Hotel was able to obtain a deferral of their rental payments owed to the City of Toronto for a period of time due to the pandemic.

[211] Mr. Dash's evidence was that 250's audit accountants, KPMG, confirmed that 250 qualified for CECRA and that a review engagement was not required and would be prohibitively expensive. Mr. Dash referred to an email from a KPMG Business Law partner, Mr. Ali Baniasadi, dated July 15, 2020. Mr. Dash also relied on 250's Financial Statements for 2019 as prepared by KPMG which showed revenue of $17.557M which was below the $20M CECRA threshold. This same revenue amount is reflected in 250's corporate tax return for 2019. Mr. Lambert testified that the Hotel never received the email from KPMG or 250's financial statements until this litigation commenced.

[212] Mr. Dash was asked why he did not ask for this memo from KPMG sooner so it could be provided to Mr. Lambert. Mr. Dash told the Court he felt it was futile. Once Mr. Lambert had made up his mind, there was no point in carrying on discussions with him.

[213] Mr. Dash was referred to a chart of rents payable by Petros and Maxx's contained in the memorandum of RSM Canada LLP (the Hotel's expert) dated February 21, 2021. That chart showed that total monthly rents for the restaurants (basic rent and additional rent) was less than $50,000 for April, May and June. Mr. Dash pointed out that these numbers included HST and would therefore be even lower and still well within the CECRA limits.

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[214] Mr. Dash also testified that he had applied for CECRA for BPNP's other venues and received the benefit based on the required attestation.

[215] The Hotel was concerned that if an application was made and 250 did not qualify for the program, the forgivable loan may have to be repaid. They did not want to participate in what they felt was a misrepresentation to the Government of Canada. 250 disagreed and took the position that an investigation into 250's financials was not required, and that the landlord was required to attest that their information was correct, not that the tenant's information was correct. Further, the CECRA application was clear that if there was reporting fraud, it was the tenant who would be required to repay the forgiven rent, not the landlord.

Expert Evidence on CECRA

[216] Mr. Brian McGee testified as an expert on behalf of 250. He was qualified to give evidence in relation to corporate accounting, tax, and the HST issue.

[217] Mr. McGee's expertise was not contested and for good reason. He has been a partner at Zeifmans LLP since 1988. He is qualified CA, CPA and has been in the accounting business for more than 30 years. He has extensive experience with accounting and auditing standards, HST, and corporate tax issues.

[218] Mr. McGee testified that he was aware of the CECRA eligibility requirements. The proper method to use for determining gross revenue would be revenue from ordinary activities using the normal accounting method. The "normal accounting method" would be the manner in which a business normally recorded its revenues on its books and records and in its corporate tax returns.

[219] The applicable accounting standard for determining 250's gross revenue is the Accounting Standards for Private Enterprises ("ASPE"). Mr. McGee reviewed 250's typical transaction cycle including who invoiced amounts to customers, whose invoice it was on, who collected the money, credit terms, and who paid whom. He determined that some invoices from the Hotel to 250 contained services that were irrelevant to 250 such as baggage handling and rooms.

[220] Mr. McGee also reviewed s. 5.1(a) of the FBA. He determined that this section and section 5.2 were inconsistent, in that section 5.1 said that 250 would collect the revenues and pay the Hotel, but what actually happened was as per section 5.2 whereby the Hotel collected the revenues and paid 250. That is, the Hotel invoiced the gross amounts, collected the amounts, retained their share, and then gave 250 its share on a periodic basis. Under ASPE, 250 is strictly limited to its revenue only being those amounts it received as owing to it from the Hotel. Mr. McGee confirmed that 250's normal accounting method is consistent with ASPE.

[221] Mr. McGee looked at the normal accounting method for 250. He determined that 250 recorded revenues from the FBA on amounts actually received from the Hotel. In 2019, those amounts totaled $17.55M. He disagreed with the conclusion reached by the Hotel's expert (Fuller Landau) that revenues would have been $21.613M. Fuller Landau had included the Hotel's share of the Licence Fee for banquet services, Skybar, room rental sales, admin fees and banquet staff gratuities. These amounts were collected by and retained by the Hotel and therefore should not

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have formed part of 250's revenues based on 250's normal accounting method and based on ASPE principles.

[222] Further, Mr. McGee stated that staff gratuities should not have been included as part of 250's revenues because they passed through a clearing account and then directly to staff. Such amounts did not pass the test of being 250's revenues as it did not decrease their liabilities nor increase their assets.

[223] It was Mr. McGee's opinion that there was no requirement under the CECRA program that 250's report to the Hotel on its revenues required review by an independent CPA. The reason for this is that there is no requirement for the owner to undertake any investigation into the information provided by the tenant. The owner's responsibility is to receive the information from the tenant and to attest to its own representations and confirm it has no knowledge of any falsehood or misrepresentation on the part of the tenant, without investigation and acting reasonably.

[224] In Mr. McGee's expert opinion, it was important to view this program in the manner intended, that is, as an incentive program. Mr. McGee had been involved with CECRA applications for other clients. The program was not designed with the precision of the *Income Tax Act* and applicants were told **not** to do certain things, which is rare but consistent with a program trying to provide assistance quickly and efficiently. CECRA was effectively telling applicants they did not need to perform an audit, and that CECRA would make their own determinations. He suggested that if the Hotel had concerns in this situation, it could have made the application but simply pointed out that their interpretation was that 250 had more than $20M in revenue.

[225] Mr. McGee was asked about the monthly gross rent eligibility under CECRA. Monthly gross rent for either restaurant could not exceed $50,000 per month. The Hotel's expert report from RSM Canada concluded that the gross monthly rents for Petros exceeded the $50,000 per month threshold. It concluded, however, that Maxx's rent was below the threshold and since 250 was required to meet all criteria in order to meet the criteria as an impacted tenant, it would not qualify. Mr. McGee did not agree with this conclusion. He noted that RSM used rent references for months other than April-June 2020, which was the qualifying period. Between April to June 2020, both Maxx's and Petros' rents were under $50,000 per month.

[226] With respect to HST reporting, Mr. McGee testified that 250's HST returns included revenue on food and beverage services that were retained by the Hotel. Mr. McGee confirmed Mr. Dash's evidence that in fact it was the Hotel that obliged 250 to remit HST in this manner. It was not an appropriate manner in which to file HST returns because they included amounts not invoiced by 250 under its own HST number. While 250 would have been required to remit HST on gratuities, this did not change Mr. McGee's opinion with respect to 250's gross revenues. Mr. McGee disagreed with RSM's conclusion that HST returns can be a reliable source to determine gross revenue. His report noted that HST is charged on supplies made by a commercial business, and accordingly includes revenues from a business together with other supplies made by a business that are not revenue.

[227] Based on all of the above, it was Mr. McGee's opinion that 250 qualified for CECRA.

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[228] Mr. Sam Tabrizi gave expert evidence on behalf of Hotel. He was qualified to give expert evidence in the areas of corporate taxation including HST and eligibility for CECRA. Mr. Tabrizi was well qualified to give his evidence. He has a CPA and CA designation and is a tax partner at RSM Canada LLP with over 12 years' experience. He has a degree in computer science and a Masters in Professional Accounting from the Rotman School of Business. His qualifications were not contested in this trial.

[229] Mr. Tabrizi testified that he had been involved in over 50 applications for CECRA. His opinion is that 250 did not qualify for CECRA because its total gross revenue based on line 101 in its HST return exceeded $20M based on a 12-month rolling period and the prior year.

[230] Mr. Tabrizi did not agree with Mr. McGee's conclusions that 250's HST returns were not an accurate reflection of 250's income because it included revenue collected by the Hotel and not received by 250. Mr. Tabrizi's view was that just because revenue was collected by the Hotel did not mean it could not form part of 250's revenues for HST purposes. Licence Fees could not be deducted from revenue because of the definition of gross receipts in the FBA, 250 could only expense the Licence Fees.

[231] Mr. Tabrizi also did not agree that gratuities collected by 250 and remitted to serving staff could be deducted from its HST revenues because the gratuities were mandatory and therefore represented an economic benefit to 250. That is, they collected the full amount of the gratuity but were not obliged to pass it all along to serving staff.

[232] In coming to his conclusions with respect to 250 exceeding the threshold for gross revenue, Mr. Tabrizi conceded that he did not review 250's corporate tax return or financial statements for 2019, both of which show gross revenue of just over $17M. However, Mr. Tabrizi went on to testify that if 250's financial statements showed that it had deducted fees and gratuities from its gross revenues, it was likely because it told the tax preparer to put in amounts that 250 had decided were revenue with a Notice to Reader.

[233] Where financial statements and tax returns contain different revenue amounts from HST returns, this raises a red flag with CRA and could result in an audit.

[234] He also agreed that in assessing 250's inflow of cash for gross revenue purposes, he did not investigate who invoiced customers for food and beverage, who collected the payments, whose account the payments went to, who set the credit terms or how much was collected by the Hotel. More importantly, he did not evaluate how much of the amounts collected by the Hotel were actually received by 250 or how 250 accounted for gratuities in its books. He agreed that it was rare but possible that an HST return could include amounts that are not revenues.

[235] In terms of the rent threshold issue, Mr. Tabrizi agreed that HST should not be included in the calculation of gross rents. He also agreed that the CECRA eligibility looked only at rents for the months of April, May and June 2020 which would mean that Maxx's and Petros would qualify.

[236] Mr. Tabrizi was taken to the CMHC website with respect to FAQs on CECRA eligibility. He agreed that the website was clear that if false information was given by a tenant, the tenant would be obliged to repay the forgiven portion of the rent. And further, the landlord was entitled

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to rely on the tenant's attestation without investigation. He added, however, that the landlord must make good faith efforts to determine if its tenant(s) are eligible.

The Hotel Terminates the Agreements and Replaces 250

[237] As early as April 1, 2020, the Hotel began engaging in discussions with a new food and beverage service provider, namely Harlo Entertainment Inc. ("Harlo"). Mr. Mike Kimel is the founder and President of Harlo Entertainment. His evidence was that Mr. Kallan approached him at the end of March 2020 advising he was having problems with his food and beverage operator and inquired whether Harlo might be interested in taking over.

[238] Mr. Kimel told the Court that the Kimel family owns two Toronto e-sports teams, the Toronto Defiant and the Toronto Ultra. He is working with Mr. Kallan on developing an e-sports stadium which would be part of Phase II of the Hotel development. At this point, the project is only in the planning stages and no agreement has been signed.

[239] In an April 1, 2020 email from Mr. Lambert to Mr. Kimel, copies of the Agreements were provided to Mr. Kimel for his review. In an email from Mr. Lambert to Mr. Kimel dated April 17, 2020, a site visit was arranged and net revenues by outlet were provided to Mr. Kimel.

[240] On May 30, 2020, the Hotel sent a non-binding Letter of Intent ("LOI") to Harlo with respect to a food and beverage partnership with the Hotel. 250 was not aware of the LOI.

[241] On June 3, 2020, Mr. Lambert circulated the signed LOI to senior management at the Hotel and requested that it be kept confidential. Section 2 of the LOI stipulated that it was not binding until definitive agreements were signed. The execution of those agreements was conditional on the dissolution of 250's Agreements.

[242] Mr. Lambert agreed that he did not invite 250 to have discussions with Harlo about a transition. His evidence was that the did not consider introducing Harlo to 250 even though 250 had spent over $7M on fixturing and renovating parts of the Hotel. Mr. Lambert did not deny that 250 was kept out of all negotiations with Harlo and that 250 was carrying on with its plans for reopening without any idea that they would be terminated. Mr. Lambert also did not deny that the Hotel closure had made it convenient for the Hotel to transition to a new food and beverage operator.

[243] Mr. Kimel's evidence was that he was not invited to have discussions with 250 but he had no interest in doing so.

[244] Mr. Kallan's evidence was that the Hotel's negotiations with Harlo were not 250's business. 250's management had told the Hotel they wanted to leave and they could have provided an exit strategy or they could have found their own replacement. They did neither. Instead, Mr. Kallan continued to receive self-serving correspondence from 250's management saying they wanted to stay when they were refusing to pay rent and still had not hired an HR Manager. Mr. Kallan decided that terminating the Agreements with 250 was the only option as he could not operate with such a level of uncertainty.

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[245] It was suggested to Mr. Kallan that it would have made sense to have 250 negotiate directly with Harlo to ensure a smooth transition. He did not agree. He felt there was no reason to keep 250 in the loop as Mr. Eliopoulos had made it clear both verbally and in writing that he was not interested in staying on at the Hotel. 250 was no longer Mr. Kallan's priority and he would not chase them. He could not stay idle and wait to see what 250 would do.

[246] Mr. Lambert explained that the Hotel had no choice but to pursue a new food and beverage operator. 250 had not paid basic rent since April and owed additional rent from March as well. It had retained over $600,00 in deposits for future events. With a reopening after the lockdown looming, the Hotel wanted to ensure it was not left without a food and beverage operator. Mr. Lambert and Mr. Kallan agreed that if 250 had paid its rent, their Agreements would have continued and the LOI would never have become binding.

[247] Mr. Kallan's evidence was that he had been waiting for a response to his February 27, 2020 letter for months and he would have continued to work with 250 had they paid what they owed the Hotel and lived up to their commitments. It was suggested to Mr. Kallan that in fact the rent was the only outstanding issue as the deposits would not be required to be repaid unless there was a termination. He disagreed. He testified that there was additional rent owing and that the Hotel had had to fund cancellations from the $611,000 in deposits retained by 250 as 250 refused to do so.

[248] Mr. Kallan was asked about 250's June 12, 2020 letter in which they indicated they were ready to resume operations when the Hotel reopened. He told the Court that it had taken 250 four months to make up their mind, and by then he had already moved on. He denied that his motivation was to terminate 250's Agreements so that the condition on his LOI with Harlo would be removed. He was forced into the position of negotiating with Harlo because of 250's inaction. While he did not disagree that by the end of June 2020 250 had made it clear they wanted to return, by this point Mr. Kallan had learned of 250's financial problems. His evidence was that 250 knew that they were insolvent by that point. He did not think that they would be able to survive even if they returned.

[249] Mr. Kimel testified that in early June Harlo was contacted about whether it had the capability of providing food and beverage services if the Hotel was chosen for the NHL bubble. Mr. Kimel's evidence was that he found out about the Hotel being chosen for the NHL bubble at the same time as everyone else. The decision had nothing to do with the Kimel family, who owned a small interest in the Pittsburgh Penguins franchise but had no influence on the MLSE decision. Mr. Kimel testified that Harlo did not make any money from the bubble contract. They basically broke even.

[250] Ms. Hasham's evidence is that the Hotel was chosen for the bubble because they had a large on-site fitness center, they were within walking distance of BMO field where the team was doing some training, and the Hotel had expansive outdoor areas. Because of COVID-19 restrictions, all of these things were important for the players.

[251] Mr. Lambert denied that the Hotel planned to replace 250 with Harlo because Harlo had better connections to the NHL (for the possible bubble contract) and e-sports. Phase II of the Hotel included building an e-sports arena next to the Hotel. Mr. Kallan testified that he had no control

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over the NHL's decision to use the Hotel for one of their player bubbles. He described MLSE as a tough negotiator. The Hotel did not make a lot of money out of the contract, but it was good for morale during the pandemic.

[252] It was suggested to Mr. Lambert that the only issue at this point between the Hotel and 250 were the rental arrears. The gratuity issue had been resolved, 250 had committed to hiring more managers, and the Hotel had backed away from its position that it required 250 to spend $100,000 per year on marketing. While there was still a disagreement about repairs and maintenance, Mr. Lambert agreed that the FBA was clear that if the tenant did not do required repairs, the Hotel could do them and charge back to the tenant.

[253] Mr. Lambert disagreed that all breaches other than rent had been resolved. He insisted that 250 had not hired the proper managers. He agreed that that would have been difficult to do while the Hotel was closed. He did not disagree that the Hotel owed 250 HST payments of more than $175,000 and an unreconciled amount from 2018 of $106,000.

[254] On July 2, 2020, after multiple meetings and exchanges of correspondence as set out above, the Hotel's counsel wrote to 250 and terminated its Agreements with 250 based on a breach of the Agreements by way of failure to pay rent. 250 was given no prior notice of any impending termination. Employees' lockers were cut open and their belongings thrown into bags. 250's witnesses testified that the termination was humiliating and unprofessional.

[255] Ms. Racco disagreed. She advised that employee lockers had to be emptied to make way for Harlo employees. Because of restrictions related to the NHL bubble, 250 employees were required to pick up their belongings at specific times. Ms. Racco also gave them the link to upcoming job fairs because Harlo was hiring. Ms. Racco advised that about 60% of the employees' belongings are still at the Hotel as no one has come to retrieve them.

[256] Ms. Hasham confirmed that in October 2020 there was a demonstration outside the Hotel by 250 staff who had been terminated on July 2, 2020. They claimed the Hotel owed them over $1.4 million in unpaid wages. Ms. Hasham's evidence was that any outstanding wage amounts were owed by 250, not the Hotel, as all 250 employees were employed by 250 and not the Hotel. The public is not informed about this, as the protests resulted in the Hotel receiving 27 one-star ratings on Trip Advisor which affected the Hotel's ranking on Trip Advisor. Ms. Hasham told the Court that she is not aware that 250 has ever properly told its employees that the Hotel is not legally responsible for their wages or benefits.

[257] It was suggested to Mr. Laksmono that the Hotel actually owed 250 more than the outstanding rent when the HST amounts and the $106,000 from 2018 were factored in. Mr. Laksmono disagreed. Deposits held by 250 were due to the Hotel upon termination. It is an agreed fact that 250 had $611,000 in deposits as of July 2, 2020. Factoring in other outstanding amounts including the rent, 250 owed the Hotel $735,879.85 on the date of termination. Mr. Laksmono relied on a damages chart he had prepared showing payables and receivables owed as between the Hotel and 250 as of July 1, 2020.

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[258] Mr. Laksmono was questioned extensively on this chart in terms of the numbers he had used to formulate his calculation of what was owing by 250 to the Hotel on the date of termination. For example, he included in the amounts owing to the Hotel by 250 an amount for the monitoring of a fire panel of $59,582. The Hotel alleged that 250 had incorrectly installed a fire alarm and it was constantly set off. It was turned off which required 24/7 security monitoring until the issue was repaired. 250 denied that it owed these amounts. The issue had previously been one which had been set aside to be decided between the owners.

[259] It was suggested to Mr. Laksmono that many of the numbers in his damages chart were incorrect. Understanding that the chart was prepared as of July 1, 2020, 250 challenged the accuracy of the input numbers as follows:

a. The amount owing to 250 for the charity rally should have been $98,000 and not $90,000.

b. The June billbacks had not yet been billed to 250 as of July 1, 2020.

c. The fire security panel amount ($59,582.) remained in dispute.

d. The $611,000 in event deposits was not actually owed to the Hotel until the termination date of July 2, 2020.

e. The amounts paid to Rogers & Company ($11,459) were paid after termination.

[260] It was further suggested to Mr. Laksmono that if the event deposit payment practice had not been changed, and using his numbers, the Hotel would actually have owed 250 $358,000. Mr. Laksmono testified that would only have been the case (and assuming he agreed with the calculations) had 250 fulfilled their management hiring commitments which they had not.

[261] Mr. Laksmono agreed that he had received instructions from Mr. Kallan not to pay 250 any amounts owed to it by the Hotel including the HST from January and February 2020. He also agreed the additional rent for March 2020 would not have been due until April 2020 when the invoices would have been available. Further, an email from Mr. Dash dated June 29, 2020 made it clear that 250 was still willing to pay amounts owing to the Hotel including Licence Fees for February and March 2020 totaling $26,990.34. Mr. Dash's email indicates that a cheque had been prepared for that amount and he wanted to coordinate with Mr. Laksmono.

[262] Mr. Eliopoulos testified that he will never forget the devastating lock out by the Hotel. Nothing like this had ever happened to him. He was concerned for the hundreds of employees who were affected and his large network of customers. He felt embarrassed and humiliated.

[263] Mr. Eliopoulos told the Court that if 250 had been given the chance to continue providing services at the Hotel it would have been business as usual. They would have learned to adapt. Things were looking up for 2020 had the pandemic not hit, and Mr. Eliopoulos was looking for great returns from Petros and the patio.

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[264] Mr. Lambert was asked why 250 was terminated when they had made it clear in at least three separate correspondences that they wanted to stay. His evidence was that 250 had flip flopped on their position, could have paid their rent and did not, and failed to make any real proposal.

[265] The July 2, 2020 letter claimed numerous defaults under the Leases and the FBA. A copy of the list of alleged defaults and other extracts from the July 2, 2020 letter are set out below:

> As you are aware, despite numerous requests, 25054243 Ontario Limited o/a byPeterandPaul.com ("P&P") has failed to pay rent on the Leases since March 2020. As of the date of this correspondence P&P owes at least $702,007.92 in back rent, even accounting for set off amounts owing by Hotel X to P&P.
>
> In addition, P&P has been in default of the Leases on an ongoing and constant basis since at least January 2019. These additional defaults include;
>
> 1. Failure to operate the Petros 82 restaurant and Maxx's Kitchen restaurant (collectively the "Restaurants"") to a level that is consistent with restaurants in other first-class hotels in the City of Toronto, including The Four Seasons Hotel, St. Regis Hotel (formerly Trump Hotel) or the Hazelton Hotel.
>
> 2. Failure to provide the list of equipment and related information required under Section 2.7 of the Petros 82 Lease.
>
> 3. Failure to provide the written reports set out in Section 5.4 of both Leases.
>
> 4. Failure to provide or make available the financial information requested by Hotel X pursuant to Section 16.10 of each of the Leases.
>
> 5. With respect to both Leases, the failure to maintain an adequate management staff in order to provide first class service; and
>
> 6. Failure to abide by operational requirements and minimum standards as set out at Article 11 of the Leases and as particularized in Hotel X's earlier letters to you.
>
> You have been notified of these defaults in correspondence dated January 3, 2019, January 17, 2019, February 18, 2019, December 6, 2019, January 3, 2020, February 3, 2020, February 27, 2020 and April 19, 2020.
>
> As a result of the above defaults Hotel X is terminating the Leases effective immediately.
>
> Please contact the undersigned lo advise when, prior to Friday July 10, 2020, P&P wishes to attend at Hotel X to pick up personal effects.
>
> P&P is also in breach of the F&B Agreement. P&P has been notified of those breaches in the above noted correspondence. The breaches include:

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1. Failure to perform the food and beverage services to a level that is consistent with other first-class hotels in the City of Toronto, including The Four Seasons Hotel, St. Regis Hotel (formerly Trump Hotel) or the Hazelton Hotel;

2. Failure to provide staffing levels to the level required under Section 4.2(a) of the F&B Agreement;

3. Failure to abide by PGH Operational Requirements as detailed in Hotel X's earlier letters to you;

4. Failure to adequately advertise and promote the food and beverage services at Hotel X including the requirement to provide a detailed marketing plan, as pertains to the "Falcon Skybar" and catering and other event operations;

5. Failure to ensure that F&B staff cooperate fully with management of Hotel X Toronto to ensure efficient and seamless performance of the food and beverage services;

6. Failure to undertake repairs and maintenance of equipment and facilities that are your express obligation under the F&B Agreement;

7. Failure to consistently conduct yourself in a professional manner and in compliance with all applicable laws, including laws relating to employee harassment;

8. Failure to pay and satisfy all of your trade debts, including amounts owing to food suppliers and others, as and when they became due and payable;

9. Failure to ensure that you maintain at all times cash on deposit or other liquid investments equal to the amount of all client deposits paid to you, currently in the outstanding amount of approximately $600,000;

10. Failure to ensure that client deposits paid to you are applied solely and exclusively to the cost and expense of specific events to which they relate; and

11. Voiding customer bills at the rooftop bar in order to avoid payment of Licence Fees owing under the F&B Agreement.

As a result of the above, Hotel X considers P&P to have repudiated the F&B Agreement and has, under earlier cover, already accepted this repudiation.

[266] Mr. Galanis testified that he and Mr. Eliopoulos were shocked to receive this letter. He was asked to comment on the alleged defaults. His evidence sums up 250's position on the disputed issues as follows:

a. The alleged rental arrears were incorrect. The arrears were in the range of $200,000.

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b. The restaurants and food and beverage services were operated at a superior level at all times.

c. He could not recall being asked for a list of equipment as per the Petros Lease and would have provided it if asked.

d. Mr. Galanis was certain that written reports were always provided to the Hotel as per the Lease requirements.

e. The Hotel had access to all 250's transactions at the hotel and provided other financial information when requested.

f. 250 agreed to fill the management positions as requested as per the parties' negotiations in February 2020. 250 always maintained adequate staffing levels despite the Hotel's lack of occupancy. 250 had issues with the Hotel's management as well. Mr. Eliopoulos' evidence is that he was experienced in running a service business and knew what he was doing. The organizational chart prepared by 250 showing various management positions had been prepared at the very beginning when hotel occupancy was estimated at 90%. Further, Mr. Eliopoulos does not philosophically agree with having HR Managers. His view is that they only create more problems. However, he agreed that 250 would hire one based on the negotiations that had taken place in February 2020.

g. 250 was not required to provide any marketing or promotion under the Agreements.

h. 250 always cooperated with and accommodated Hotel staff.

i. 250 maintained the equipment it was required to under the Agreements.

j. 250 always paid its trade debts. Mr. Galanis had different terms with different suppliers, so some debts were shown as outstanding because the supplier had agreed to a longer term.

k. 250 was not required to keep event or room rental deposits in trust. There was no such provision in the Agreements. Deposits were treated as part of 250's gross receipts. There was nothing improper in this. Mr. Galanis mentioned that with the Peter & Paul group, all event and banquet deposits are retained as gross receipts and used for cash flow.

l. 250 did not void customer bills to avoid Licence Fees. Occasionally, 250 would provide a free drink for a good customer or a potential special event client.

[267] 250's counsel responded to the July 2, 2020 letter on July 7, 2020 denying any defaults and disputing the Hotel's right to terminate the Agreements. The letter sets out in detail 250's position on all of the alleged defaults.

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[268] Mr. Park testified that the manner in which 250's employees were terminated was both devastating and shocking. They were treated unfairly with little thought as to how the termination would affect their life or family. The Hotel broke over 100 employee lockers, put their belongings in garbage bags, and left them at the loading dock for pick up. Employees reported to Mr. Park that they then saw their job posted online by Harlo. A few of 250's employees were hired by Harlo but not many.

[269] Mr. Galanis' evidence was that if 250 had been permitted to return to the Hotel upon reopening it would have continued to provide service under the Agreements including the NHL contract, in-room dining, takeout service, Grab & Go and patio dining. The Hotel has never paid the deposits or gross receipts owed to 250.

[270] Mr. Galanis testified that with some help from the governmental rental assistance and wage subsidy programs he was confident that 250 would have been able to make a small profit during COVID if the Hotel had not terminated the Agreements. His view was that revenues would have returned to pre-COVID levels in late 2021, especially with plans for sizeable revenue from the Petros private rooms, Sunday brunch and patio service.

[271] Mr. Galanis was clear that 250 never wanted to leave the Hotel. They simply felt bullied to the point that in February 2020 they mentioned the possible dissolution of the Agreements. However, after receipt of Mr. Lambert's February 27, 2020 letter they thought the idea had been shelved while the parties tried to work together cooperatively.

[272] Ms. Breckbill testified that even after the Hotel shut down in March, the senior leadership team continued working and making marketing plans for a reopening. That continued from the Hotel closing until the termination on July 2, 2020.

[273] Mr. Kimel testified that he was aware of the termination of 250 and began recruiting staff for his organization as early as July 9, 2020 to be ready for the NHL bubble. Harlo began to operate at the Hotel on July 16, 2020.

[274] It is true that 250 lost money in 2018 (March to December), 2019 (January to December) and 2020 (January to March), but Mr. Galanis stated he was looking forward to a busier hotel in 2021 and a chance to recoup some losses. Mr. Galanis was clear that the losses were not from any form of mismanagement on the part of 250. BPNP was an experienced food and beverage and event provider. However, such a large enterprise takes time to reach capacity. As well, as a result of the low occupancy rates at the Hotel and what 250 perceived was a failure by the Hotel to properly market itself, both sides suffered financially at the outset.

The Evidence of Brad Kinsella

[275] Mr. Kinsella is a businessman and the Director of the Starbucks located in the Hotel. He originally met with Mr. Kallan in 2014 to discuss the possibility of providing food and beverage service to the Hotel. However, Mr. Kinsella's business does not specialize in fine dining and did not think he was the right fit. Mr. Kinsella and Mr. Kallan did agree that Mr. Kinsella could lease the Stanley Barracks outdoor event space next door. Stanley Barracks' Gardens can accommodate 4,500 guests including a stage and a gazebo.

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[276] Mr. Kinsella described Mr. Kallan as "genius" who knows how to get things done. However, Mr. Kinsella was critical of Mr. Kallan's bullying tactics with staff and with him. Mr. Kallan called one of his staff members a "dyke." She quit two days later. Mr. Kinsella added that Mr. Kallan refused to assist him with a CECRA application for rental relief during the pandemic.

[277] Mr. Kinsella is in litigation with Mr. Kallan. According to Mr. Kinsella, Mr. Kallan would not allow him to use the designated parking spot, patio or common area seating outside of his Starbucks in the Hotel. Mr. Kinsella had to obtain an injunction to allow access to those areas. That lawsuit is ongoing. Mr. Kinsella has also sued Mr. Kallan in relation to the termination of his lease at the Stanley Barracks.

[278] Mr. Kallan confirmed several times throughout the trial that it was important to him and to the Hotel that he act in the best interests of his tenants and engage in a partnership with them so they could both have success. Mr. Kallan was asked how this was possible when he is being sued by his Starbucks tenant, the food and beverage operators of Stanley Barracks and 250, all of whom are or were his tenants. Mr. Kallan insisted that all of these tenants had failed to keep up their end of the bargain. He had given up millions to support them but in the end they simply lied.

The Bankruptcy Issue

[279] On September 9, 2020, the Hotel and five other creditors commenced a bankruptcy application against 250. The Hotel was the driving force behind the application since the other five creditors' claims only total approximately $100,000.

[280] On September 24, 2020, 250 filed a Notice of Intention pursuant to section 50.4 of the BIA. In October 2020, 250 brought a motion to stay the bankruptcy application. The Hotel opposed the motion. The Court allowed the motion pursuant to section 43(11) of the BIA. The Court noted that "on my view of the record, Hotel X commenced the application for the collateral purpose of putting an end to the litigation, not to protect any legitimate creditor interest."

[281] Prior to the commencement of trial, 250 brought a motion to extend the stay from March 8, 2021 to 15 days after the day on which the Court released its final decision in this matter. The relief was sought on the grounds that 250 will have sufficient funds to fund its expenses during the extension period and no stakeholder would be materially affected. Further, the BIA maximum extension would have been March 24, 2021 which is just over two weeks after the originally scheduled last day of trial. In fact, the trial continued well beyond the projected completion date taking 13 days instead of the projected seven days.

[282] As the Hotel did not take a position on the motion, the Court permitted the stay on the terms requested by 250. Given that the main asset of 250 is the claim in this litigation, it was logical to deal with the bankruptcy issues once the result of this trial is known.

Damages

[283] 250 claims damages for monies spent on leasehold improvements in fixturing the restaurants and other areas of the hotel. 250 claims capital expenditures of $7,124,524.92 inclusive

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of uniforms. It also claims an amount for bartered services at $670,000, and cash losses for 2017, 2018 and 2019 at $1,171,000 for a total of $8,965,542.92.

[284] With respect to bartered services, Mr. Galanis testified that for services done to improve the restaurant by Rose Hill Design, Norr and Superior Seating, events for those businesses were held at the hotel which offset or partially offset the cost of those services.

[285] In his evidence, Mr. Dash was referred to the Proposal Trustee's First Report dated September 28, 2020 which showed 250's assets at $8.372M as of September 25, 2020.

[286] Liabilities in that report were listed as $10.414M including trade payables of $3.9M. The trade payables in the First Report included $1.1M in related party loans and $583,000 in "bill backs" owed to the Hotel for April – June 2020. Bill backs included 250's share of things such as cleaning, utilities, garbage and parking.

[287] Other liabilities included loans from related parties (other PNP companies) and shareholder loans (from Mr. Galanis and Mr. Eliopoulos) at $5.778M. There were no repayment terms for those loans. The unearned revenue shown under liabilities included the $611,000 that 250 had retained as event deposits.

[288] Mr. Laksomono was referred to a spreadsheet he had prepared, which calculated the amount expended by 250 for Hotel fixturing at $4.737M. This was based on documents provided to him by 250. There was some dispute about this document and its admissibility at trial. Counsel for 250 objected on the grounds that the document was prepared after the commencement of litigation and for the purpose of settlement. Counsel for the Hotel argued that this document had been submitted in the Hotel's schedule of productions and was not identified as privileged.

[289] This document is *some* evidence of expenditures made by 250 but does not appear to be reliable. That is, the witness who prepared it, Mr. Laksmono, identified many questions about the documents used to formulate the spreadsheet. I therefore give the document some weight and accept Mr. Laksmono's evidence that as far as he knew Harlo did not have to pay for any of the capital expenditures he identified in the spreadsheet.

Employee Termination Damages

[290] After the termination letter on July 2, 2020, 250 was required to terminate approximately 270 full-time and part-time employees. At least 12 weeks of pay was owed to the employees. At the request of the Proposal Trustee, Mr. Dash prepared various charts setting out 250's potential liability for salary, hourly wages, vacation pay, and the employer's share of CPP, EI, WISB and EHT. Depending on the scenario, the liability ranged from $1.8M to just over $2M.

[291] Four employees made complaints to the Ministry of Labour. The payment orders resulting from those complaints have been stayed pending the outcome of this litigation.

[292] Mr. Kallan was asked about a meeting he attended at a Meeting of the Board of Governors of Exhibition Place on October 26, 2020. This meeting related to Phase II of the Hotel which has not yet commenced. During the course of that meeting, a former employee of 250 called in and

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asked that the City not approve any Hotel expansion because of Mr. Kallan's refusal to take responsibility for the hundreds of workers who were left without work when he broke his contract with 250. Councillor Joe Cressy asked Mr. Kallan to respond to the deputation from the former workers. Mr. Kallan explained that the 250 contract was terminated because it was not paying proper wages and benefits to its employees and failing to provide proper service. He also mentioned that 250 had been insolvent for 18 months.

[293] Mr. Kallan was asked why he said this at the meeting when the reason given to 250 for termination of the Agreements was their failure to pay rent. He told the Court that rent was the primary reason for the termination but there were many others including his two-year battle with 250 to force them to pay proper wages and hire adequate management staff. He insisted that these questions were a staged maneuver by disgruntled employees of 250. The Board of Governors meeting had nothing to do with termination of the Agreements with 250.

The Mistrial Motion

[294] After five and a half days of trial, on the afternoon of Monday March 8, 2020, Mr. Jacob Park, the former Director of Food and Beverage for 250 at the Hotel, was being cross-examined by the Hotel's counsel. During his cross-examination, he mentioned that he was aware of certain facts because he had learned them in the course of watching the trial. At that point, Mr. Park was placed in a separate room and a discussion took place between counsel and the Court. It was clear that neither the Court nor the Defendant were aware that 250's witnesses had been observing the trial. No Order Excluding Witnesses was sought at the commencement of trial by the Defendant. Counsel for the Hotel assumed, as did the Court, that the witness room that 250 had set up was a waiting room and not an observation room. An Order Excluding Witnesses was sought by the Hotel and granted shortly after this event.

[295] On the first morning of trial (March 1, 2021), counsel for 250 advised that Norton Rose's office would have three boardrooms connected to Zoom: one for counsel, one from which witnesses would testify, and another where witnesses would wait prior to their testimony. Counsel for the Plaintiff and submitted that both the Court and counsel for the Hotel had been advised that their clients would be observing the proceeding. Clearly, both the Court and the Defence took the reference to "clients" to mean clients who were not witnesses or witnesses who had already testified. Counsel for 250 has advised in its motion material that Mr. Eliopoulos, Mr. Galanis (other than times he was excluded), Anil Dash (until he was excluded), Erin Breckbill and Jacob Park had been observing the trial throughout.

[296] A transcript of the first morning of trial was ordered and circulated to counsel. During the opening minutes of the trial, the Court did a roll call and asked the various parties on the Zoom call to identify themselves. In response to the Court asking who was in the room identified as "L N Computer", counsel for 250 responded that "I believe that may be our clients in the boardroom." There was no indication that those "clients" were witnesses who would be testifying during the trial or that they would be observing the trial prior to their testimony. The clients in the witness room did not identify themselves nor were they requested to do so by either party or the Court.

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[297] The Hotel brought a motion seeking a mistrial and full indemnity costs. Alternatively it sought an Order striking the evidence of Jacob Park, Anil Dash and Erin Breckbill. The Hotel submitted that having these witnesses listen to and discuss the evidence of other witnesses resulted in unfairness to the Hotel. Specifically, Mr. Dash attempted to rehabilitate the evidence of Mr. Galanis, and Ms. Breckbill attempted to rehabilitate the evidence of Mr. Galanis and Mr. Eliopoulos.

[298] 250's position was that these witnesses were viewed as essential as each had specialized knowledge of 250's business. They were required to instruct counsel and if an Order excluding witnesses had been sought, 250 would have opposed it.

[299] I found that while the situation was concerning, it was not so egregious that it would require the extreme remedies of either a mistrial or the striking of evidence. I ruled that the Court would examine what weight to give to the evidence of Ms. Breckbill, Mr. Park and Mr. Dash where it related to issues about which Mr. Galanis or Mr. Eliopoulos testified.

[300] In the end, the Court relied very little on the evidence of Ms. Breckbill or Mr. Park on substantive issues. The evidence given by Mr. Dash was more significant as it related to what constituted HST revenues for the purpose of the CECRA application and how much money the Hotel owed to 250 as of June 30, 2020.

[301] However, these issues were ones in which Mr. Dash alone had expertise. Neither Mr. Galanis nor Mr. Eliopoulos were aware of the details of the HST issue, the parameters of the CECRA application or the reconciliation of what was owed to whom. As such, in retrospect, while the issue was very concerning when first raised, in the end it is not one which would change this Court's view with respect to the reliability of the testimony of the impugned witnesses and particularly Mr. Dash.

[302] What remains is perhaps a lesson for the world of virtual trials. Since there is no courtroom where those present can easily be accounted for, counsel and the Court must be aware of and enquire as to exactly who is present in each Zoom "room" during a trial to ensure trial fairness.

THE LEGAL ISSUES

ISSUE #1 – WAS THE TERMINATION OF THE AGREEMENTS LAWFUL?

[303] 250 argues that the termination of the Agreements was not lawful because the Hotel owed it money, the parties were engaged in discussions to seek relief, and the *Commercial Tenancies Act*, R.S.O., 1990, c. L.7, precluded eviction. The termination was a breach of the duty of good faith and honest performance and unlawful.

[304] The Hotel submits that all of this is very simple. 250 did not pay rent when it was obligated to do so. The Hotel had the right to terminate pursuant to the Lease. Further, 250 could have paid rent if it had chosen to do so. The Hotel refers by example to the fact that 250 has paid $500,000 in security for costs in this action. It had the funds available and simply chose not to pay rent.

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[305] Further, 250 never brought a motion for relief from forfeiture or an injunction because it had already chosen not to carry on with its financially disastrous business at the Hotel.

[306] The Proposal Trustee's report reveals that 250 owes $3.5M in trade debt, spent the $611,000 in deposits, and has no assets. 250 lost $1M in its first year of business and is insolvent. The non-payment of rent was simply a way to end what was the inevitable demise of 250's badly managed business.

[307] I do not agree with the Hotel. 250 was not obliged to pay rent from other sources. The Hotel insisted that 250 work with it to explore government subsidies for rent. It then failed to cooperate and act reasonably. I also do not agree that 250's actions were intended to lead to an end to its relationship with the Hotel. The evidence, in fact, demonstrates the contrary.

A. Was the Hotel Entitled to Keep the Deposits?

[308] A strict reading of s. 5.1 of the FBA did not permit the Hotel to keep the deposits. They were payable bi-weekly on the Monday of each second week. As set out in the extensive summary of facts above, the Hotel unilaterally and without notice changed the deposit arrangement on November 11, 2019. It is uncontested that this had a drastic effect on 250's cashflow.

[309] The Hotel's position was that this unilateral action was necessary to protect itself from liability related to cancellations as all catering contracts were made with the Hotel and not 250. Mr. Kallan gave evidence that he was concerned about 250's financial viability and needed to protect the Hotel. Mr. Kallan was also concerned that 250 was using the deposits for cashflow and to build out Petros. The unstated concern was that when the event came along, 250 would not have the money to pay for staff and supplies.

[310] The Hotel's alternative position is that the deposits were not actually withheld, only the timing of the payment of the deposits changed. The deposits were not money owed to 250, they were effectively advances and recorded as a liability on the Hotel's books. As such, Mr. Kallan took the view that s. 5.1 of the FBA actually meant that the Hotel was not required to pay the deposits until the event had taken place.

[311] I prefer the evidence of Mr. Galanis on this point. He was clear that the cost of putting on an event starts the moment it is booked considering staffing, meal selection and overall planning. This makes sense. The contractual arrangement between the parties was intended to allow 250 the benefit of the deposits in advance. The FBA did not specify what the deposits were to be spent on or that they were to be segregated in any way.

[312] By February 2020, it became clear that Mr. Kallan was using the non-payment of deposits to extract certain concessions from 250, many of which 250 was not contractually required to provide. Mr. Kallan conceded in the February 2020 meeting that was recorded by Ms. Racco that 250's failure to hire sufficient staff was the **only** reason the Hotel was holding the money. He did not mention his alleged concerns with 250's solvency.

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[313] Mr. Kallan insisted that 250 hire an HR Manager and commit to spending $100,000 per year on marketing. This was not required under the FBA, but the Hotel clung to its insistence on these items, using the withheld deposits as leverage.

[314] It is clear that the Hotel and 250 had different management styles. The Hotel had a traditional top-down departmental management style with very defined roles at each level of staff and management. 250 had a much looser style of management with managers floating from one area to another as needed and sometimes even working in the assigned area if staffing necessitated it. These two management styles clashed throughout the time that 250 was at the Hotel.

[315] The parties disagree with respect to the ultimate reconciliation of amounts owing between the parties. 250 takes the position that the approximately $611,000 in "unearned deposits" should not be included in the reconciliation, as those would not be payable but for the termination of the Agreements. Based on 250's calculations, the Hotel would have owed it over $358,000 as of June 30, 2020 meaning that there were no grounds for termination of the Agreements.

[316] The Hotel's accounting is different. Their position is that even if you back out the unearned deposits of $611,000, the HST payments and the 2018 outstanding payable, 250 owed the Hotel $152,000. However, many of the numbers in Mr. Laksomono's calculations were disputed as outlined in the summary of the evidence. In the end, there is some evidence to conclude that 250 was either owed money by the Hotel, there was no money owing either way or 250 owed a very small amount to the Hotel.

[317] I prefer the position of 250 on this issue. Accounting for HST payments, an outstanding payable of $106,225, the wrongly withheld deposits of $582,000, a rental security deposit of $112,000, backing out the charge for additional rent which would not have been billed until mid-July, and accepting that the unearned deposits of $611,000 would not have been due to be repaid until termination, the amounts owed to 250 by the Hotel exceeded any outstanding rent as of June 30, 2020.

[318] The Hotel had its own version of these numbers but it cannot have things both ways. It withheld the payment of deposits and HST it owed 250 and accounted for deposits in 250's possession which 250 had every right to retain until termination.

[319] In the end, I find that the Hotel took a high-handed approach to the situation with 250 on the issue of deposits. I find that it 1) wrongfully withheld them contrary to the FBA, 2) used the unpaid deposits to demand concessions to which it was not entitled under the FBA and 3) then used the deposits properly in the possession of 250 to justify amounts owing to it prior to and by way of justification for termination.

B. Should the Hotel Have Assisted 250 with CECRA?

[320] The evidence was clear that when the pandemic hit, the Hotel encouraged 250 to work with it to explore government subsidies available to assist with rent. However, the Hotel's actions were inconsistent with its statement that it truly wanted to work with 250 on the rental assistance issue as set out below.

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a. The Hotel's insistence on an independent CPA's opinion as to revenue was unrealistic and entirely unnecessary with respect to the requirements of the Program. Further, the early constraints of the pandemic when virtually all businesses closed for a period of time meant that services (including accounting services) were delayed and it would have been impossible to obtain such an opinion in the short turnaround time demanded by the Hotel.

b. The Hotel's position was inconsistent, claiming on the one hand it wanted to work with 250 with respect to the payment of outstanding rent and then advising it by letter on June 4, 2020 that it wanted to dissolve the agreements due to unpaid rent. 250 advised by way of email on June 12, 2020 that it wanted to continue to work with the Hotel on the rent issue.

c. I accept the evidence of 250's expert on the issue of CECRA. He was very familiar with these applications, having assisted many clients with them. It was his evidence that revenue audits such as the one demanded by the Hotel were not required. Further, I accept his evidence that if the Hotel had an issue with whether 250 exceeded the revenue threshold for the program, it could have pointed out its concerns to CRA without entirely refusing to participate. The liability and risk related to the program was shouldered by the tenant not the landlord.

d. The parameters of the Program were in evidence. The Hotel's obligation was to confirm that its **own** information was correct and it was entitled to rely on the tenant's attestation. If the tenant was found to have provided false information, this would have had no impact on the Hotel. Rather, 250 would have had to repay all forgiven rent. The landlord's 25% contribution of rent was not recoverable in any event.

e. It is clear that 250 qualified for the assistance in relation to its restaurants which both had revenues of under $50,000 during April, May and June 2020. The Hotel's expert, Mr. Tabrizi, agreed that Petros and Maxx's would have qualified under CECRA.

f. While Mr. Tabrizi and Mr. McGee differed in their views with respect to the revenues in the HST return for 2019 for 250, in the end I find that the fact that 250 exceeded the $20M revenue threshold by a small amount (assuming you accept Mr. Tabrizi's view) was insufficient to justify the Hotel's refusal to assist 250. There were ways around this according to Mr. McGee and ultimately 250's financial statements (when ready) revealed that their revenues in 2019 were in the range of $17M.

g. The Hotel submitted that 250 did nothing to verify its income. Its financial statements for 2018 and 2019 were not completed until December 2020. All the Hotel had was the HST return. The attestation required by CRA stipulated that the Landlord "had no knowledge, acting reasonably and without investigation, of any falsehood or misrepresentation contained in the tenant attestation…" The Hotel had

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knowledge that the tenant's revenue exceeded the threshold so they could not attest that they had no knowledge of a falsehood or representation by the tenant. However, Mr. Dash had provided a comprehensive outline of why certain revenue in the HST return should not form part of revenue due to "flow throughs" such as gratuities, license fees for banquet services, Skybar, and room rental sales. Mr. McGee agreed that these were all amounts collected by and retained by the Hotel and the HST on those amounts should not have been included in 250's revenue for the purpose of the CECRA Application.

[321] Pursuant to revisions to *Commercial Tenancies Act* made as a result of the pandemic, the Hotel would have been precluded from evicting 250 if 250 had qualified for CECRA (see s. 82) during the period of May 1, 2020 to August 31, 2020. Thereafter, 250 would have been eligible for the Canada Emergency Rent Subsidy Program ("CERS") and protected from eviction until as late as April 2022. Mr. Dash testified that he has successfully applied for both CECRA and CERS for PNP's other businesses.

[322] 250 submits that pursuant to s.86 of the *CTA* it is entitled to damages for an eviction during the pause period from May 1, 2020 to August 31, 2020 under CECRA. The damages are expectation damages as per *Dasham Carriers Inc. v. Gerlach,* 2012 ONSC 4797. In that case the court awarded damages for unlawful re-entry by a landlord including lost income and forfeiture of any security deposit.

[323] The Hotel argues that even if 250 had qualified for CECRA, this would not have resulted in any quantifiable damages because the lease had been terminated. The Hotel would have been precluded from entering until January 2021 but both experts called in relation to expectation damages testified that 250 would have lost money between July 1, 2020 and January 31, 2021. If 250 had qualified for CERS (which the Hotel submits it would not have since it was no longer a tenant) the Hotel could not have re-entered until April, 2022. 250's expert testified that 250 would not have been making a profit by that point in any event so there are still no damages. I deal with the issue of damages below.

[324] In summary, I find that the Hotel should have assisted 250 with its CECRA application. In hindsight, its reasons for not doing so were unjustified and it was resolute in its insistence that 250 did not qualify rather than finding ways in which it did. I further infer that part of the reason the Hotel did not want to assist 250 was that it had already decided that it wanted to dissolve the Agreements. By this point in June, the Hotel already had a signed Letter of Intent with Harlo. Committing to assisting 250 with CECRA meant further ties between the Hotel and 250. The Hotel had already moved on but had not told 250 this.

C. Did 250 Breach the Agreements?

[325] While the Hotel claimed that if 250 had simply paid its rent it could have continued on at the Hotel, this is not borne out by the Hotel's actions. The Hotel had a myriad of complaints about 250, its staff, its management and the quality of its services.

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[326] If I am wrong that the Hotel owed 250 more than 250 owed the Hotel as of June 30, 2020 and there were no grounds to terminate the tenancy, were there other breaches of the Agreements that would have entitled the Hotel to terminate them?

[327] There was significant evidence about customer satisfaction during the trial. The Hotel claimed that 250 failed to follow up on or completely ignored customer complaints. 250's position was that overall, in consideration of the number of people served and the fact that it was a new Hotel, the complaints were entirely within the normal range. Further, Mr. Park's evidence was that he tried very hard to follow up on complaints. Mr. Kallan's evidence was that he had to hire Meagan McDonald to deal with customer complaints given that 250 failed to do so.

[328] In the end, I do not find that this issue can be framed as a formal "breach" of the Agreements nor was it specifically raised in the July 2, 2020 termination letter. The fact is that there were many positive reviews of the hotel, catered events and the restaurants. Hotel X was new and had only had one full year of operation before the pandemic hit. Without an historic basis on which to compare the complaints it is difficult to use the Revenate or Trip Advisor information to substantiate a breach of the standard of performance expected pursuant to the Agreements.

[329] There was also significant evidence at trial concerning 250's management structure. This is set out in detail in the description of the trial evidence but as mentioned above, it is this Court's view that the real problem was the fundamentally different philosophical approaches taken by the Hotel and 250 towards how to manage its employees and its services.

[330] I accept the evidence of Mr. Paravalos that the organizational chart he prepared before the Hotel opened was based on 80% occupancy and a projected $30M in revenue. The Hotel referenced this chart repeatedly during the trial claiming that 250 was bound to provide the management structure set out in the chart but had failed to do so. First, staffing 250 in accordance with Mr. Paravolos' organizational chart was not a requirement under the Agreements. Second, it is not disputed that the Hotel occupancy was never even close to 80% during the time that 250 was there. Mr. Paravolos' evidence was that management positions would be filled as demand grew. That demand did not grow at the pace that was anticipated.

[331] The evidence of Mr. Kallan was that this was not the way to organize staff. One must have all of the staff hired up front rather than waiting to fill a demand. While no expert evidence was called on the optimum staffing model for hotel food and beverage services, suffice it to say that there was a significant divergence of opinion on this issue.

[332] It is clear, however, that after the "gratuity crisis" in November 2019, 250 recognized that if it wanted to continue to have a good working relationship with the Hotel, it had to hire more management staff. As such, by February 2020 250 had added eight management staff and seven supervisory staff from the date it commenced operations in the Hotel in 2018. Further, it is clear from Senior Leadership Team meeting minutes in February 2020 that recruitment was "ongoing." The February 25, 2020 Senior Leadership Team meeting minutes reflected that Mr. Park was actively recruiting an HR Manager. Ms. Racco testified that she was aware that Mr. Park had undertaken an interview process for an HR Manager. Unfortunately, due to the pandemic shutdown and the subsequent termination of 250, no one was ever hired for that position.

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[333] Despite Mr. Kallan's and Ms. Racco's concurrence that an HR Manager was essential for 250's effective operation, there was no such requirement in the Agreements. Mr. Kallan conceded that this was true but insisted that 250 was bound by the fact that its organizational charts included an HR Manager position which had never been filled.

[334] I do not find that 250 can be reasonably bound to management planning set out in an organizational chart. Such charts were prepared for guidance and none were ever referred to in the Agreements. In the end, the Hotel never achieved its occupancy or revenue goals during the time that 250 operated there so it is not surprising that 250 was not staffed to its full capacity. While hiring an HR Manager earlier on would likely have been beneficial to 250, it was not required under the Agreements and the failure to do so cannot be considered a breach.

[335] The Hotel justified many of its actions post-November 2019 on the basis of concerns that 250 was insolvent. While 250 did owe suppliers money, Mr. Galanis told the Court that he had different arrangements with different suppliers. Mr. Galanis had been in the construction business for many years and had long standing relationships with many suppliers. There was also evidence from Mr. Dash that PNP would make capital transfers to 250 as necessary for cash flow purposes.

[336] I accept 250's submissions that the actions of the Hotel itself contributed significantly to 250's financial difficulties after November 2019, including the following:

a. The unilateral and without-notice withholding of deposits;

b. The decision by the Hotel to close (without consulting 250) thereby depriving 250 of potential in-room dining and take out revenue;

c. The unilateral and without-notice withholding of HST payments owed to 250;

d. The Hotel allowed 250 to continue to incur costs for a reopening in July while covertly negotiating with Halo;

[337] Mr. Kallan's evidence was that he was concerned that 250 was spending its deposit revenue on fixturing Petros and this was a reason for concern about 250's solvency. The Agreements did not prohibit using deposit revenue for cashflow. Further, Mr. Laksomono agreed that the Hotel used funds earmarked for HST owed to 250 for its own cashflow.

[338] Mr. Kallan also relied on the "Rose Hill Dispute" as a reason for concern about 250's solvency. The evidence about what was actually owed to Rose Hill was contradictory. Mr. Raitsinis agreed that when he first demanded payment from 250 in August 2019 he had only provided the invoices for the previous year's work a few weeks before due to an "accounting issue at his end."

[339] In the end, I agree that it would be unfair for the Hotel to rely on 250's alleged insolvency as a breach of the Agreements when the Hotel's own actions contributed to 250's financial difficulties after November 2019.

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[340] When the gratuity issue was resolved in December 2019, Mr. Kallan and Mr. Lambert agreed that the only remaining outstanding issues with 250 as of June 30, 2020 were the rent arrears and the commitment to hiring management staff. 250 was surprised to receive the July 2, 2020 termination letter setting out a list of alleged breaches, many of which had not previously been brought to 250's attention.

[341] With respect to termination based on a failure to pay rent, the alleged breach is addressed either by outstanding amounts owed by the Hotel to 250 or by the Hotel's failure to assist 250 with its CECRA application. The Hotel's position is that the failure to pay rent cannot be dealt with by way of set off since set off of rent is not permitted under the Leases. Specifically, the Leases do not permit either set off or abatement of basic rent even in the face of a breach. However, I find that the fact that set off is not permitted under the terms of the Leases does not end the matter. Any amounts found owing to 250 could form the basis of a counterclaim against a judgment obtained by 250 against the Hotel. That is, the terms of the Leases cannot be viewed in a vacuum in terms of amounts owing to 250.

[342] Turning to the other alleged breaches in the July 2, 2020 letter, two of them do not require consideration because there was no such requirement in the Agreements. These include:

a. Failure to promote and market the Hotel or the Restaurants or to commit to a $100,000 per annum marketing spend;

b. Failure to ensure cash on deposit equal to the amount of client deposits and that such deposits must be applied solely to the events to which they related.

[343] With respect to the allegations that 250 stole the Hotel's client lists or diverted business to their other venues, there was no evidence led by the Hotel at trial to refute the evidence of 250. 250's witnesses testified that client lists were used with the Hotel's knowledge to cross promote events. 250's witnesses denied any diversion of business.

[344] Regarding the allegation that 250 was voiding customer bills at Skybar, Ms. Breckbill conceded that occasionally she or other members of senior management would provide free food or drinks at Skybar to potential customers related to large catering contracts. When the Hotel complained, the practice immediately stopped. The Hotel's undertakings confirmed that this was no longer an issue. I find that it was not a ground on which the Hotel could rely by way of a breach of the Agreements.

[345] The Hotel also alleged breaches related to 250's failure to provide certain financial information and a list of leasehold improvements at Petros. I accept Mr. Dash's evidence that the Hotel had access to 250's financial systems. Indeed, all Food & Beverage transactions went through 250's POS system to which the Hotel had access. Mr. Dash's evidence was that no further financial reports were ever requested.

[346] As for the list of leasehold improvements, a list for Maxx's was provided in February 2019. It was conceded that one was not provided for Petros as when it was originally requested in January 2019 Petros was not yet complete. 250 received no further follow up requests or any Notice of Breach.

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[347] I do not find that the failure to provide financial information or a list of leasehold improvements constitutes a breach of the Agreements. There was evidence that the information was not requested or if it was (in the case of the Petros leasehold improvements) there was no follow up. I infer that the long delay in the Petros opening contributed to the miscommunication on this issue.

[348] The Hotel complained that 250 breached the Agreements by failing to conduct repairs and maintenance. The evidence revealed disagreements about who was responsible for certain repairs including maintenance for general wear and tear. In the end, I rely on the provision in the Agreements that the Hotel could charge back such repairs to 250 if required and they routinely did so. There was no evidence that 250 refused to pay such chargebacks. I do not find that this can be found to be a breach of the Agreements when the Hotel had its own remedy for this alleged default which it regularly utilized.

[349] Another breach related to an alleged failure by 250 to abide by operational standards by failing to deal with customer complaints. As outlined above, there was contradictory evidence on this issue, with the Hotel alleging that 250 ignored complaints and 250 claiming they did their best to follow up. I have already concluded above that the Hotel was so new, with revenue and occupancy so far below other Hotels in the CompSet, it is impossible to lay the blame of all customer dissatisfaction at the feet of 250. Of course, there were many positive reviews of both the Hotel and the Restaurants which the Hotel chose not to refer to in its evidence.

[350] The Hotel alleged that 250 breached the Agreements by instructing its staff not to cooperate with Hotel management. Mr. Eliopoulos did not deny that he had told his staff not to take instructions from Hotel management. That is because those instructions often contradicted the instructions from 250 management. It is therefore understandable why such an instruction may have been given.

[351] Interestingly, Mr. Paravolos' evidence was that he felt that 250 cooperated well with the Hotel given the glitches with the Hotel opening. Also, Ms. Ross similarly testified that 250's leadership cooperated well with the Hotel and that their leadership team were all professionals.

[352] There were also the regular Senior Leadership Team meetings at which management from both the Hotel and 250 were present. The Minutes of those meetings in evidence demonstrate a good level of cooperation and professionalism.

[353] I find that this issue arises once again from the fundamental difference in management styles as between the Hotel and 250. This led to suspicions, accusations and misunderstandings which were interpreted by both sides as a lack of cooperation. I therefore do not find that this can be characterized as a breach of the Agreements.

[354] The Hotel also alleged that 250 had breached the Agreements by failing to conduct itself in compliance with applicable laws including employee harassment. This alleged breach permits the Court to explore its concerns with the allegations related to the behavior of both Mr. Kallan and Mr. Eliopoulos. Mr. Kallan is alleged to have acted in a rude and homophobic manner towards

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Mr. Park and a TD conference attendee. He also felt he had an unfettered right to comment on 250's employees.

[355] According to Mr. Park, Mr. Kallan insisted that a certain employee of Skybar be fired because he was a "prick." Mr. Kallan was also directed to a letter of complaint from Parkdale Legal Services regarding a former 250 employee, Ms. Evelina Tihomirova. Mr. Kallan had requested that Ms. Tihomirova be "relocated" due to a mole on her face. Mr. Kallan also requested that a 250 employee be removed from Maxx's because "he looks like an idiot" and "we should not have people like this in my hotel."

[356] Mr. Kallan's evidence was that he was permitted to relocate employees temporarily pursuant to s. 4.13 of the FBA. His position was that he was entitled to do this until the condition was "dealt with" and that it was not personal. He was just being helpful.

[357] Evidence from other 250 witnesses described Mr. Kallan as aggressive and threatening. Mr. Park, in particular, felt threatened by Mr. Kallan who told him that 250 had to hire more management or he would "kick them out." Ms. Ross was present at a meeting when Mr. Kallan announced that once 250 had finished the leasehold improvements he would be terminating their contract. Mr. Park also reported that Mr. Kallan referred to Mr. Eliopoulos as a "drunk" and "crazy."

[358] Mr. Kallan denied these allegations and was supported in this by Mr. Lambert and Ms. Racco who described him as an excellent person to work for and far from homophobic.

[359] Mr. Eliopoulos did not come through this trial unscathed either. He was described by Mr. Kallan as prone to exaggeration and unprofessional. It did not seem to be a secret that Mr. Eliopoulos regularly swore in front of his employees. Mr. Eliopoulos conceded that he told Mr. Lambert to "fuck off" more than once. He did not respect Mr. Lambert. Mr. Lambert's evidence was that Mr. Eliopoulos' permissiveness instilled a culture in 250's management which led to complaints by employees.

[360] In summary, I find that both Mr. Eliopoulos and Mr. Kallan acted inappropriately at times. Frankly, neither of them is in a position to complain about the other. I find that, at times, neither of them were in compliance with the expected conduct of principals of their respective businesses and that any alleged breaches of the Agreements in this regard should be given no weight.

[361] Given all of the above, I find that the termination of the Agreements was unlawful for the following reasons:

a. The Hotel was not entitled to keep the event deposits which it then used to leverage concessions from 250 and contributed to 250's financial difficulties;

b. The Hotel owed 250 money as of the day before the termination;

c. The Hotel had an obligation to assist 250 with the CECRA Program. Its position on the issue of revenue was not reasonable.

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d. The Hotel's own actions contributed to 250's inability to pay rent.

e. The list of alleged breaches in the July 2, 2020 termination letter was groundless.

ISSUE #2 – WAS THE TERMINATION OF THE AGREEMENTS IN BAD FAITH?

A. The Harlo Negotiations

[362] There can be no doubt that the Hotel undertook the negotiations with Harlo with no intention of advising 250 that it was doing so. Its employees were told not to discuss the negotiations. The Hotel's position is that it had no choice but to undertake negotiations because 250 had never responded to its February 27, 2020 letter. I find this position to be a ruse intended to justify the Hotel's secretive and intentional steps to rid itself of 250 commencing in March 2020.

[363] While it is true that 250 did not respond to the February 27, 2020 letter until June, it continued to provide services at the Hotel based on the statement in that letter that the Hotel preferred that 250 remain as its food & beverage operator. It was open to the Hotel to advise 250 that since no response had been received it intended to embark on negotiations with a new operator. That would certainly have provoked a response from 250.

[364] Specific examples of "business as usual" conduct on the part of the Hotel included communication such as the email on May 1, 2020 from Matt Black to Mr. Park discussing a marketing plan and communication strategy for the reopening.

[365] In fact, 250 continued to provide services and planning a return to the Hotel after its closure as late as the morning of July 2, 2020 when the termination letter was received. At no time did the Hotel disabuse 250 of the fact that they would not be returning to the Hotel. In fact, the Hotel's actions in June 2020 could be described as bordering on cruel. 250 was continuing to hire new management staff in accordance with the Hotel's demands and the Hotel knew this yet did not reveal its plans. Further, on the day the LOI was signed with Harlo (June 4, 2020), Mr. Lambert sent a demand letter to 250 requesting payment of all arrears of rent.

[366] On two occasions in June 2020 (June 12th and 26th) 250 formally advised the Hotel that they wanted to stay on and hoped to engage the support of the Hotel in obtaining rental relief through CECRA. The Hotel again did not reveal its intentions even up to the last minute when Mr. Lambert engaged in email correspondence with Mr. Park about the NHL Bubble.

[367] In *Bhasin v. Hrynew*, 2014 SCC 71, 3 S.C.R. 494, the Supreme Court of Canada set out the duty of honest performance in contract. This duty applies to all contracts and includes an obligation to correct a false impression created through that party's own actions. A case on point is *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, 10 B.L.R. (6th) 1. In this recent Supreme Court case, the court dealt with a condominium corporation that terminated a winter maintenance agreement with Callow but did not inform Callow at the time. Callow continued working and thought it would be receiving a two-year extension of its contract. Given this expectation, it performed summer maintenance work without charge. The condo corporation then terminated the contract. Callow sued for breach of contract claiming bad faith. The trial judge was satisfied that the condo corporation actively deceived Callow. The Court of Appeal set aside the trial decision on the basis

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that the deception related to a new contract not yet in existence and was therefore not directly related to the winter maintenance contract. The Supreme Court set aside the Court of Appeal's decision and reinstated the decision of the trial judge.

[368] The Supreme Court tackled the question of whether the duty of good faith in *Bhasin* included inaction as well as outright lies. The Court concluded that it did, and that one can be misled through action or through inaction by failing to correct a misapprehension caused by one's own conduct (para. 90).

[369] It is clear in this case that the Hotel knew that 250 intended to stay on and continue with its contract. Despite this, it continued with serious negotiations with Harlo even to the point of making staff introductions (Mr. Laksmono). The process was kept entirely secret from 250. The fact that the Hotel continued to communicate with 250 as late as the morning of July 2, 2020 as if nothing had changed was, I find, a breach of the duty of good faith in contract by way of misleading by inaction.

[370] I do not accept the Hotel's argument that active misrepresentation is required. *Callow* is clear that inaction in failing to correct a misapprehension is a breach of the duty of good faith. The Hotel was well aware that 250 retained staff who were actively preparing for a July reopening and subsequently the possibility of the NHL bubble.

[371] Further, like in *Callow*, the Hotel was aware that 250 was continuing with its recruitment of management personnel as per the Hotel's demands and that staff such as Mr. Park were working hard towards ensuring that when the Hotel re-opened in July 2020 it would be able to offer food & beverage services. In fact, staff of 250 were excited about the prospect of servicing the NHL Bubble. The Hotel never advised them of the fact that they had no intention of keeping 250 on for servicing the NHL Bubble.

[372] The Hotel submits that they were under no obligation to advise 250 that they intended to bring in a new operator when 250 was in breach of its lease.

[373] The Hotel is clearly under the impression that because 250 had not (in its view) adequately responded to the February 27, 2020 letter and because it was in arrears of rent, the Hotel could choose any course of action without repercussion and without consultation with 250. That is a flawed course of action which does not account for the Hotel's duty of good faith to 250.

[374] The Hotel argues that, in any event, the lease is clear that the Hotel is entitled to retain the fixtures once they are installed in the Hotel. The Hotel argues that 250's arguments related to damages in relation to it having been deprived of the use of its equipment is untenable because the lease was properly terminated and the equipment then belonged to the Hotel.

[375] The fact that the lease stipulates that any capital improvements belong to the landlord upon termination of the lease does not disentitle 250 to reliance damages. 250 was deprived of the use of that equipment which it installed in reliance on the Agreements. The Hotel's termination of the Agreements without notice created chaos for 250 and its employees.

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B. Could 250's Intentions Have Been Misinterpreted?

[376] In February 2019, Mr. Eliopoulos wrote to Mr. Kallan expressing 250's desire to "stay in partnership with PGH and move forward in a positive direction." The negotiations were not always positive, and by March 2019, 250 was asking that their differences be arbitrated.

[377] The Hotel was busy in 2019 and things between the parties settled somewhat until the "gratuity crisis" in November 2019 sparked further negotiations concerning an agreement about staffing and gratuities. Those negotiations were often heated because of the issue of withheld deposits and by February 2020, 250 stated on two occasions in writing that it wanted to dissolve the Agreements. This led to the Hotel's February 27, 2020 letter about which there was much evidence at trial and much discussion in this judgment.

[378] The contents of the February 27, 2020 letter bear examination again. In that letter the Hotel stated:

> We would prefer that you remain as Operator and Tenant in the hotel, and focus on creating and sustaining a culture and management structure that enables you to perform the services at the level required. This has always been our objective. However we are open to discussions if you insist…We request that you provide us for our review any specific proposals that you may have with respect to the requested dissolution of the contracts.

[379] 250 took no substantive action in response to that letter. Their position was that the letter did not need a response so long as it intended to continue to provide services at the Hotel. The Hotel relies on this lack of response as significant and deliberate, while 250 thought nothing of it.

[380] While the Hotel waited for a response to that letter, things carried on as usual. In early March 2020, Mr. Laksmono and Mr. Dash worked on a reconciliation by swapping out amounts owed by each to the other. This included 250's March rent.

[381] On March 10, 2020, Ms. Adele Gutman sent an email to Mr. Galanis encouraging 250's commitment to hire more managers.

[382] On April 19, 2020, Mr. Lambert wrote to Mr. Galanis advising 250 that its position that it would not pay rent while the Hotel was shut down was untenable but that 250 **had an obligation to engage your landlord to explore options.** The letter refers to options such as government loans and subsidies.

[383] By June 2020, 250 confirmed in writing that it wanted to stay on. This led to the June 17, 2020 without-prejudice discussions between Mr. Kallan and Mr. Eliopoulos and later the termination letter on July 2, 2020.

[384] As mentioned above, while these negotiations were ongoing, 250 continued to plan for an intended hotel opening in July, continued with its hiring of management staff and requested help with its application to CECRA.

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[385] It is understandable that the Hotel may have been confused about the messaging from 250 and what its true intentions were but, overall, I find that its actions post-February 2020 could not amount to any form of repudiation of the Agreements. Certainly the Hotel's actions could not be found to be an acceptance of the repudiation as the Hotel permitted 250 to think it would be resuming normal operations in July 2020.

[386] In summary, I find that termination of the Agreements was done in bad faith for the following reasons:

a. The Hotel permitted 250 to believe that it was "business as usual" all the while negotiating with Harlo with a clear intention to replace 250.

b. The Hotel terminated the Agreements without notice which had drastic and foreseeable consequences including compensation for 250's 200 employees who were working at the Hotel at the time.

c. The Hotel's reliance on 250's lack of response to the February 27, 2020 letter to justify all of its actions is disingenuous.

DAMAGES

[387] The ordinary measure of damages in tort is reliance damages. The ordinary measure of damages for breach of contract is expectation damages. Where the contract has been unprofitable (as in this case), the claimant may elect to claim reliance damages which amount to wasted expenditures which the claimant would not have incurred had it known the contract would have been breached: *PreMD Inc. v Ogilvy Renault LLP*, 2013 ONCA 412 at para. 66.

[388] Reliance damages are limited in two ways. First, they are limited to expenses that are "truly wasted": *PreMD* at para. 67. Second, they are limited to recovery of the plaintiff's expectancy interest; that is, the claimant cannot be put in a better position than it would have been had the contract been performed. The defendant bears the onus of showing that the injured party would not have recouped the expense even if the defendant had met its obligations under the contract: *PreMD* at para 70. Therefore, the Hotel bears the onus to show that 250 would not have recouped its expenses even if it had not terminated the contract.

[389] Generally, it is thought that expectation and reliance damages are mutually exclusive. However, there is the possibility of claiming for both so long as they do not overlap: *Ticketnet Corp. v. Air Canada*, 154 D.L.R. (4th) 271 (Ont. C.A.).

[390] As will be set out below, while there may not be overlap of the two types of damages in this case, expectation damages are too difficult for the Court to assess given the level of uncertainty in the exercise of that assessment.

[391] The more reliable approach is to grant reliance damages based on a review the evidence related to the cost of 250's investment, as the Court is more easily able to put 250 back into the position it would have been in had it not entered into the contract at all.

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A. *Expectation Damages - Lost Profit for the Remainder of the Lease*

Plaintiff's Expert

[392] Mr. Prem Lobo ("Mr. Lobo") of Cohen Hamilton Steger & Co. Inc. provided an expert report for 250 outlining the financial losses suffered by 250 as a result of the alleged improper termination of the Agreements by the Hotel.

[393] Mr. Lobo's qualifications were not contested by the Hotel. Mr. Lobo is a qualified CA, CPA, CBV and fraud examiner. He has experience in loss quantification in court proceedings and has prepared reports for the food and beverage, manufacturing, real estate and pharmaceutical industries. He has testified as an expert in Ontario, Quebec and Eastern Caribbean Courts.

[394] Mr. Lobo summarizes 250's losses at page 12 of his report. His conclusions were divided into four separate time periods: past losses from July 2 to December 31, 2020; future losses for the balance of the first initial 10-year term ending in September 2029; and two further five-year extension periods as permitted by the FBA and the Leases. His estimate of the mid-range of losses for the total periods was $11.598M.

[395] Under the FBA, Mr. Lobo separated out the losses into banquet/catering, Skybar, Other Operations (room service and Grab & Go) and Cost Plus Operations (VIP Lounge and staff cafeteria). Maxx's and Petros were also separate line items.

[396] Mr. Lobo began his analysis by looking to projections prepared for the FBA and the restaurants which were prepared in January 2018. Mr. Lobo described these as projections which had been collaboratively set up by the parties for a four-year period extending to January 2021. He also looked at the 2020 sales budget as prepared in 2019. The 2020 sales budget assumed that 250 would have earned the same amount as Harlo during the NHL bubble, or $2.6M.

[397] Mr. Lobo was asked why he relied on the 2018 projections when they were done prior to the Hotel opening. His view was that they were a reliable source of information because they were prepared collaboratively between 250 and the Hotel prior to the negotiations related to the Amending Agreement.

[398] The "ramp-up" for the Hotel and 250 was originally projected over a four-year period, after which the projections anticipated a mature, stabilized state; however, in December 2019 it was determined by 250 that the ramp-up period would be extended by a year such that projections extended to year 4 (2021) and year 5 (2022).

[399] The abovementioned projections were all made prior to any effect from the pandemic. As such, Mr. Lobo revised the projections and extended them out for a further two years assuming that the ramp-up anticipated for 2020-2022 would be extended to 2022-2024.

[400] In determining a return to normal occupancy and operations by 2024, Mr. Lobo relied on a reopening beginning in the fall of 2021 due to vaccines and an initial growth of 2%, with a growth of 4% in 2022. These projections were based on data economic and industry data related to the pandemic and its effect on sales revenue for the next two years.

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[401] In coming to his conclusions about 250's profitability of Banquet/Catering Earnings for the period of the Agreements, Mr. Lobo used industry statistics, Government of Canada statistics, and comparisons to two of BPNP's venues, Universal and Paramount. Mr. Lobo used industry standards by way of reasonableness checks with respect to adjustments made to the projections.

[402] Mr. Lobo did not use the 2018 projections in determining future losses for the restaurants as the projections did not include the restaurants. Instead, he used 250's 2020 and 2021 sales budget, had discussions with 250 about the operation of the restaurants and their marketing plan, and used pricing assumptions for menus in these types of establishments. His calculations also included the two-year effect of the pandemic in 2020 and 2021.

[403] Mr. Lobo applied a risk adjustment contingency to his calculations due to the risk that the food and beverage and restaurant revenue may not rebound as projected as the economy rebounds from the pandemic. He also applied a discount rate to account and adjust for the present value of future losses. Using a formula to calculate 250's "weighted average cost of capital" ("WACC"), Mr. Lobo considered the cost of equity, the cost of debt, positive factors (such as pent-up demand for events, 250's long history of operations, and the Hotel's large event space offerings) and negative factors (such as the Hotel's lower-than-expected occupancy rate, the poor ongoing relationship between the Hotel and 250, and the limited track record of operations at the Hotel by 250). For each of the five-year extension periods available at the end of the Agreements, he added a further discount rate to account for the possibility of the Agreements not being renewed or terminated prior to their expiry.

[404] Mr. Lobo estimated expenses for the relevant period but made reductions to certain of the fixed costs because of the lower revenue levels. He also included eligible wage subsidies. He did not include any rent subsidies, but that would have further reduced expenses.

[405] In summary, Mr. Lobo calculated that over the total period banquet/catering services would have earned a profit of $11.22M, Skybar $571,00, Petros $1.32M and $586,000 from the VIP Lounge, special events and the staff canteen. Room service and Grab & Go would have lost $1.047M and Maxx's $1.052M. The total average of the low and high numbers net of the losses was therefore $11.598M in lost profits over the entire period.

[406] Mr. Lambert did not agree with Mr. Lobo's projections. His evidence was that it would have been impossible for banquets to do revenue of $4.8M and Skybar $815,000 in 2021 with the current restrictions in place. Mr. Lambert's view was that even if restrictions were lifted tomorrow, that amount of revenue could not be achieved. He described Mr. Lobo's projections for Skybar and banquets up to 2025 as "aggressive" and "almost impossible."

[407] Mr. Lambert was referred to a letter dated January 25, 2019, which he wrote to Mr. Eliopoulos summarizing a meeting which had taken place between the Hotel and 250's management on January 23, 2020. The letter refers to the Hotel's view that Skybar should be able to generate $10M+ in revenue annually and banquets should be able to generate $15M in 2019.

[408] On February 3, 2020, Mr. Lambert wrote to 250 about the disappointing revenues for Skybar and banquets in 2019. The Hotel proposed minimum license fees going forward. His

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revenue estimate for Skybar went down to $5M. He agreed that the $10M estimate in his January 25, 2019 for Skybar was "pie in the sky." He further agreed that the Hotel's own revenue forecasts and Mr. Lobo's projections never went to $5M for Skybar, yet this is what they were demanding from 250.

[409] Mr. Laksmono was also referred to Mr. Lobo's report. He had prepared a five-year forecast summary for the Hotel in January 2021 based on historical and industry data. He has done these types of forecasts in the past and found that they have proven to be 85-90% accurate.

[410] Mr. Laksmono's forecast for banquet and catering revenue for the Hotel was $1.1M in 2021, $9M in 2022 and $11M in 2023. He asked to comment on Mr. Lobo's banquet and catering projection of $4.8M in 2021. He viewed that projection as a huge number and "out to lunch." His evidence was that the Hotel had $19M in catering and banquet revenue in 2019 and would likely not achieve that number again until 2024 given COVID.

[411] Mr. Laksmono was also asked about Mr. Lobo's projections for Skybar revenue at $3.2M in 2022. He did not agree and did not feel that number was achievable until 2024. With respect to Mr. Lobo's projection for Skybar at $5M for 2023, Mr. Laksmono's evidence was that meant that Skybar had to generate approximately $13,000 in revenue per day. He did not believe that was realistic as Skybar only had 20 days in 2019 in which it generated revenues over $20,000. He also did not believe that Mr. Lobo's number of $8M for 2024 was viable. He explained that there is a capacity issue at Skybar. The space is limited which means that even at its peak, revenues can only reach a certain threshold.

[412] Mr. Lobo was referred to the Fuller Landau expert's report filed by the Hotel and dated February 16, 2021. That report concluded that 250 would have had losses of $912,000 between July 2, 2020 to January 31, 2020. Mr. Lobo's report showed a loss for the period from July 2, 2020 to December 31, 2020 of $72,000. His evidence was that the Fuller Landau report used a seven-month instead of a six-month reporting period, and different assumptions including higher operating and labour costs and rental arrears of $300,000. If he had adjusted his calculations for a seven-month period, he would have calculated a loss of $187,000. He noted that both his report and that of Fuller Landau reported losses during that initial period.

[413] Mr. Lobo confirmed that he applied a contingency factor to the losses during the abovementioned period. He was asked why he would do that when the numbers were in the past and known. His view was that some contingency should be applied for expenses. Mr. Lobo further agreed that if additional rent and rental arrears were added into the loss for that period it could have been as high as $507,000. He agreed that this number also did not include the $611,000 in deposits received by 250.

[414] Mr. Lobo did not opine that these differences in the initial period would change his opinion overall. He noted that he also calculated losses in 2021. However, all industries were forecasted to have increased revenues after 2021 and even during late 2021.

[415] Mr. Lobo was asked why he did not include the liabilities of $10M set out in the KSV report from September 2020. His response was that the scope of his report did not include any

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comment on the insolvency portion but related solely to incremental cash flows potentially earned by 250. He did account for risk which is not the same as 250's liabilities.

[416] Mr. Lobo was also directed to projections of future revenue streams as prepared by the Hotel. Those projections showed revenues much lower than those predicted by Mr. Lobo. He explained that the fundamental driver for those numbers was room occupancy. Without proper context he was not willing to rely on those numbers. However, he agreed that if the Hotel's projections were used, the lost profits would be lowered. He also noted that the Hotel's projections did not include revenue from either of the restaurants.

[417] Mr. Lobo was asked to use the Hotel projection numbers for the Skybar and banquet revenue for 2023. Using his model and applying his discount rate, he agreed that neither of those outlets would have earned any money until 2023.

Defendant's Expert

[418] Mr. Bruce Roher gave evidence on behalf of the Hotel with respect to the cash flow or deficiency that would have been incurred or realized by 250 from July 2, 2020 to January 31, 2021 but for the termination of the Agreements. Mr. Roher prepared two reports. His main report dated February 16, 2021 and an Addendum Report dated March 4, 2021.

[419] Mr. Roher is a qualified CPA, Certified Business Valuator, and is also certified in financial forensics. His qualification to testify as an expert and the scope of his testimony was not contested. Mr. Roher has testified many times before the Superior Court.

[420] The period of July 2, 2020 to January 31, 2021 ("the cashflow period") was chosen as, under current legislation, 250 could not have been evicted until after January 31, 2021 if it had qualified for CECRA.

[421] Mr. Roher originally estimated that 250's estimated cash flow deficiency during the cash flow period would have been $912,000. In his Addendum Report he revised this number down to $819,000. The revision resulted from changes to the fixed and variable operating expenses and HST.

[422] The deficit included an assumption that 250 was in arrears of rent, additional rent, and billbacks from prior to July 2, 2020. He reviewed a total of 28 documents including the pleadings. Mr. Roher asked for Harlo's statements of income during the cash flow period and a breakdown of 250's gross profit by venue from inception to July 2, 2020 but did not receive those documents.

[423] In terms of methodology used, Mr. Roher started with revenue based on 250's actual 2019 revenue and then deducted various costs including food and beverage, fixed and variable labour, fixed operating expenses, license fees, base rent, additional rent, billbacks owed and rent owed prior to the cash flow period. A wage subsidy was added back.

[424] Mr. Roher explained that food and beverage costs at 29% were calculated using the 2019 variable costs as a percentage of revenue to estimate the 2020 variable costs, industry standards,

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Government of Canada statistics and the financial statements for two of BPNP's other businesses for 2019.

[425] Wages were estimated using a similar methodology but removing the variable portion which related to agency labour. Mr. Roher's calculations included wage but not rental subsidies as he was advised that there was a dispute as to whether 250 met the CECRA criteria.

[426] Mr. Roher made several comments about Mr. Lobo's report. His view was that Mr. Lobo should have met with the Hotel to understand the assumptions in the Hotel management projections he relied upon. He also felt that Mr. Lobo underestimated the percentage of food and beverage cost at 24%.

[427] Mr. Roher agreed that any deductions from revenue that were incorrect would impact his bottom-line number. He agreed that his expense for wages did not assume any employee layoffs during the cash flow period.

Analysis

[428] It is difficult for this court to accurately determine expectation damages in this case. In *T.T.C. v. Aqua Taxi Ltd.*, 6 D.L.R. (2d), (Ont. Sup. Ct.), Justice Gale grappled with a damages claim by the TTC for damages it alleged it suffered in 1955 due to the defendants operating a water taxi service in Toronto Harbour on the theory that the TTC alone had the right to operate passenger service to Toronto Island.

[429] The Court noted the following at page 745 in attempting to assess the TTC's damages;

> Although the Courts sometimes appear to be at variance in their approach to the degree of proof required for the assessment of substantial damages, I think they are guided by a consistent principle. The general rule is that the plaintiff must prove sufficient facts to enable the Court **to calculate the loss with reasonable certainty.** To this must be added the qualification that, where the damages are, by their intrinsic nature, incapable of assessment with any degree of certainty, the plaintiff must prove the facts and the Court will approximate a sum, even although it may be little better than a guess. The case at bar falls within the general rule. There is no inherent difficulty in the nature of the damages themselves. The plaintiff's damage was clearly the loss of the fares which it would have received from passengers who travelled on the defendants' jitney service, and who would otherwise have used the plaintiff's ferries. Accordingly, the plaintiff was required to prove the facts from which the Court could make a reasonable calculation as to the damages suffered, and that was not done. I am satisfied that there was some damage, but the plaintiff has not shown the necessary facts from which I could come to an intelligent conclusion as to what it was. The only alternative would be for me to speculate and that I decline to do. This is not a case where the nature of the damages makes it practically impossible to measure the loss, and even if it was, the plaintiff would not have satisfied the duty on it to prove the facts on which the calculations could be based. That is an obligation which the Court will never

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assume and if a plaintiff is unable to discharge it, then substantial damages cannot be awarded.

[430] While substantial expert evidence was provided, the difficulty with the experts' calculations is the degree of uncertainty. A few examples of the Court's concerns are as follows:

a. While both experts acknowledged the effect of the pandemic on future profits, their estimates may now be inaccurate given the effects of the third wave of the pandemic and the length of time needed for the phasing in of re-opening. Mr. Lobo's report relied on the Hotel's assessment that they would be able to re-open venues and host events commencing June 2021. That is no longer realistic. It is simply unknown at this time when restrictions will be lifted to the point where indoor gatherings will permit full banquet and restaurant operation.

b. Mr. Lobo's calculations assume that the 10-year contract would be fulfilled plus two renewals. That is, one of Mr. Lobo's assumptions was that the loss period began on July 2, 2020 and extended to March 2038 (September 2039 for Petros). It is this Court's view that a 20-year relationship with these two entities is not a realistic assumption give the differences in their business models.

c. The profits of 250 were to some degree tied to room occupancy. The projections for occupancy were far lower than anticipated when 250 was at the Hotel and this was a future variable on which Mr. Lobo could not speculate and would also no doubt be affected by economic factors tied to the pandemic recovery period.
d. Mr. Lobo agreed that there would be no profit from either Skybar or banquets until 2023 using the Hotel's projections.

[431] What the above examples illustrate is that the conclusions of both experts are very dependent on variables which are "incapable of assessment with any degree of certainty", to borrow the language of the *TTC* case. The Court cannot be called upon to speculate when the effects of such unpredictable variables as the pandemic (Will there be a fourth wave? Will vaccines work against new variants? When will restrictions be loosened? What will be the long-term effect on the hotel and food & beverage industry?) will force the Court to simply guess at what the future profits of 250 could be. That is not acceptable and indeed contrary to the ratio in such cases as *TTC*. A more rational and reliable manner of assessing damages is by examining the lost capital which 250 expended in reliance on the performance of its contract.

B. *Lost Costs Invested in the Hotel and Other Damages Claimed (Reliance Damages)*

[432] The nature of reliance damages tries to put the injured party in the position it would have been had the tort not been committed. Where expectation damages cannot be proven (as in this case), reliance damages amount to wasted expenditures which the party incurred in reliance on the contract.[2]

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[2] John McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at pp. 832-37.

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[433] 250 claims lost costs invested in the Hotel of $8,965,534.92 as per their revised Reliance Damages brief dated February 25, 2021. Those damages can be broken down into three categories: 1) leasehold improvements including uniforms, 2) bartered goods, and 3) cash losses for 2017, 2018 and 2019 as per their financial statements. 250 provided receipts and cheques verifying the leasehold improvements.

[434] Mr. Laksmono had prepared a spreadsheet in which he calculated that 250 had spent a total of only $4.737M on fixturing the hotel restaurants. This document's admissibility was challenged at trial as 250's counsel submitted it was prepared for the purposes of settlement. The Hotel's position was that it formed part of its schedule of productions and was known to 250 well in advance of trial.

[435] KSV's First Report dated September 28, 2020 showed leasehold improvements of $6.983M plus accounts receivable and various other amounts for total assets of $8.372M.

[436] Therefore, the floor of reliance damages would be Mr. Laksmono's estimate of $4.737M, the mid-range would be KSV's asset assessment at $8.372M, and the highest estimate was 250's at $8,965,534.92.

[437] The Hotel has counterclaimed for $2M in damages but was only able to substantiate $735,879 in its evidence. The Hotel seeks to have its counterclaim set off against any amounts found to be owing to 250.

[438] The Hotel submits that since 250's expectation damages are $0, their reliance damages must be capped at $0. The Hotel takes the position that, had the leases not been terminated, there is no explanation as to how 250 would have survived. 250 is simply a disgruntled and unsuccessful contractor who wants the Hotel to pay for its mistakes.

[439] Turning to the actual amount of reliance damages claimed, I refer to the reliance damages brief dated February 25, 2021. The $8,965.524 claimed by 250 can be broken down as follows:

a. Capital improvements: $7,704,52

b. Value for bartered services: $670,000

c. Cash loss for 2017/18/19 $1,171,000

[440] It is the Court's view that neither the barter transactions nor the cash losses should be included as part of the claimed reliance damages. The cash losses would form part of expectation damages which I have already determined are too speculative to award. As for the barter transactions, there was no reliable evidence that the services in exchange for the barters had actually taken place. Since the basis for the barters was often a service in exchange for a PNP event, the inability to hold events because of the pandemic makes the barter arrangements impossible to evaluate.

[441] 250 also sought to include executive time for Mr. Dash, Ms. Breckbill, Mr. Galanis and Mr. Eliopoulos prior to the hotel opening totaling $894,400. Again, these amounts would not form

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part of reliance damages and were apparently absorbed by the PNP companies in any event. For this proposition, I rely on *PreMD v. Ogilvy Renault LLP*, 2013 ONCA 412, where the trial judge declined to award damages for expenses incurred by PreMD before it entered into its contract with Ogilvy Renaud. The trial judge was upheld on this point by the Court of Appeal. The Court of Appeal held that the parties did not contemplate that PreMD would be compensated for it expenses prior to the contract. I find the present case is analogous in that regard.

[442] The Hotel submits that $2.3M of the capital improvement was billed to and paid for by Paramount, and there was no evidence that 250 is obliged to repay Paramount given that it forms part of the PNP group. I do not agree that this amount should be deducted from the claimed reliance damages. 250 is a separate company from Paramount and would be obliged to repay the amounts owing. The fact that Paramount has not required that those amounts be repaid to date is irrelevant. They are still owed.

[443] In summary, I find that reliance damages of $7,124,524.92 are owed by the Hotel to 250. 250 entered into the Agreements and fixtured Maxx's and Petros on the understanding that they would have the use of those capital improvements throughout the course of the Agreements. The termination of the Agreements by the Hotel was done in bad faith and without notice. This deprived 250 of the ability to use their investment in the hotel.

[444] I confirm having rejected the Hotel's argument that the lease stipulates that they own the fixtures upon the termination of the Agreements and therefore no reliance damages are owed. That provision does not preclude 250 from claiming and receiving reliance damages in relation to the Agreements. Further, the fact that expectation damages are hard to evaluate does not rule out the awarding of reliance damages. They are not mutually exclusive.

Punitive Damages

[445] 250 claims punitive damages of $10M based on a breach of the duty of good faith where the Hotel terminated the Agreements in a high-handed manner that went well beyond the expected standard of business morality.

[446] 250 relies on several employment law cases for its claim for punitive damages. In *Liebrich v. Farmers of North America,* 2019 BCSC 1074, the court awarded punitive damages, finding that the employer's misconduct in the manner of termination of the employee was "egregiously objectionable" and was "properly the subject of deterrence and denunciation" and sufficiently blameworthy to merit the imposition of punitive damages (para. 131). $15,000 in punitive damages was awarded.

[447] In *Morison v. Ergo-Industrial Seating Systems Inc.*, 2016 ONSC 6725 the court found that the defendant had committed an actionable wrong independent of the claim for damages for breach of contract. The court found the Defendant's conduct to be reprehensible, malicious, oppressive and high-handed (para 54). The court awarded $50,000 in punitive damages.

[448] Although I have found bad faith on the part of the Hotel in the manner in which they terminated the Agreements, their actions do not reach the high threshold of reprehensible or egregiously objectional conduct in the employment law cases cited by 250. This is, therefore, not

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a case for punitive damages. If I am wrong, I would have awarded $1.00 in punitive damages to 250.

Employee Termination Damages

[449] While 250 claims these damages under a separate heading, they form part of the overall compensatory damages claimed. 250 claims employee termination damages of between $1.799M and $2.063M based on four different scenarios plus four decisions already rendered under the *Employment Standards Act.*

[450] It is this Court's view that the termination damages were a reasonably foreseeable consequence of the termination of the Agreement without notice when 250 had several hundred employees working at the Hotel. I do not accept the Hotel's argument that these damages cannot be awarded because they are conditional and therefore the court has no jurisdiction to award them. 250's former employees should not suffer from the foreseeable consequence of the Hotel's conduct. A fair process for dealing with these damages must be determined.

[451] The difficulty with such a process is not knowing exactly how much will actually be claimed. Therefore, $2.063M (the highest of the four scenarios calculated by the Plaintiffs) will be paid by the Hotel to the Trustee within 30 days of the date of this judgment. The Trustee will run a form of claims process over a six-month period and pay out the claims as they are received upon confirmation by the Trustee of the validity of the claim. Any amounts left after the claims process period will be returned to the Hotel. If the claims exceed the amounts paid to the Trustee, 250 will not be permitted to claim more from the Hotel.

The Counterclaim

[452] The Hotel has claimed $2M in damages by way of counterclaim. By its own admission it is only able to prove a total of $735,879.85. As requested by 250, this amount should be set off against the damages awarded to 250.

FINAL ORDERS

[453] The Defendant shall forthwith pay to the Trustee the sum of $7,124.524.92 in reliance damages forthwith.

[454] Deducted from the Plaintiff's damages shall be the sum of $735,879.85 in damages owed to the Defendant.

[455] The Defendant shall, within 30 days, pay to the Trustee the sum of $2.063M in employee compensation damages to be used exclusively for the claims process set out in this judgment. These funds are impressed with a trust in favour of the employees and therefore do not form part of the bankrupt's estate and are not available to other creditors.

[456] 250 shall provide to the Trustee any required employment records in order to facilitate the employee claims process.

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[457] The Trustee's fees for the administration of the employee claims process shall be brought back to me for approval and in any event cannot exceed 10% of the amount of the paid out claims.

[458] If the Trustee requires further Orders or directions in relation to the employee claims process, I may be spoken to.

[459] If the parties cannot agree on costs, I will receive written submissions of no more than 8 pages (double spaced) exclusive of any Bill of Costs or Offer to Settle. Case and file references are to be hyperlinked. Costs submissions will be received on a seven-day turnaround starting with the Plaintiff. Cost submissions are to be sent by email attachment to my assistant at therese.navrotski@ontario.ca. If no costs submissions are received within 35 days, costs shall be deemed to be settled.

C. Gilmore, J.

Released: July 5, 2021

2021 ONSC 4649 (CanLII)

CITATION: 2505243 Ontario Limited et al. v. Princes Gate GP Inc. et al., 2021 ONSC 4649
COURT FILE NO.: CV-20-00644262
DATE: 20210705

2021 ONSC 4649 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

2505243 Ontario Limited o/a ByPeterandPaul.com

Plaintiff

– and –

Princes Gate GP Inc. in its Capacity as General Partner of Princes Gates Hotel Limited Partnership

Defendant

TRIAL JUDGMENT

C. Gilmore, J.

Released: July 5, 2021

TAB 4

1999 CanLII 664 (SCC)

Guarantee Company of North America *Appellant*

v.

Gordon Capital Corporation *Respondent*

and

Chubb Insurance Company of Canada and Laurentian General Insurance Company Inc. *Respondents*

INDEXED AS: GUARANTEE CO. OF NORTH AMERICA *v.* GORDON CAPITAL CORP.

File No.: 26654.

1999: June 17; 1999: October 15.

Present: L'Heureux-Dubé, Gonthier, Iacobucci, Major and Bastarache JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil procedure — Summary judgment — Test for summary judgment — Motions judge determining that record sufficient to deal with motion for summary judgment — No genuine issue requiring trial — Whether Court of Appeal erred in interfering with motions judge's determination.

Contracts — Insurance — Misrepresentation — Rescission — Repudiation — Distinction between rescission and repudiation.

Contracts — Insurance — Contractual limitation periods — Wrongful rescission — Construction approach to fundamental breach — Whether contractual limitation period in bond survived wrongful rescission of bond.

The respondent investment dealer and brokerage firm entered into a fidelity insurance contract with the appellant. During the period of time covered by the bond, one of its employees engaged in fraudulent and dishonest activities which led to his enrichment and significant losses to the respondent. The respondent notified the appellant of a potential fidelity bond claim. Its sworn proof of loss indicated that the loss was discovered on June 26, 1991. The appellant advised the respondent

Guarantee Company of North America *Appelante*

c.

Gordon Capital Corporation *Intimée*

et

Chubb Insurance Company of Canada et Laurentian General Insurance Company Inc. *Intimées*

RÉPERTORIÉ: GUARANTEE CO. OF NORTH AMERICA *c.* GORDON CAPITAL CORP.

N° du greffe: 26654.

1999: 17 juin; 1999: 15 octobre.

Présents: Les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major et Bastarache.

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

Procédure civile — Jugements sommaires — Critère applicable aux jugements sommaires — Décision du juge des requêtes que le dossier est suffisant pour trancher une motion visant à obtenir un jugement sommaire — Absence de véritable question requérant la tenue d'un procès — La Cour d'appel a-t-elle commis une erreur en modifiant la décision du juge des requêtes?

Contrats — Assurance — Déclaration inexacte — Résiliation — Répudiation — Distinction entre résiliation et répudiation.

Contrats — Assurance — Délais de prescription contractuels — Résiliation injustifiée — Façon d'aborder l'inexécution fondamentale sous l'angle de l'interprétation — Le délai de prescription prévu dans la police a-t-il continué de s'appliquer après la résiliation injustifiée de cette dernière?

La maison de courtage de valeurs mobilières intimée a conclu avec l'appelante une police d'assurance contre les détournements. Pendant la période visée par la police, un des employés de l'intimée s'est livré à des activités frauduleuses et malhonnêtes qui lui ont permis de s'enrichir et qui ont entraîné des pertes importantes pour l'intimée. L'intimée a informé l'appelante de la possibilité qu'une réclamation fondée sur une assurance contre les détournements soit présentée. Sa preuve de

that, pursuant to a provision in the bond, it was rescinding the bond on the basis that the respondent had made misrepresentations in its application for the bond. The respondent denied the validity of the rescission and refused to accept the return of the premiums, and on July 15, 1993 commenced an action against the appellant in Quebec. The appellant then commenced an action in Ontario claiming that the bond was rescinded and that the respondent had failed to commence legal proceedings for the recovery of the loss within 24 months from the discovery of such loss as required by the bond. Eventually, the proceedings instituted in Quebec were stayed pending the outcome of the Ontario action. The appellant brought a motion for summary judgment on the basis that the respondent had failed to commence legal proceedings within the time period prescribed by the bond. The motions judge granted summary judgment in favour of the appellant. The Court of Appeal allowed the respondent's appeal. At issue here is whether the Court of Appeal should have interfered with the motions judge's determination that the record was sufficient to deal with the appellant's summary judgment motion and whether the Court of Appeal erred in finding that the limitation period in the bond did not survive the appellant's affirmation that the bond was rescinded.

Held: The appeal should be allowed.

The proper test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial. Once the moving party has made this showing, the respondent must then establish his claim as being one with a real chance of success. This case is an appropriate one for summary judgment as there was no genuine issue for trial. Under section 3 of the bond, all that was required for discovery of loss were sufficient facts to cause a reasonable person to assume that a loss of a type covered by the bond would be incurred. The undisputed facts in the present case lend strong support to the inference that it could be reasonably assumed that a loss of the type covered by the policy had been or would be incurred. No credibility issue sufficient to require trial was raised in the present case. A self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence. On a proper reading of the bond, a loss of the type covered is simply a loss resulting from employee dishonesty with the presumption that the manifest intent of such behaviour was personal gain. The test for dis-

sinistre attestée sous serment indiquait que le sinistre avait été découvert le 26 juin 1991. L'appelante a informé l'intimée que, conformément à une disposition de la police, elle résiliait cette police pour le motif que l'intimée avait fait des déclarations inexactes dans sa demande de police. L'intimée a nié la validité de la résiliation, refusé le remboursement des primes et intenté une action contre l'appelante au Québec, le 15 juillet 1993. L'appelante a alors intenté une action en Ontario dans laquelle elle alléguait que la police était résiliée et que l'intimée avait omis d'engager des procédures d'indemnisation du sinistre dans les 24 mois suivant sa découverte, comme l'exigeait la police. En fin de compte, l'action intentée au Québec a été suspendue jusqu'à ce qu'une décision soit rendue sur l'action intentée en Ontario. L'appelante a présenté une motion visant à obtenir un jugement sommaire pour le motif que l'intimée avait omis d'engager des procédures judiciaires dans le délai prescrit par la police. Le juge des requêtes a rendu un jugement sommaire en faveur de l'appelante. La Cour d'appel a accueilli l'appel de l'intimée. Il s'agit en l'espèce de savoir si la Cour d'appel a eu raison de modifier la décision du juge des requêtes que le dossier était suffisant pour trancher la motion de l'appelante visant à obtenir un jugement sommaire, et si la Cour d'appel a commis une erreur en concluant que le délai de prescription prévu dans la police avait cessé de s'appliquer dès que l'appelante avait confirmé que la police était résiliée.

Arrêt: Le pourvoi est accueilli.

Le critère qu'il convient d'appliquer à une motion visant à obtenir un jugement sommaire est respecté lorsque le requérant démontre qu'il n'y a aucune véritable question de fait importante qui requiert la tenue d'un procès. Une fois que l'auteur de la motion a fait cette démonstration, il incombe ensuite à la partie intimée d'établir que son action a vraiment des chances de réussir. La présente affaire se prête à un jugement sommaire vu l'absence de véritable question requérant la tenue d'un procès. Suivant l'article 3 de la police, la découverte d'un sinistre requiert seulement l'existence de faits suffisants pour inciter une personne raisonnable à supposer qu'un sinistre du genre visé par la police surviendra. Les faits non contestés en l'espèce étayent fortement la déduction que l'on pouvait raisonnablement supposer qu'un sinistre du genre visé par la police était survenu ou surviendrait. Aucune question de crédibilité suffisante pour nécessiter la tenue d'un procès n'a été soulevée dans la présente affaire. En l'absence d'un exposé détaillé des faits et d'éléments de preuve à l'appui, un affidavit intéressé n'est pas suffisant en soi pour donner naissance à une question susceptible de faire

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covery of loss under the bond was an objective one that did not require a definitive finding of loss, but merely an assumption. There was no legal issue to be resolved at trial.

l'objet d'un débat judiciaire. Selon une juste interprétation de la police, un sinistre du genre visé correspond simplement au sinistre résultant de la malhonnêteté d'un employé qui, présume-t-on, avait manifestement l'intention de réaliser un gain personnel. Suivant la police, le critère applicable à la découverte d'un sinistre était un critère objectif qui requérait non pas une constatation définitive de sinistre, mais simplement une supposition. Il n'y avait aucune question de droit à trancher au procès.

Problems have arisen from misuse of the word "rescission" to describe an accepted repudiation. To use these terms synonymously can only lead to confusion and should be avoided. Rescission is a remedy available to the representee, *inter alia*, when the other party has made a false or misleading representation. Repudiation, by contrast, occurs by words or conduct evincing an intention not to be bound by the contract. Contrary to rescission, which allows the rescinding party to treat the contract as if it were void *ab initio*, the effect of repudiation depends on the election made by the non-repudiating party. If the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations, although rights and obligations that have already matured are not extinguished. If the repudiation is not accepted, the contract remains in being for the future and each party has the right to sue for damages for past or future breaches. Courts must be sensitive to the potential for misuse of the term rescission and must analyse the entire context of the contract and give effect, where possible, to the parties' intent. Where, as in this case, the misrepresentation becomes a term of the contract, rescission will be available if the misrepresentation is "substantial", "material" or "goes to the root of the contract". Here the bond specifically provided that misrepresentations of "material fact" would be grounds for rescission. As the parties are sophisticated, it is appropriate to give effect to their intent as expressed in the plain words of the contract. The appellant's attempt to effect a restitution of the premiums paid by the respondent confirms that "rescission" is appropriately used in the bond.

Des problèmes découlent de l'emploi abusif du mot «résiliation» pour décrire une répudiation acceptée. L'emploi de ces mots comme synonymes ne peut qu'engendrer de la confusion et devrait être évité. Une partie peut résilier un contrat notamment dans le cas où l'autre partie lui a fait une déclaration fausse ou trompeuse. Par contre, la répudiation se fait par des mots ou une conduite traduisant l'intention de ne pas être lié par le contrat. Contrairement à la résiliation qui permet à la partie qui résilie le contrat de le considérer comme étant nul au départ, l'effet de la répudiation dépend du choix que fait la partie autre que celle qui répudie le contrat. Si la partie autre que celle qui répudie le contrat accepte la répudiation, le contrat prend fin et les parties sont libérées de leurs obligations futures, quoique les droits et obligations qui sont déjà arrivés à échéance ne soient pas éteints. Si la répudiation n'est pas acceptée, le contrat reste en vigueur à l'avenir et chacune des parties a le droit d'intenter une action en dommages-intérêts pour toute rupture passée ou future. Les tribunaux doivent être conscients du risque d'emploi abusif du terme «résiliation» et ils doivent analyser le contexte intégral du contrat et, si possible, mettre à exécution l'intention des parties. Lorsque, comme en l'espèce, la déclaration inexacte devient une clause du contrat, la résiliation sera possible si la déclaration inexacte est «substantielle», «importante» ou «touche à l'essence même du contrat». Dans la présente affaire, la police prévoyait expressément que toute déclaration inexacte d'un «fait important» constituerait un motif de résiliation. Comme les parties sont avisées, il convient de mettre à exécution l'intention qu'elles ont clairement exprimée dans le contrat. La tentative par l'appelante d'effectuer une restitution des primes versées par l'intimée confirme que le mot «résiliation» est utilisé à juste titre dans la police.

Proceeding upon the assumption that the appellant wrongfully rescinded the bond, the appellant was not precluded from relying on the 24-month contractual limitation period contained in the bond. Substantial failure of contractual performance, often described in other contexts as a fundamental breach, may relieve the non-breaching party from future executory contractual

En supposant qu'elle a résilié la police de façon injustifiée, l'appelante n'était pas empêchée d'invoquer le délai de prescription de 24 mois prévu dans la police. L'inexécution substantielle d'un contrat par une partie, souvent appelée «inexécution fondamentale» dans d'autres contextes, peut libérer l'autre partie de l'exécution future des obligations qui lui incombent en vertu du

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obligations. Here, as a matter of contractual interpretation, the parties intended that the contractual limitation period survive a wrongful rescission on the part of the appellant. Commercial reality is often the best indicator of contractual intention in cases such as this. Absent some explanation to the contrary, if a given construction of the contract would lead to an absurd result, the assumption is that this result could not have been intended by rational commercial actors in making their bargain. In this case, to deny the application of the time limitation clause would lead to an absurd result. The appellant, when faced with a potential misrepresentation concerning the degree of risk it has agreed to underwrite, would be placed in the untenable position of subjecting itself to a longer statutory limitation period than would otherwise apply in circumstances where coverage has been denied for other reasons. Upon a true construction of the contract, and taking into account the stated purpose of a contractual limitation period as a device whereby the insurer can both quantify and limit risk, the intention of the parties was that the clause setting out the 24-month limitation period was to apply to the process of bringing a claim against the appellant where the appellant has breached the contract by wrongfully rescinding, whether the breach is characterized as fundamental or otherwise. The parties to this appeal were sophisticated commercial actors who were represented by counsel. In these circumstances, it would not be unconscionable, unfair, unreasonable or otherwise contrary to public policy to uphold the intentions of the parties concerning the operation of the contractual limitation period.

Cases Cited

Applied: *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; **distinguished:** *Mills v. S.I.M.U. Mutual Insurance Association*, [1970] N.Z.L.R. 602; **referred to:** *Ross v. Scottish Union and National Insurance Co.* (1918), 58 S.C.R. 169; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545; *Rogers Cable TV Ltd. v. 373041 Ontario Ltd.* (1994), 22 O.R. (3d) 25; *Confederation Trust Co. v. Alizadeh*, [1998] O.J. No. 408 (QL); *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773; *Keneric Tractor Sales Ltd. v. Langille*, [1987] 2 S.C.R. 440; *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 S.C.R. 265; *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827; *B.G. Linton Construction Ltd. v. Canadian National Railway Co.*,

contrat. En l'espèce, sur le plan de l'interprétation du contrat, les parties ont voulu que le délai de prescription prévu dans le contrat continue de s'appliquer après sa résiliation injustifiée par l'appelante. La réalité commerciale est souvent le meilleur indice de l'intention des parties contractantes dans des cas comme celui-ci. Si une interprétation donnée du contrat menait à un résultat absurde, on supposerait qu'en l'absence d'explication contraire des acteurs commerciaux rationnels ne peuvent pas avoir voulu un tel résultat en concluant leur contrat. En l'espèce, un refus d'appliquer la clause du délai de prescription mènerait à un résultat absurde. L'appelante, face à une éventuelle déclaration inexacte concernant l'ampleur du risque qu'elle a accepté d'assurer, se retrouverait dans la situation intenable où elle s'imposerait un délai de prescription légal plus long que celui qui s'appliquerait par ailleurs dans le cas où l'indemnisation est refusée pour d'autres motifs. Selon une interprétation exacte du contrat et compte tenu de l'objet explicite d'un délai de prescription contractuel en tant que mécanisme permettant à l'assureur de quantifier et de limiter le risque, les parties ont voulu que la clause, qui établit le délai de prescription de 24 mois, s'applique à l'engagement d'une action contre l'appelante dans le cas où celle-ci romprait le contrat en le résiliant de façon injustifiée, peu importe que cette rupture soit qualifiée de fondamentale ou autre. Les parties au présent pourvoi étaient des acteurs commerciaux avisés représentés par des avocats. Dans ces circonstances, il ne serait pas inique, injuste, déraisonnable ou par ailleurs contraire à l'ordre public de respecter l'intention des parties concernant l'application du délai de prescription contractuel.

Jurisprudence

Arrêt appliqué: *Hunter Engineering Co. c. Syncrude Canada Ltée*, [1989] 1 R.C.S. 426; **distinction d'avec l'arrêt:** *Mills c. S.I.M.U. Mutual Insurance Association*, [1970] N.Z.L.R. 602; **arrêts mentionnés:** *Ross c. Scottish Union and National Insurance Co.* (1918), 58 R.C.S. 169; *Hercules Managements Ltd. c. Ernst & Young*, [1997] 2 R.C.S. 165; *Dawson c. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257; *Irving Ungerman Ltd. c. Galanis* (1991), 4 O.R. (3d) 545; *Rogers Cable TV Ltd. c. 373041 Ontario Ltd.* (1994), 22 O.R. (3d) 25; *Confederation Trust Co. c. Alizadeh*, [1998] O.J. No. 408 (QL); *Abram Steamship Co. c. Westville Shipping Co.*, [1923] A.C. 773; *Keneric Tractor Sales Ltd. c. Langille*, [1987] 2 R.C.S. 440; *Sail Labrador Ltd. c. Challenge One (Le)*, [1999] 1 R.C.S. 265; *Photo Production Ltd. c. Securicor Transport Ltd.*, [1980] A.C. 827; *B.G. Linton Construc-*

[1975] 2 S.C.R. 678; *Beaufort Realties (1964) Inc. v. Chomedey Aluminum Co.*, [1980] 2 S.C.R. 718; *Port Jackson Stevedoring Pty. Ltd. v. Salmond & Spraggon (Australia) Pty. Ltd.*, [1981] 1 W.L.R. 138.

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APPEAL from a judgment of the Ontario Court of Appeal (1998), 38 O.R. (3d) 563, 157 D.L.R. (4th) 643, 108 O.A.C. 46, 3 C.C.L.I. (3d) 202, [1998] I.L.R. I-3555, reversing a judgment of the Ontario Court (General Division) (1997), 32 O.R. (3d) 428, 33 B.L.R. (2d) 310. Appeal allowed.

Kenneth W. Scott, Q.C., *James D. Patterson* and *Sharon C. Vogel*, for the appellant.

Thomas G. Heintzman, Q.C., *R. Paul Steep* and *Darryl A. Cruz*, for the respondent Gordon Capital Corporation.

Jamieson Halfnight, *Glynis Evans* and *I. H. Fraser*, for the respondents Chubb Insurance Company of Canada and Laurentian General Insurance Company Inc.

The judgment of the Court was delivered by

IACOBUCCI AND BASTARACHE JJ. — This appeal deals with the appropriateness of using summary judgment proceedings and with the issue of whether a contractual limitation period survives a

tion Ltd. c. Compagnie des chemins de fer nationaux du Canada, [1975] 2 R.C.S. 678; *Beaufort Realties (1964) Inc. c. Chomedey Aluminum Co.*, [1980] 2 R.C.S. 718; *Port Jackson Stevedoring Pty. Ltd. c. Salmond & Spraggon (Australia) Pty. Ltd.*, [1981] 1 W.L.R. 138.

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Kenneth W. Scott, c.r., *James D. Patterson* et *Sharon C. Vogel*, pour l'appelante.

Thomas G. Heintzman, c.r., *R. Paul Steep* et *Darryl A. Cruz*, pour l'intimée Gordon Capital Corporation.

Jamieson Halfnight, *Glynis Evans* et *I. H. Fraser*, pour les intimées Chubb Insurance Company of Canada et Laurentian General Insurance Company Inc.

Version française du jugement de la Cour rendu par

LES JUGES IACOBUCCI ET BASTARACHE — Le présent pourvoi porte sur l'opportunité de recourir aux procédures de jugement sommaire et sur la question de savoir si le délai de prescription prévu 1

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wrongful rescission of the contract in dispute. On February 17, 1997, O'Brien J. of the Ontario Court (General Division), sitting as a motions judge, granted summary judgment in favour of the Guarantee Company of North America ("Guarantee"). The judgment declared that Gordon Capital Corporation ("Gordon") had failed to commence legal proceedings for recovery of a loss under Financial Institution Bond No. 401642 (the "Bond") within 24 months from the discovery of "facts which would cause a reasonable person to assume that a loss of a type covered by this bond has been or will be incurred", pursuant to section 3 of the Bond. The Court of Appeal of Ontario set aside the judgment. It determined that Guarantee was precluded from relying on section 3 because it had wrongfully rescinded the said Bond; it also determined that the question of when a loss within the meaning of the Bond was discovered was a triable issue and should be left for determination at trial.

2 There are therefore two issues before this Court. The first is whether the Court of Appeal should have interfered with the motion judge's determination that the record was sufficient to deal with Guarantee's summary judgment motion; the second issue is whether the Court of Appeal erred by finding that the limitation period in the Bond did not survive an affirmation by Guarantee that the Bond was rescinded.

I. Background

3 Gordon is an investment dealer and brokerage firm in Toronto and Montreal. It entered into a $25,000,000 fidelity insurance contract with Guarantee for a term commencing on December 31, 1990 and ending on December 30, 1991. Additional contracts for $10,000,000 of excess insurance each were entered into with Chubb and Laurentian.

4 The Bond provided coverage for "dishonest and fraudulent acts committed by an Employee acting alone or in collusion with others", providing the employee acted with the "manifest intent" to obtain financial benefit for himself, other than that

dans un contrat continue de s'appliquer après la résiliation injustifiée de ce dernier. Le 17 février 1997, le juge O'Brien, de la Cour de l'Ontario (Division générale), siégeant à titre de juge des requêtes, a rendu un jugement sommaire en faveur de Guarantee Company of North America («Guarantee»). Selon ce jugement, Gordon Capital Corporation («Gordon») avait omis d'engager des procédures d'indemnisation fondées sur la police d'institution financière nº 401642 (la «police») dans les 24 mois suivant la découverte, au sens de l'article 3 de la police, de [TRADUCTION] «faits de nature à inciter une personne raisonnable à supposer qu'un sinistre du genre visé par la présente police est survenu ou surviendra». La Cour d'appel de l'Ontario a annulé ce jugement. Elle a décidé que Guarantee ne pouvait pas invoquer l'article 3 parce qu'elle avait résilié ladite police de façon injustifiée, et que la question de savoir quand il y avait eu découverte d'un sinistre au sens de la police pouvait faire l'objet d'un débat judiciaire.

Notre Cour est donc saisie de deux questions. La première question est de savoir si la Cour d'appel a eu raison de modifier la décision du juge des requêtes que le dossier était suffisant pour trancher la motion de Guarantee visant à obtenir un jugement sommaire; la deuxième question est de savoir si la Cour d'appel a commis une erreur en concluant que le délai de prescription prévu dans la police avait cessé de s'appliquer dès que Guarantee avait confirmé que la police était résiliée.

I. Contexte

Gordon est une maison de courtage de valeurs mobilières établie à Toronto et à Montréal. Elle a conclu avec Guarantee une police d'assurance de 25 000 000 $ contre les détournements qui serait en vigueur du 31 décembre 1990 au 30 décembre 1991. D'autres contrats d'assurance complémentaire de 10 000 000 $ chacun ont été conclus avec Chubb et Laurentian.

La police fournissait une protection contre [TRADUCTION] «les actes malhonnêtes et frauduleux d'un employé agissant seul ou de connivence avec autrui», pourvu que l'employé ait agi dans l'«intention manifeste» de tirer un avantage finan-

which he would earn in the normal course of employment.

cier personnel en sus de ce qu'il toucherait dans l'exercice normal de ses fonctions.

The insured is required, under section 5 of the Bond, to give to the underwriter notice of loss "[a]t the earliest practicable moment, not to exceed 30 days, after discovery of loss", and to provide sworn proof of loss within 6 months of the discovery. Legal proceedings for the recovery of "any loss hereunder shall not be brought prior to the expiration of 60 days after the original proof of loss is filed . . . or after the expiration of 24 months from the discovery of such loss".

5 Suivant l'article 5 de la police, l'assuré doit aviser l'assureur du sinistre [TRADUCTION] «[d]ès que possible, mais au plus tard 30 jours après [s]a découverte» et fournir une preuve de sinistre, attestée sous serment, dans les six mois de cette découverte. Des procédures judiciaires en vue d'obtenir l'indemnisation de [TRADUCTION] «tout sinistre visé aux présentes ne doivent pas être engagées avant l'expiration d'un délai de 60 jours suivant le dépôt de la preuve originale de sinistre [. . .] ni après l'expiration d'un délai de 24 mois suivant la découverte du sinistre».

The Bond contains a definition of "discovery" in section 3. It reads:

6 La police définit ainsi le terme [TRADUCTION] «découverte» à l'article 3:

> This bond applies to loss discovered by the insured during the Bond Period. Discovery occurs when the insured first becomes aware of facts which would cause a reasonable person to assume that a loss of a type covered by this bond has been or will be incurred, regardless of when the act or acts causing or contributing to such loss occurred, even though the exact amount or details of loss may not then be known.

> [TRADUCTION] La présente police s'applique au sinistre découvert par l'assuré pendant qu'elle est en vigueur. Il y a découverte lorsque l'assuré prend connaissance de faits de nature à inciter une personne raisonnable à supposer qu'un sinistre du genre visé par la présente police est survenu ou surviendra, peu importe le moment où ont été accomplis l'acte ou les actes qui ont causé le sinistre ou y ont contribué, même s'il se peut que le montant exact ou le détail du sinistre ne soit pas encore connu.

Eric Rachar was a Gordon partner responsible for the Derivative Products Group in Toronto. He engaged in various securities lending and related transactions with Patrick Lett and companies under Lett's control, but led Gordon to believe that those transactions were in effect being carried out with a Designated Financial Institution ("DFI"), specifically National Trust ("National").

7 Un associé de Gordon, Eric Rachar, était responsable du groupe des produits dérivés à Toronto. Il s'est livré à divers prêts de titres et à des opérations connexes avec Patrick Lett et des compagnies contrôlées par ce dernier, tout en amenant Gordon à croire que ces opérations étaient effectuées avec une institution financière désignée («IFD»), plus précisément National Trust («National»).

Between July 16, 1990 and May 22, 1991, Gordon loaned National $1.1 billion in Government of Canada bonds. As collateral for the loans, Gordon received Provincial Government Bonds and bonds from senior financial institutions in equivalent principal amounts with similar maturity dates and cash flow. The trading value of the commodity was inferior but regulatory obligations did

8 Entre le 16 juillet 1990 et le 22 mai 1991, Gordon a prêté à National des obligations du gouvernement canadien d'une valeur de 1,1 milliard de dollars. À titre de garantie de ces prêts, Gordon a reçu du gouvernement provincial et de grandes institutions financières des obligations dont le capital était équivalent, et les échéances et les encaissements semblables. La valeur marchande de la garantie était inférieure à celle du prêt, mais aucun règlement n'obligeait Gordon à fournir un

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not require Gordon to provide additional regulatory capital for a loan to a DFI.

capital réglementaire additionnel pour un prêt à une IFD.

9 Rachar also caused Gordon to enter into transactions with Lett and Citibank involving certificates of deposit, bearer deposit notes, bond forward purchase contracts and securities lending agreements. Because of Rachar's misrepresentations, Gordon accepted worthless collateral which exposed it to high risk.

Rachar a également amené Gordon à effectuer avec Lett et Citibank des opérations comportant des certificats de dépôt, des billets de dépôt au porteur, des contrats d'achat à terme d'obligations et des prêts de valeurs mobilières. Sur la foi des déclarations inexactes de Rachar, Gordon a accepté une garantie sans valeur qui l'exposait à un risque élevé.

10 On June 14, 1991, James Connacher, Chairman and Chief Executive Officer of Gordon received a telephone call from Jon Paysant of National, who expressed the concerns of National about "Account # 2", the Rachar-Lett account. On June 17, 1991, a meeting of Gordon and National officers was held to question the unusual features of the transactions. At this meeting, National indicated that it was only acting as agent for Account # 2. Gordon conducted a review between June 14 and June 19, 1991 of the collateral held in respect of Account # 2. It was determined that the collateral was $51,000,000 less than the value of the Government of Canada bonds.

Le 14 juin 1991, le président-directeur général de Gordon, James Connacher, a reçu un appel téléphonique de Jon Paysant, de National, qu'il lui a fait part des inquiétudes de cette dernière au sujet du «compte nº 2», à savoir le compte Rachar-Lett. Le 17 juin 1991, les dirigeants de Gordon et de National se sont rencontrés pour s'interroger sur les caractéristiques inhabituelles des opérations. Lors de cette rencontre, National a alors indiqué qu'elle n'agissait qu'à titre de mandataire à l'égard du compte nº 2. Du 14 au 19 juin 1991, Gordon a procédé à un examen de la garantie détenue relativement à ce compte. Il a été déterminé que la valeur de la garantie était de 51 000 000 $ inférieure à celle des obligations du gouvernement canadien.

11 On June 19, Gordon retained the services of a law firm to determine the nature of the National account by looking at the documentation and interviewing Rachar. O'Brien J. found that Gordon relied on the firm to advise them as to the terms of section 5 of the Bond.

Le 19 juin, Gordon a retenu les services d'un cabinet juridique pour déterminer la nature du compte de National en consultant la documentation et en interrogeant Rachar. Le juge O'Brien a conclu que Gordon comptait sur ce cabinet juridique pour la conseiller sur le libellé de l'article 5 de la police.

12 On June 20, Peter Bailey, the Gordon Compliance Officer, met Rachar, who denied any regulatory or other problem with the Account. On June 21, Bailey and a lawyer from the firm met with Rachar, who admitted knowing of Lett, but affirmed National was acting as principal on the account. On June 24, 1991, Bailey met Rachar again to discuss whether the account was in fact held by an individual rather than a DFI. On June 26, the date at which discovery was made according to the proof of loss filed, Bailey and Rachar met with Lett. Bailey determined Rachar had lied,

Le 20 juin, l'agent de vérification de la conformité chez Gordon, Peter Bailey, a rencontré Rachar qui a nié toute irrégularité du compte. Le 21 juin, Bailey et un avocat du cabinet juridique ont rencontré Rachar qui a admis qu'il connaissait Lett, tout en confirmant que National agissait en tant que mandant à l'égard du compte. Le 24 juin 1991, Bailey a de nouveau rencontré Rachar pour déterminer si le compte était en fait détenu par un particulier plutôt que par une IFD. Le 26 juin, date de la découverte du sinistre selon la preuve de sinistre déposée, Bailey et Rachar ont rencontré

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suspended him and denied him access to Gordon's premises. Gordon notified the Toronto Stock Exchange, who notified the Ontario Securities Commission, that there had been misrepresentation by Rachar and that it had a margin deficiency. Gordon retained the Forensic Accounting Division of Peat Marwick Thorne and subsequently Lindquist Avey Macdonald Baskerville to conduct an investigation. Bailey advised senior people at Gordon that Gordon would have to put up in excess of $80,000,000 of regulatory capital.

Lett. Bailey a décidé que Rachar avait menti et l'a suspendu, en lui interdisant l'accès aux locaux de Gordon. Gordon a informé la Bourse de Toronto, qui à son tour a informé la Commission des valeurs mobilières de l'Ontario, des déclarations inexactes de Rachar et de son insuffisance de couverture. Gordon a demandé à la division de la juricomptabilité de Peat Marwick Thorne et, par la suite, à Lindquist Avey Macdonald Baskerville de procéder à une enquête. Bailey a informé les cadres supérieurs de Gordon que celle-ci devrait fournir plus de 80 000 000 $ de capital réglementaire.

On June 27, 1991, Gordon took out a loan of approximately $90,000,000 to meet the regulatory capital obligations. It immediately began paying interest on the loan; this interest was claimed in the sworn proof of loss.

Le 27 juin 1991, Gordon a contracté un prêt d'environ 90 000 000 $ pour satisfaire à ces obligations de capital réglementaire. Elle a immédiatement commencé à payer des intérêts sur le prêt, et ces intérêts sont réclamés dans la preuve de sinistre attestée sous serment. 13

On June 28, 1991, Gordon notified Guarantee of a potential fidelity bond claim in relation to the activities of Rachar. During a meeting among representatives of Guarantee, the law firm and Peat Marwick, Brian Clarkin of Guarantee was told that the discovery of the loss by Gordon occurred on June 26, 1991.

Le 28 juin 1991, Gordon a informé Guarantee de la possibilité qu'une réclamation fondée sur une assurance contre les détournements soit présentée relativement aux activités de Rachar. Lors d'une rencontre des représentants de Guarantee, du cabinet juridique et de Peat Marwick, Brian Clarkin, de Guarantee, a appris que Gordon avait découvert le sinistre le 26 juin 1991. 14

Bailey testified that he was concerned, on July 1, 1991 "that there had to be some kind of relationship for . . . Rachar to proceed with these transactions". He assumed that there had been a relationship between Rachar and Lett. He concluded that Gordon would have to unwind the transactions arising from the dishonest conduct of Rachar and that it would suffer a substantial loss. On July 2, 1991, Guarantee provided Gordon with a proof of loss form. It directed Gordon's attention to the requirements of the Bond.

Bailey a témoigné qu'il craignait, le 1er juillet 1991, [TRADUCTION] «qu'un lien quelconque ait existé pour [. . .] que Rachar puisse effectuer ces opérations». Il a supposé qu'un lien avait existé entre Rachar et Lett. Il a conclu que Gordon devrait liquider les opérations résultant de la conduite malhonnête de Rachar et qu'elle subirait une perte substantielle. Le 2 juillet 1991, Guarantee a remis à Gordon une formule de preuve de sinistre. Elle a attiré l'attention de Gordon sur les exigences de la police. 15

On July 2, 1991, Gordon learned about the irregularities with respect to the Citibank certificates of deposit. It learned of other irregularities on July 5 and July 8, 1991.

Le 2 juillet 1991, Gordon a été informée des irrégularités des certificats de dépôt de Citibank. D'autres irrégularités ont été portées à sa connaissance les 5 et 8 juillet 1991. 16

On July 10, 1991, Rachar agreed to an inspection of his personal records. On August 15, 1991,

Le 10 juillet 1991, Rachar a consenti à l'inspection de ses dossiers personnels. Le 15 août 1991, 17

Gordon was informed that Rachar had obtained a personal benefit in connection with the transactions. In fact, National advised Gordon that it had discovered a cheque payable to Rachar for $800,000 in account of Lett at National.

Gordon a appris que Rachar avait tiré un avantage personnel des opérations. En fait, National a avisé Gordon qu'elle avait découvert un chèque au montant de 800 000 $ payable à Rachar sur le compte que Lett possédait chez elle.

18 Gordon continued to investigate the activities of Rachar. Lindquist presented a report in February 1992. Gordon then delivered a sworn proof of loss to Guarantee on March 31, 1992, after having obtained two extensions of time for its filing. The report of the forensic investigators was appended to the proof of loss, which affirmed that the date of discovery was June 26, 1991.

Gordon a continué d'enquêter sur les activités de Rachar. Lindquist a soumis un rapport en février 1992. Gordon a alors fait parvenir à Guarantee, le 31 mars 1992, une preuve de sinistre attestée sous serment, après avoir obtenu deux prorogations de délai pour la déposer. Le rapport des juricomptables était annexé à la preuve de sinistre, qui confirmait que la date de découverte était le 26 juin 1991.

19 On August 5, 1992, Guarantee advised Gordon that, pursuant to a provision in the Bond, it was rescinding the Bond, which had in effect expired on December 31, 1991, on the basis that Gordon had made misrepresentations in its application for the bond. In its application for insurance, Gordon represented to Guarantee that for the purposes of internal control, customer accounts would be reviewed on a monthly basis by a partner, officer or other designated employee not involved with the relevant account. The proof of loss submitted by Gordon, however, revealed that Racher had sole responsibility for the National accounts, and that the accounts were not subject to review. After various meetings between the parties, an agreement was reached to allow Guarantee to pursue its investigation. On August 7, 1992, Gordon refused to accept the return of premiums from Guarantee and denied the validity of the rescission. The parties agreed to pursue negotiations without prejudice to their legal positions.

Le 5 août 1992, Guarantee a informé Gordon que, conformément à une disposition de la police, elle résiliait cette police qui avait en fait expiré le 31 décembre 1991, pour le motif que Gordon avait fait des déclarations inexactes dans sa demande de police. Dans cette demande, Gordon avait indiqué à Guarantee qu'à des fins de contrôle interne chacun des comptes clients ferait l'objet d'un examen mensuel par un associé, un dirigeant ou un autre employé désigné n'ayant rien à voir avec le compte en question. Toutefois, la preuve de sinistre présentée par Gordon révélait que Rachar avait l'entière responsabilité des comptes de National et que ceux-ci ne faisaient l'objet d'aucun examen. Après diverses rencontres, les parties ont convenu de permettre à Guarantee de poursuivre son enquête. Le 7 août 1992, Gordon a refusé le remboursement des primes par Guarantee et a nié la validité de la résiliation. Les parties ont accepté de poursuivre les négociations sans que cela ne porte atteinte à leur situation juridique.

20 On June 30, 1993, Bailey advised Guarantee that Gordon had not commenced an action prior to June 26, 1993. On July 15, 1993, Gordon commenced an action in Quebec, and on July 16 in Ontario. On July 21, 1993, Guarantee set out its position on the limitation period. Guarantee commenced an action in Ontario on July 29, 1993. On August 4, 1993, Gordon filed a notice of intent to defend.

Le 30 juin 1993, Bailey a informé Guarantee que Gordon n'avait intenté aucune action avant le 26 juin 1993. Gordon a intenté une action au Québec le 15 juillet 1993, puis en Ontario le 16 juillet de la même année. Le 21 juillet 1993, Guarantee a exposé son point de vue sur le délai de prescription. Guarantee a intenté une action en Ontario le 29 juillet 1993. Le 4 août 1993, Gordon a déposé un avis d'intention de présenter une défense.

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On August 20, 1993, Bailey swore an affidavit stating that the monetary benefit which Rachar received was not known on June 26, 1991, "which may result in the date of discovery being after June 26, 1991".

Ground J. refused Gordon's motion to stay the Ontario action on January 17, 1994. On April 25, 1994, Montgomery J. refused to grant leave to appeal that decision. This Court refused a further application for leave to appeal. On November 21, 1994, Gordon filed its statement of defence. In January of 1997, Guarantee made a motion for summary judgment relying only on the limitation period contained in the Bond. Meanwhile, the Quebec Court of Appeal had stayed the Quebec action pending the determination of the Ontario action.

II. Judicial History

(1) *The Motion for Summary Judgment* (1997), 32 O.R. (3d) 428

The relevant portion of O'Brien J.'s decision deals with the argument that Guarantee's rescission prevented reliance on the limitation provision, and the argument that the conditions for summary judgment were not met.

On the first issue, O'Brien J. held that assuming the rescission was wrongful, it did not prevent reliance on the limitation period contained in the Bond. On the second issue, the motion judge first noted that Gordon had conceded some of the interest expense on money borrowed to meet the margin requirements predated July 16, 1991, and that it constituted "some 'loss' at that time" (p. 437). He rejected the argument by Gordon that the limitation period did not commence to run until a loss was "incurred" by Gordon. It was his view that there is no ambiguity regarding the word "loss", which must refer to the loss as described in the

21 Le 20 août 1993, Bailey a signé un affidavit attestant que l'existence de l'avantage pécuniaire tiré par Rachar était inconnue le 26 juin 1991, [TRADUCTION] «de sorte que la découverte peut avoir eu lieu après le 26 juin 1991».

22 Le 17 janvier 1994, le juge Ground a rejeté la motion de Gordon visant à faire suspendre l'action intentée en Ontario. Le 25 avril 1994, le juge Montgomery a refusé l'autorisation d'en appeler de cette décision. Notre Cour a rejeté une autre demande d'autorisation de pourvoi. Le 21 novembre 1994, Gordon a produit sa défense. En janvier 1997, Guarantee a présenté une motion visant à obtenir un jugement sommaire uniquement sur la base du délai de prescription prévu dans la police. Dans l'intervalle, la Cour d'appel du Québec avait suspendu l'action intentée au Québec jusqu'à ce qu'une décision soit rendue sur l'action intentée en Ontario.

II. Historique des procédures judiciaires

(1) *La motion visant à obtenir un jugement sommaire* (1997), 32 O.R. (3d) 428

23 La partie pertinente de la décision du juge O'Brien porte sur l'argument que la résiliation par Guarantee empêchait d'invoquer la disposition relative à la prescription et sur l'argument que les conditions applicables au jugement sommaire n'étaient pas remplies.

24 En ce qui concerne la première question, le juge O'Brien a décidé que, même en supposant que la résiliation ait été injustifiée, elle n'empêchait pas d'invoquer le délai de prescription prévu dans la police. Quant à la seconde question, le juge des requêtes a d'abord fait remarquer que Gordon avait reconnu qu'une partie des intérêts payés sur le prêt contracté pour satisfaire aux exigences de couverture avait été versée avant le 16 juillet 1991 et qu'elle constituait [TRADUCTION] «un "sinistre" à l'époque» (p. 437). Il a rejeté l'argument de Gordon selon lequel le délai de prescription n'avait commencé à courir qu'au moment où un sinistre était «survenu» à son égard. Il n'y avait selon lui aucune ambiguïté concernant le sens du mot «sinistre», qui doit s'entendre du sinistre décrit à la

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"Discovery" section of the Bond. This, he said, is not an actual loss.

25 Dealing with the conditions applicable to summary judgment, O'Brien J. said there were no significant issues requiring trial, whether legal or factual. He specifically rejected the argument that the different affidavits of Bailey raised a credibility issue requiring trial.

(2) *The Decision of the Court of Appeal* (1998), 38 O.R. (3d) 563

26 Noting that "this is a very difficult issue and one in which there is little guidance in the jurisprudence of this jurisdiction", Carthy J.A. concluded that the Ontario action was not barred by virtue of the limitation period in the Bond because Guarantee had rescinded the Bond. He reasoned that the limitation period was similar to the filing of a proof of loss provision, and that the latter could not be enforced after rescission on the authority of *Ross v. Scottish Union and National Insurance Co.* (1918), 58 S.C.R. 169, at p. 182. In his view, only the neutral features of a contract could survive rescission. On the other issue, Carthy J.A. found that "should this judgment be reversed on further appeal . . . the question of when the loss was discovered within the meaning of the bond should be left for determination at trial" (p. 573). He based his conclusion on the finding that "[t]here are serious factual disputes about when there was discovery of the type of loss covered by the bond" (p. 573), but gave no indication of the nature of those disputes.

III. Analysis

(1) *Were the Conditions for Summary Judgment Met?*

27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore sum-

rubrique «Découverte» de la police. Il ne s'agit pas, a-t-il dit, d'un sinistre réel.

En ce qui concerne les conditions applicables au jugement sommaire, le juge O'Brien a dit qu'il n'y avait aucune question de droit ou de fait importante qui requérait la tenue d'un procès. Il a expressément écarté l'argument selon lequel les divers affidavits de Bailey soulevaient une question de crédibilité requérant la tenue d'un procès.

(2) *L'arrêt de la Cour d'appel* (1998), 38 O.R. (3d) 563

Faisant remarquer [TRADUCTION] «qu'il s'agit d'une question très difficile au sujet de laquelle la jurisprudence de notre cour n'est pas d'un grand secours», le juge Carthy a décidé que le délai de prescription prévu dans la police ne faisait pas obstacle à l'action intentée en Ontario, puisque Guarantee avait résilié la police. Il s'est dit d'avis que le délai de prescription ressemblait à la disposition relative au dépôt d'une preuve de sinistre qui devenait inapplicable à la suite d'une résiliation, selon *Ross c. Scottish Union and National Insurance Co.* (1918), 58 R.C.S. 169, à la p. 182. À son avis, seules les caractéristiques neutres d'un contrat continuaient d'exister après la résiliation. En ce qui concerne l'autre question, le juge Carthy a conclu que [TRADUCTION] «si jamais le présent jugement était infirmé à la suite d'un autre appel [. . .] la question de savoir à quel moment le sinistre a été découvert au sens de la police devrait être tranchée au procès» (p. 573). Il a fondé sa conclusion sur la constatation [TRADUCTION] «qu'il existe de sérieux différends d'ordre factuel quant à savoir à quel moment il y a eu découverte d'un sinistre du genre visé par la police» (p. 573), mais il n'a pas précisé la nature de ces différends.

III. Analyse

(1) *Les conditions applicables au jugement sommaire étaient-elles remplies?*

Le critère qu'il convient d'appliquer à une motion visant à obtenir un jugement sommaire est respecté lorsque le requérant démontre qu'il n'y a aucune véritable question de fait importante qui

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mary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules*, *supra*, at para. 15).

requiert la tenue d'un procès et qu'il est donc opportun que le tribunal examine s'il y a lieu d'accorder un jugement sommaire. Voir *Hercules Managements Ltd. c. Ernst & Young*, [1997] 2 R.C.S. 165, au par. 15; *Dawson c. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (C.A. Ont.), aux pp. 267 et 268; *Irving Ungerman Ltd. c. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), aux pp. 550 et 551. Une fois que l'auteur de la motion a fait cette démonstration, il incombe ensuite à la partie intimée «d'établir que son action a vraiment des chances de réussir» (*Hercules*, précité, au par. 15).

The limitation period defence raises mixed questions of fact and law. O'Brien J. found that the only disputes were on the application of the law. We find no reason to disturb this finding.

28 La défense fondée sur le délai de prescription soulève des questions mixtes de fait et de droit. Le juge O'Brien a conclu que les différends portaient uniquement sur l'application du droit. Nous ne voyons aucune raison de modifier cette conclusion.

Under section 3 of the Bond, all that is required for discovery of loss are sufficient facts to cause a reasonable person to assume that a loss of a type covered by the Bond will be incurred. A loss need not be conclusively determined to be covered in order for discovery to occur. Having accepted that Gordon knew its employee had acted fraudulently before July 16, 1991 and that Gordon had already incurred interest charges in respect of a $90,000,000 loan to meet its regulatory capital obligations, O'Brien J. inferred that it could reasonably be assumed that a loss of the type covered by the policy was or would be incurred. Although O'Brien J. regarded as significant that Gordon had actually incurred interest charges without questioning whether they were in fact covered by the Bond, he clearly rejected the argument that a loss had to be incurred before the limitation period would commence to run.

29 Suivant l'article 3 de la police, la découverte d'un sinistre requiert seulement l'existence de faits suffisants pour inciter une personne raisonnable à supposer qu'un sinistre du genre visé par la police surviendra. Il peut y avoir découverte sans qu'il soit nécessaire de décider péremptoirement que le sinistre est visé par la police. Après avoir convenu que Gordon savait que son employé avait agi frauduleusement avant le 16 juillet 1991 et qu'elle avait déjà payé des intérêts sur un prêt de 90 000 000 $ contracté pour satisfaire à ses obligations de capital réglementaire, le juge O'Brien a déduit que l'on pouvait raisonnablement supposer qu'un sinistre du genre visé par la police était survenu ou surviendrait. Même s'il a jugé significatif le fait que Gordon ait payé des intérêts sans se demander s'ils étaient effectivement visés par la police, le juge O'Brien a clairement rejeté l'argument qu'un sinistre devait être survenu pour que le délai de prescription commence à courir.

We are of the view that the undisputed facts in this case lend strong support to the motion judge's inference. Without repeating all that is said in the background section, we would note that Gordon had, on or before June 26, 1991, found out that Account # 2 was not held by a DFI and that Rachar had lied concerning the account; it had borrowed $90,000,000 to meet regulatory capital require-

30 Nous sommes d'avis que les faits non contestés en l'espèce étayent fortement la déduction du juge des requêtes. Sans reprendre tout ce qui a été dit pour décrire le contexte, nous tenons à souligner que, le 26 juin 1991 ou avant cette date, Gordon avait découvert que le compte nº 2 n'était pas détenu par une IFD et que Rachar avait menti au sujet de ce compte; elle avait emprunté

ments, hired forensic accountants and instructed its law firm, notified the Toronto Stock Exchange, suspended Rachar and prevented him from entering their premises. Shortly thereafter, Gordon filed a notice of loss and became suspicious of a Rachar-Lett relationship. The filing of a notice of loss in itself is a strong indication that Gordon reasonably assumed that a loss covered by the Bond had been or would be incurred. The fact that the interest paid on account of the loan may eventually not be covered under the Bond is immaterial since a reasonable person would assume it fits within the definition of "a loss of a type covered by [the] bond". Likewise, suspicion in itself is not sufficient to constitute discovery, but coupled with all other material facts it would cause a reasonable person to assume a loss has been or will be incurred and a personal benefit is involved.

90 000 000 $ pour satisfaire aux exigences de capital réglementaire, retenu les services de juricomptables et donné des directives à son cabinet d'avocats, avisé la Bourse de Toronto et suspendu Rachar à qui elle avait interdit l'accès à ses locaux. Peu après, Gordon a déposé un avis de sinistre et commencé à soupçonner l'existence d'un lien entre Rachar et Lett. Le dépôt d'un avis de sinistre est en soi un indice convaincant que Gordon supposait raisonnablement qu'un sinistre visé par la police était survenu ou surviendrait. La possibilité que les intérêts payés sur le prêt ne soient pas éventuellement visés par la police est sans importance, étant donné qu'une personne raisonnable supposerait qu'ils répondent à la définition d'un «sinistre du genre visé par la [. . .] police». De même, un doute n'est pas suffisant en soi pour qu'il y ait découverte, mais combiné à tous les autres faits importants, il inciterait une personne raisonnable à supposer qu'un sinistre est survenu ou surviendra et qu'un avantage personnel est en cause.

31 Gordon objected that the various affidavits of Bailey raised a credibility issue sufficient to require a trial. O'Brien J. disagreed. Reading the various affidavits, he was of the view that Bailey's reversal of position after a limitation period defence had been asserted did not create a genuine issue for trial. We agree with that finding. The reversal was based on Bailey's opinion that actual knowledge that Rachar had benefited from his transactions was determinative. The affidavit of November 22, 1995 states that the June 26, 1991 date was used only because this was the date at which Gordon knew it had to meet a capital requirement, not because it believed that a loss of the type covered by the Bond had occurred. O'Brien J. looked at this in the context of the proceedings, taking into account the sophistication of the parties and the fact that they had been discussing their problem with forensic accountants and outside legal counsel. We do not find his conclusion to be unreasonable, especially in view of the fact that the true test of discoverability is an objective one under the terms of section 3 of the Bond. We would add that the trial judge's ruling on this point is entirely consistent with previous decisions holding that a self-serving affidavit is not suffi-

Gordon a fait valoir que les divers affidavits de Bailey soulevaient une question de crédibilité suffisante pour nécessiter la tenue d'un procès. Le juge O'Brien n'était pas de cet avis. Après avoir lu ces différents affidavits, il a conclu que le revirement d'opinion de Bailey après que le délai de prescription eut été invoqué en défense n'a pas donné naissance à une véritable question requérant la tenue d'un procès. Nous sommes d'accord avec cette conclusion. Ce revirement reposait sur l'avis de Bailey que la connaissance réelle du fait que Rachar avait tiré avantage de ses opérations était déterminante. Selon l'affidavit du 22 novembre 1995, la date du 26 juin 1991 n'était retenue que parce que Gordon savait alors qu'elle devait satisfaire à une exigence de capital et non parce qu'elle croyait qu'un sinistre du genre visé par la police était survenu. Le juge O'Brien a examiné cette question dans le contexte de l'instance, en tenant compte du fait que les parties étaient des parties avisées qui avaient discuté de leur problème avec des juricomptables et des avocats de l'extérieur. Sa conclusion ne nous paraît pas déraisonnable, particulièrement à la lumière du fait que le véritable critère de la possibilité de découvrir est objectif selon le libellé de l'article 3 de la police. Nous

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cient in itself to create a triable issue in the absence of detailed facts and supporting evidence. See *Rogers Cable TV Ltd. v. 373041 Ontario Ltd.* (1994), 22 O.R. (3d) 25 (Gen. Div.); *Confederation Trust Co. v. Alizadeh*, [1998] O.J. No. 408 (QL) (Gen. Div.).

tenons à ajouter que la décision du juge de première instance sur ce point est entièrement compatible avec la jurisprudence antérieure voulant qu'en l'absence d'un exposé détaillé des faits et d'éléments de preuve à l'appui, un affidavit intéressé n'est pas suffisant en soi pour donner naissance à une question susceptible de faire l'objet d'un débat judiciaire. Voir *Rogers Cable TV Ltd. c. 373041 Ontario Ltd.* (1994), 22 O.R. (3d) 25 (Div. gén.); *Confederation Trust Co. c. Alizadeh*, [1998] O.J. No. 408 (QL) (Div. gén.).

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32 Gordon insists that the facts known to Gordon did not suffice to cause a reasonable person to assume a loss "of a type" covered by the Bond. O'Brien J. did not discuss this issue except to say that the loss he contemplated was the one described in the "Discovery" section. We believe that on a proper reading of the Bond, a loss of the type covered is simply a loss resulting from employee dishonesty with the presumption that the manifest intent of such behaviour was personal gain. This is the only interpretation that accords with the nature of the fidelity bond and which makes commercial sense. To require evidence of an actual benefit would defeat the purpose of an early notification provision which specifically excludes the need to establish an actual loss. It would also expose the insurer to "long tail" claims (evidence of a personal benefit could come years after evidence of a loss), as argued by the respondent Chubb, and contradict the normal assumption that dishonesty, fraud and deceit are usually associated with personal benefit.

Gordon souligne que les faits qu'elle connaissait n'étaient pas suffisants pour inciter une personne raisonnable à supposer l'existence d'un sinistre «du genre» visé par la police. Le juge O'Brien n'a pas analysé cette question, sauf qu'il a dit que le sinistre qu'il envisageait était celui décrit à la rubrique «Découverte». Nous croyons que, selon une juste interprétation de la police, un sinistre du genre visé correspond simplement au sinistre résultant de la malhonnêteté d'un employé qui, présume-t-on, avait manifestement l'intention de réaliser un gain personnel. C'est la seule interprétation qui soit compatible avec la nature de l'assurance contre les détournements et qui soit logique sur le plan commercial. Exiger la preuve d'un avantage réel irait à l'encontre de l'objectif d'une disposition en matière de préavis, qui exclut expressément la nécessité d'établir un sinistre réel. Cela exposerait également l'assureur à des réclamations à long terme (la preuve d'un avantage personnel pouvant être obtenue plusieurs années après la preuve d'un sinistre), comme le fait valoir l'intimée Chubb, et serait contraire à la supposition normale que la malhonnêteté, la fraude et la tromperie vont habituellement de pair avec l'avantage personnel.

33 Gordon also argues that the question of law is uncertain. In his factum, counsel for Gordon argues that discovery is only established when there is knowledge of a "real loss", or knowledge of all of the facts which the insured must prove in order to entitle him or her to judgment. In fact, the issue is simply one regarding the interpretation of the Bond.

Gordon soutient également que la question de droit est incertaine. Dans son mémoire, l'avocat de Gordon prétend qu'il n'y a découverte que s'il y a connaissance d'un «sinistre réel» ou de tous les faits que l'assuré doit établir pour avoir droit à un jugement. En réalité, le litige concerne simplement l'interprétation de la police.

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34 Section 3 of the bond first requires that the insured "becomes aware of facts". This simply means "being informed of" facts. It then provides that those facts "would cause a reasonable person to assume". This is an objective test that does not require a definitive finding, but an assumption. Another component is that those facts relate to a possible loss "of a type covered by [the] bond". These broad terms refer to the nature of the coverage involved, namely, fidelity insurance. The type of conduct contemplated is dishonest conduct. The section specifies that the loss "has been or will be incurred". This excludes the requirement of actual loss and introduces the notion that the insured may be subject to a loss. The last part of the section specifies the following: "regardless of when the act or acts causing or contributing to such loss occurred, even though the exact amount or details of loss may not then be known"; this is also inconsistent with Gordon's argument that the loss must be incurred. It specifies that the limitation runs from the first evidence establishing discovery.

L'article 3 de la police exige premièrement que l'assuré [TRADUCTION] «pren[ne] connaissance de faits». Cela signifie simplement qu'il doit «être informé» des faits. Il prévoit ensuite que ces faits doivent être «de nature à inciter une personne raisonnable à supposer». Il s'agit d'un critère objectif qui requiert non pas une conclusion définitive mais une supposition. Un autre élément veut que ces faits se rapportent à un éventuel sinistre «du genre visé par la [. . .] police». Ces termes généraux renvoient à la nature de la protection en cause, à savoir une assurance contre les détournements. Le genre de comportement envisagé est le comportement malhonnête. L'article précise que le sinistre «est survenu ou surviendra», ce qui exclut l'exigence de sinistre réel et laisse entendre que l'assuré peut être victime d'un sinistre. La dernière partie de l'article précise ceci: «peu importe le moment où ont été accomplis l'acte ou les actes qui ont causé le sinistre ou y ont contribué, même s'il se peut que le montant exact ou le détail du sinistre ne soit pas encore connu»; cela est également incompatible avec l'argument de Gordon que le sinistre doit être survenu. L'article indique que le délai de prescription commence à courir dès l'obtention du premier élément de preuve établissant la découverte.

35 We agree that there is no legal issue to be resolved at trial. The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding. The motion judge found that the undisputed facts met the definition of discovery of loss under the Bond and that a reasonable person would have assumed that they were sufficient to establish that a loss of a type covered by the Bond had been or would be incurred. The Court of Appeal did not provide sufficient reasons on this issue for us to comment. It did not describe the factual disputes in the case, except to say that the interest paid on the loan of $90,000,000 before June 26, 1991 may not have been a covered loss. As mentioned earlier, this last comment is inconsistent with the fact that the Bond does not require that facts known by the insured be ultimately proved to relate to an actual recoverable loss. With regard to the alleged uncertainty of the term "loss", the Court of Appeal

Nous convenons qu'il n'existe aucune question de droit à trancher au procès. L'application du droit énoncé aux faits est exactement ce qui est envisagé par la procédure de jugement sommaire. Le juge des requêtes a conclu que les faits non contestés répondaient à la définition de la découverte d'un sinistre contenue dans la police et qu'une personne raisonnable aurait supposé qu'ils étaient suffisants pour établir qu'un sinistre du genre visé par la police était survenu ou surviendrait. À cet égard, la Cour d'appel n'a pas exposé de motifs suffisants pour que nous puissions les commenter. Sa description des différends relatifs aux faits de l'affaire se résume à une affirmation qu'il se pouvait que les intérêts payés sur le prêt de 90 000 000 $ avant le 26 juin 1991 ne soient pas un sinistre visé. Tel que mentionné précédemment, cette dernière observation est incompatible avec le fait que la police n'exige pas qu'il s'avère en fin de compte que les faits connus de l'assuré se rappor-

agreed with O'Brien J. We are also of the view that no issue for trial has been established in this regard.

tent à un sinistre réel pouvant donner lieu à indemnisation. Quant au prétendu sens incertain du terme «sinistre», la Cour d'appel a souscrit à l'avis du juge O'Brien. Nous estimons également que l'existence d'une question justifiant la tenue d'un procès n'a pas été établie à cet égard.

We would therefore conclude that the motions judge committed no error in determining that this was a proper case for summary judgment. Gordon has not met the evidentiary burden to show there is a genuine issue for trial.

36 Nous sommes donc d'avis de conclure que le juge des requêtes n'a commis aucune erreur en décidant que l'affaire se prêtait à un jugement sommaire. Gordon n'a pas satisfait à l'obligation de prouver l'existence d'une véritable question justifiant la tenue d'un procès.

(2) *Was Guarantee Precluded from Relying on the Limitations Clause in Section 5(d) of the Bond by Reason of Its Rescission of the Bond?*

(2) *Après avoir résilié la police, Guarantee était-elle empêchée d'invoquer la clause du délai de prescription contenue à l'article 5d) de cette police?*

For the purposes of bringing a summary motion, Guarantee agreed to proceed on the basis that its rescission of the Bond was wrongful. Accordingly, the issue to be determined on the motion was the legal question of whether wrongful rescission precluded Guarantee from relying on the contractual limitation period contained in the Bond as a defence to Gordon's claim for coverage.

37 Afin de présenter sa motion visant à obtenir un jugement sommaire, Guarantee a accepté de tenir pour acquis que sa résiliation de la police était injustifiée. Il s'agissait donc de trancher, dans le cadre de cette motion, la question juridique de savoir si la résiliation injustifiée empêchait Guarantee d'invoquer le délai de prescription prévu dans la police pour se défendre contre la réclamation de Gordon.

Given both parties' assumption that Guarantee's rescission was wrongful, it is not necessary to address the effect of the contract's limitations period assuming a valid rescission. However, we believe it is worthwhile, both as background and to eliminate some apparent confusion, to address the distinction between rescission and repudiation. This done, we will turn to the question of whether a limitations clause can survive a wrongful rescission.

38 Étant donné que les deux parties supposent que la résiliation par Guarantee était injustifiée, il n'est pas nécessaire d'aborder l'effet du délai de prescription contractuel en cas de résiliation valide. Nous croyons toutefois qu'il vaut la peine d'aborder la distinction qui existe entre la résiliation et la répudiation, à la fois pour comprendre la situation et pour éliminer la confusion qui semble exister dans la jurisprudence et les ouvrages de doctrine. Une fois cela fait, nous examinerons si une clause établissant un délai de prescription peut s'appliquer malgré une résiliation injustifiée.

(a) The Distinction Between Rescission and Repudiation

a) La distinction entre résiliation et répudiation

A fundamental confusion seems to exist over the meaning of the terms "rescission" and "repudiation". This confusion is not a new one, as it has plagued common law jurisdictions for years.

39 Il semble exister une confusion fondamentale au sujet du sens des mots «résiliation» et «répudiation». Cette confusion, qui n'est pas nouvelle, règne depuis des années dans les ressorts de

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Rescission is a remedy available to the representee, *inter alia*, when the other party has made a false or misleading representation. A useful definition of rescission comes from Lord Atkinson in *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773 (H.L.), at p. 781:

> Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in status quo ante and restores things, as between them, to the position in which they stood before the contract was entered into.

See similarly G. H. L. Fridman, *The Law of Contract in Canada* (3rd ed. 1994), at p. 807.

40 Repudiation, by contrast, occurs "by words or conduct evincing an intention not to be bound by the contract. It was held by the Privy Council in *Clausen v. Canada Timber & Lands, Ltd.* [[1923] 4 D.L.R. 751], that such an intention may be evinced by a refusal to perform, even though the party refusing mistakenly thinks that he is exercising a contractual right" (S. M. Waddams, *The Law of Contracts* (4th ed. 1999), at para. 620). Contrary to rescission, which allows the rescinding party to treat the contract as if it were void *ab initio*, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "remains in being for the future on both sides. Each (party) has a right to sue for damages for *past or future breaches*" (emphasis in original): *Cheshire, Fifoot and Furmston's Law of Contract* (12th ed. 1991), by M. P. Furmston, at p. 541. If, however, the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished. Furmston, *supra*, at pp. 543-44.

common law. Une partie peut résilier un contrat notamment dans le cas où l'autre partie lui a fait une déclaration fausse ou trompeuse. Lord Atkinson donne une définition utile de la résiliation dans *Abram Steamship Co. c. Westville Shipping Co.*, [1923] A.C. 773 (H.L.), à la p. 781:

> [TRADUCTION] Lorsqu'une partie à un contrat exprime sans équivoque, par des paroles ou par des actes, qu'elle a décidé de résilier un contrat parce qu'elle a été amenée à le conclure par fraude ou à la suite d'une erreur essentielle sur un aspect important du contrat, et qu'elle refuse d'être liée par celui-ci, l'expression de son choix, s'il est justifié par les faits, met fin au contrat, ramène les parties au statu quo antérieur et les remet dans la situation où elles se trouvaient avant la conclusion du contrat.

Voir de même G. H. L. Fridman, *The Law of Contract in Canada* (3e éd. 1994), à la p. 807.

Par contre la répudiation se fait [TRADUCTION] «par des mots ou une conduite traduisant l'intention de ne pas être lié par le contrat. Dans l'arrêt *Clausen c. Canada Timber & Lands, Ltd.* [[1923] 4 D.L.R. 751], le Conseil privé a statué que le refus d'exécuter un contrat peut dénoter une telle intention, même si la partie qui exprime ce refus pense à tort qu'elle exerce un droit contractuel» (S. M. Waddams, *The Law of Contracts* (4e éd. 1999), au par. 620). Contrairement à la résiliation qui permet à la partie qui résilie le contrat de le considérer comme étant nul au départ, l'effet de la répudiation dépend du choix que fait la partie autre que celle qui répudie le contrat. Si cette dernière considère que le contrat est toujours parfaitement exécutoire, le contrat [TRADUCTION] «reste en vigueur à l'avenir pour les deux parties. Chacune (des parties) a le droit d'intenter une action en dommages-intérêts pour *toute rupture passée ou future*» (en italique dans l'original): *Cheshire, Fifoot and Furmston's Law of Contract* (12e éd. 1991), par M. P. Furmston, à la p. 541. Cependant, si la partie autre que celle qui répudie le contrat accepte la répudiation, le contrat prend fin et les parties sont libérées de leurs obligations futures. Les droits et obligations qui sont déjà arrivés à échéance ne sont pas éteints. Furmston, *op. cit.*, aux pp. 543 et 544.

So much is relatively clear. Problems have arisen, however, from misuse of the word "rescission" to describe an accepted repudiation. In *Keneric Tractor Sales Ltd. v. Langille*, [1987] 2 S.C.R. 440, at p. 455, Wilson J., writing for the Court, addressed the distinction as follows:

> The modern view is that when one party repudiates the contract and the other party accepts the repudiation the contract is at this point terminated or brought to an end. The contract is not, however, rescinded in the true legal sense, i.e., in the sense of being voided *ab initio* by some vitiating element. The parties are discharged of their prospective obligations under the contract as from the date of termination but the prospective obligations embodied in the contract are relevant to the assessment of damages: see *Johnson v. Agnew*, [1980] A.C. 367, [1979] 1 All E.R. 883 (H.L.), and *Moschi v. Lep Air Services Ltd.*, [1973] A.C. 331, [1972] 2 All E.R. 393 (H.L.). [Emphasis added.]

See similarly Waddams, *supra*, at para. 629; Furmston, *supra*, at p. 287, note 12; G. H. Treitel, *The Law of Contract* (9th ed. 1995), at p. 341; S. Williston, *A Treatise on the Law of Contracts* (3rd ed. 1970), by W. H. E. Jaeger, vol. 12, § 1454A, at p. 13; cf. *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 S.C.R. 265, at paras. 31 and 50.

However, merely clarifying the distinction between rescission and an accepted repudiation does not end the discussion. Since "rescission" has frequently been used to describe an accepted repudiation, courts must be sensitive to the potential for misuse. To that end, courts must analyse the entire context of the contract and give effect, where possible, to the intent of the parties. If they intended "rescission" to mean "an accepted repudiation", then the contract should be interpreted as such. For example, in *Mills v. S.I.M.U. Mutual Insurance Association*, [1970] N.Z.L.R. 602 (C.A.), the court held that a clause stating that in the event of false statements the policy "shall be void", was in fact a repudiation clause. Crucial to the court's reasoning in that case was the fact that the clause in question

41 Tout cela est relativement clair. Des problèmes découlent toutefois de l'emploi abusif du mot «résiliation» pour décrire une répudiation acceptée. Dans l'arrêt *Keneric Tractor Sales Ltd. c. Langille*, [1987] 2 R.C.S. 440, à la p. 455, le juge Wilson, qui a rédigé les motifs de la Cour, a analysé cette distinction:

> Selon la conception moderne, lorsqu'une partie répudie le contrat et que l'autre partie accepte la résiliation, le contrat prend fin à ce moment-là. Toutefois, le contrat n'est pas résilié au sens juridique véritable du terme, c'est-à-dire en ce sens que la présence d'un certain élément a pour effet de le rendre nul au départ. Les parties sont libérées de leurs obligations futures aux termes du contrat à compter de la date où celui-ci est résilié, mais les obligations futures incorporées dans le contrat sont pertinentes pour ce qui est d'évaluer les dommages-intérêts: voir *Johnson v. Agnew*, [1980] A.C. 367, [1979] 1 All E.R. 883 (H.L.), et *Moschi v. Lep Air Services Ltd.*, [1973] A.C. 331, [1972] 2 All E.R. 393 (H.L.). [Nous soulignons.]

Voir de même Waddams, *op. cit.*, au par. 629; Furmston, *op. cit.*, à la p. 287, note 12; G. H. Treitel, *The Law of Contract* (9e éd. 1995), à la p. 341; S. Williston, *A Treatise on the Law of Contracts* (3e éd. 1970), par W. H. E. Jaeger, vol. 12, § 1454A, à la p. 13; comparer *Sail Labrador Ltd. c. Challenge One (Le)*, [1999] 1 R.C.S. 265, aux par. 31 et 50.

42 Toutefois, la simple clarification de la distinction qui existe entre une résiliation et une répudiation acceptée ne met pas fin à la discussion. Comme le terme «résiliation» a été fréquemment utilisé pour décrire une répudiation acceptée, les tribunaux doivent être conscients du risque d'emploi abusif de ce terme. À cette fin, ils doivent analyser le contexte intégral du contrat et, si possible, mettre à exécution l'intention des parties. Si ces dernières ont voulu que le terme «résiliation» s'entende d'une «répudiation acceptée», le contrat doit être interprété ainsi. Par exemple, dans l'arrêt *Mills c. S.I.M.U. Mutual Insurance Association*, [1970] N.Z.L.R. 602 (C.A.), la cour a statué qu'une clause qui prévoyait qu'en cas de fausses déclarations la police serait [TRADUCTION] «nulle» était en fait une clause de répudiation. Le fait que la clause en question prévoyait la perte du droit aux primes a

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provided for forfeiture of premiums. Turner J. therefore concluded, at p. 609, that

joué un rôle crucial dans le raisonnement de la cour. En conséquence, le juge Turner a conclu, à la p. 609, que

> the policy does not provide that the consequences of an untrue statement shall be that the policy shall be deemed void *ab initio*, as if it had never come into existence, for the premium is to be forfeited. . . . I therefore construe the clause to mean that an untrue statement shall entitle the respondent to repudiate liability under the policy, while keeping the premium.

> [TRADUCTION] la police ne prévoit pas qu'une déclaration erronée fera en sorte que la police sera réputée nulle au départ comme si elle n'avait jamais existé, puisqu'il doit y avoir perte du droit à la prime. [. . .] Je considère par conséquent que la clause signifie qu'une déclaration erronée habilite l'intimé à répudier sa responsabilité en vertu de la police, tout en conservant la prime.

Of course, contrary to the facts in this appeal, the actual term "rescission" was not used in *Mills*. Nonetheless, we must always examine whether the use of the word rescission is indeed consistent with the parties' intent.

Il va sans dire que, contrairement à ce qui s'est passé dans le présent pourvoi, le mot «résiliation» («*rescission*») n'a pas été employé dans l'arrêt *Mills*. Néanmoins, nous devons toujours examiner si l'emploi du terme «résiliation» est vraiment compatible avec l'intention des parties.

43 Before turning to the issue of intent, however, one must determine whether rescission is even available. As Treitel notes regarding the law in England, *supra*, at p. 347:

Avant d'examiner la question de l'intention, il faut déterminer s'il y a même une possibilité de résiliation. Comme Treitel, *op. cit.*, à la p. 347, le fait observer au sujet du droit en vigueur en Angleterre:

> Before the Misrepresentation Act it was clear that a person could rescind a contract for a misrepresentation which did *not* form part of the contract; but it was doubtful whether this right to rescind survived where the misrepresentation was later incorporated into the contract as one of its terms. [Emphasis in original.]

> [TRADUCTION] Avant l'adoption de la Misrepresentation Act, il était clair qu'une personne pouvait résilier un contrat en raison d'une déclaration inexacte qui *ne* faisait *pas* partie du contrat; mais on ne savait pas si ce droit de résilier un contrat continuait d'exister lorsque la déclaration inexacte était par la suite incorporée dans le libellé du contrat. [En italique dans l'original.]

However, the *Misrepresentation Act 1967* (U.K.), 1967, c. 7, s. 1, cleared up that question in England, providing that "a person shall be entitled to rescind notwithstanding that the misrepresentation has become a term of the contract" (Treitel, *supra*, at p. 347).

La *Misrepresentation Act 1967* (R.-U.), 1967, ch. 7, art. 1, a toutefois clarifié cette question en Angleterre, en prévoyant [TRADUCTION] «qu'une personne a droit à la résiliation même si la déclaration inexacte est devenue une clause du contrat» (Treitel, *op. cit.*, à la p. 347).

44 In Canada, the issue is somewhat less clear. The state of the law is best summarized by Waddams, *supra*, at para. 427:

Au Canada, cette question est un peu moins claire. C'est Waddams, *op. cit.*, au par. 427, qui résume le mieux l'état du droit:

> If the [misrepresentation] is a term of the contract . . . the mistaken party is entitled to damages as for breach of contract. Whether the party is further entitled to set aside the transaction and demand restitution of the contractual benefits transferred will depend upon . . . whether the breach is "substantial" or "goes to the root of" the contract.

> [TRADUCTION] Si la [déclaration inexacte] constitue une clause du contrat [. . .] la partie qui s'est méprise a droit à des dommages-intérêts pour inexécution de contrat. La question de savoir si la partie aura en outre le droit d'annuler l'opération et d'exiger la restitution des avantages conférés par le contrat dépend [. . .] de celle de savoir si l'inexécution est «substantielle» ou «touche à l'essence même» du contrat.

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A breach that is "substantial" or "goes to the root of" the contract is often also described as a material breach; see, for example, Fridman, *supra*, at p. 293: "A misrepresentation is a misstatement of some fact which is material to the making or inducement of a contract". The misrepresentation in this case was in the application, and was thereby incorporated into the Bond. Specifically, the misrepresentation complained of was, as stated in Guarantee's August 5, 1992 letter to Gordon that

L'inexécution qui est «substantielle» ou qui «touche à l'essence même» du contrat est souvent qualifiée d'importante; voir, par exemple, Fridman, *op. cit.*, à la p. 293: [TRADUCTION] «Une déclaration inexacte est un exposé erroné d'un fait important pour conclure ou pour inciter à conclure un contrat». La déclaration inexacte en l'espèce figurait dans la demande et a donc été incorporée dans la police. Plus précisément, la déclaration inexacte reprochée, selon la lettre du 5 août 1992 que Guarantee a fait parvenir à Gordon, était la suivante:

> in respect of customer accounts a partner, officer or other designated responsible employee who has no other duties in connection with the account [would review] each account monthly checking for excessive or improper activity. The proof of loss discloses that no one other than Rachar was charged with reviewing the accounts in question.

> [TRADUCTION] en ce qui a trait aux comptes clients, un associé, un dirigeant ou un autre employé désigné n'ayant aucune autre responsabilité relativement au compte en question [procéderait] à un examen mensuel de chacun de ces comptes en vue de vérifier s'ils ont fait l'objet d'une activité abusive ou irrégulière. La preuve de sinistre révèle que seul Rachar était chargé d'examiner les comptes en question.

The question, in light of the law as stated in Waddams, *supra*, and Fridman, *supra*, is whether the misrepresentation is "substantial", "material", or "goes to the root of" the contract. This brings us back to the issue of the parties' intent, for whether the rescission is warranted is at least in part a question of intent.

La question qui se pose, compte tenu de l'état du droit exposé par Waddams, *op. cit.*, et Fridman, *op. cit.*, est de savoir si la déclaration inexacte est «substantielle», «importante» ou «touche à l'essence même» du contrat. Cela nous ramène à la question de l'intention des parties car la question de savoir si la résiliation est justifiée est tout au moins en partie une question d'intention.

45

Whether the misrepresentation is material is a complicated question on which there is an extensive body of case law. However, these precedents are not entirely apposite, as they generally do not involve contracts, like this one, that use the term "rescission" to define the remedy for a misrepresentation in the application. The rescission clause in this appeal reads as follows:

La question de savoir si la déclaration inexacte est importante est complexe et fait l'objet d'une jurisprudence abondante. Toutefois, cette jurisprudence n'est pas tout à fait pertinente puisqu'en général il n'y est pas question de contrats, comme celui dont il est question en l'espèce, où le mot «résiliation» est utilisé pour définir le recours applicable à une déclaration inexacte dans la demande. La clause de résiliation dont il est question en l'espèce se lit ainsi:

> The insured represents that the information furnished in the application for this bond is complete, true and correct. Such application constitutes part of this bond.
>
> Any misrepresentation, omission, concealment or incorrect statement of a material fact, in the application or otherwise, shall be grounds for the rescission of this bond. [Emphasis added.]

> [TRADUCTION] L'assuré déclare que les renseignements fournis dans la demande de police sont complets et exacts. La demande fait partie de la police.
>
> Toute déclaration inexacte, omission, dissimulation ou description erronée d'un fait important, dans la présente demande ou ailleurs, constitue un motif de résiliation de la présente police. [Nous soulignons.]

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By stating that a misrepresentation in the application would be grounds for rescission, the parties effectively stated their intent that such a misrepresentation is "substantial" and "goes to the root of" the contract. The reference to misrepresentations of "material fact" suggests the same conclusion. These are sophisticated parties that can be expected to know the meaning of fundamental legal terms such as "rescission", and it is appropriate to give effect to their intent as expressed in the plain words of the contract. As stated by Wilson J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, at p. 505, "parties of equal bargaining power should be allowed to make their own bargains". See similarly, at p. 458, *per* Dickson C.J. This point is discussed more fully *infra*, at paras. 54-56.

En précisant qu'une déclaration inexacte dans la demande justifierait la résiliation, les parties ont effectivement indiqué leur intention qu'une telle déclaration inexacte soit «substantielle» et «touche à l'essence même» du contrat. La mention de la description erronée d'un «fait important» inspire la même conclusion. Les parties sont avisées et on peut donc s'attendre à ce qu'elles connaissent le sens de termes juridiques fondamentaux comme la «résiliation»; il convient de mettre à exécution l'intention qu'elles ont clairement exprimée dans le contrat. Comme l'a dit le juge Wilson dans l'arrêt *Hunter Engineering Co. c. Syncrude Canada Ltée*, [1989] 1 R.C.S. 426, à la p. 505, «il devrait être permis à des parties qui ont négocié à armes égales de conclure leur propre contrat». Voir, dans le même ordre d'idées, à la p. 458, le juge en chef Dickson. Cette question est approfondie plus loin, aux par. 54 à 56.

46 Aside from our general reluctance to disturb the choice of terms by sophisticated commercial parties, we note in passing that the appellant not only rescinded the contract, but also tendered return of the insurance premiums. Their letter of August 5, 1992 stated their intention to rescind the policy, and they enclosed a cheque for $106,000, representing the premiums paid by Gordon under the policy. This distinguishes this case from *Mills*, *supra*, and demonstrates Guarantee's attempt to effect a restitution and restore the parties to the *status quo ante*, a crucial aspect of rescission. See Waddams, *supra*, at para. 424. While obviously not conclusive evidence of their contractual intentions, this evidence confirms the earlier conclusion that "rescission", as used in this contract, did indeed mean just that.

Outre notre réticence générale à modifier les termes choisis par des parties commerciales avisées, nous soulignons en passant que l'appelante a non seulement résilié le contrat, mais qu'elle a aussi offert de rembourser les primes d'assurance. Dans sa lettre du 5 août 1992, elle a exprimé son intention de résilier la police et a joint un chèque de 106 000 $ représentant le montant des primes versées par Gordon en vertu de la police. Cela distingue la présente affaire de l'arrêt *Mills*, précité, et démontre que Guarantee a tenté d'effectuer une restitution et de remettre les parties dans la situation où elles se trouvaient antérieurement, un aspect crucial de la résiliation. Voir Waddams, *op. cit.*, au par. 424. Bien qu'elle ne soit manifestement pas concluante quant aux intentions des parties contractantes, cette preuve confirme la conclusion précédente que le mot «résiliation», utilisé dans le présent contrat, signifiait précisément cela.

47 In summary, a misrepresentation, even one that was incorporated into the contract, gives the innocent party the option of rescinding the contract, i.e. to have it declared void *ab initio*. The misrepresentation must be "material", "substantial" or "g[o] to the root of" the contract. We express no opinion on the availability of damages in such cases. Repudiation, by contrast, occurs when one party indicates

En résumé, une déclaration inexacte, même si elle a été incorporée dans le contrat, donne à la partie innocente la possibilité de résilier le contrat, c'est-à-dire de le faire déclarer nul au départ. La déclaration inexacte doit être «importante», «substantielle» ou «touche[r] à l'essence même» du contrat. Nous ne nous prononçons pas sur la possibilité d'obtenir des dommages-intérêts en

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its intention not to fulfill any future obligations under the contract. If the other party accepts the repudiation, the contract is terminated, not rescinded. To use "rescission" and "accepted repudiation" synonymously can lead only to confusion and should be avoided. Where there is some doubt as to whether repudiation or rescission is intended, courts should look to such factors as the context of the contract, particularly the intent of the parties. For sophisticated parties, it will take strong evidence to displace the meaning suggested by the parties' choice of language in the contract itself. In this case, because both parties agreed to the word "rescission", and Guarantee acted in accordance with that intention, the consequence of a valid rescission based on Gordon's misrepresentation is the avoidance of the contract, and Guarantee's release from any liability thereunder.

pareils cas. Par contre, la répudiation se produit lorsque l'une des parties manifeste son intention de ne pas exécuter les obligations futures qui lui incombent en vertu du contrat. Si l'autre partie accepte la répudiation, le contrat prend fin et n'est pas résilié. L'emploi des mots «résiliation» et «répudiation acceptée» comme synonymes ne peut qu'engendrer de la confusion et devrait être évité. Pour dissiper tout doute quant à savoir si c'est la répudiation ou la résiliation qui est voulue, les tribunaux devraient examiner des facteurs comme le contexte du contrat et, en particulier, l'intention des parties. Dans le cas de parties avisées, il faudra une preuve solide pour remplacer le sens qu'inspirent les mots que les parties ont choisi d'utiliser dans le contrat lui-même. En l'espèce, comme les deux parties ont accepté d'utiliser le mot «résiliation» et que Guarantee a agi conformément à cette intention, la conséquence d'une résiliation valide fondée sur la déclaration inexacte de Gordon est la résolution du contrat, Guarantee étant libérée de toutes les obligations en découlant.

(b) Effect of the Contractual Limitation Period Assuming Wrongful Rescission of the Bond by Guarantee

b) L'effet du délai de prescription contractuel en supposant que la résiliation de la police par Guarantee est injustifiée

48 In the event that Gordon did not misrepresent the extent of the risk involved in applying for the fidelity bond, we can assume for the purposes of this part of the analysis that Guarantee wrongfully denied coverage to Gordon on the basis of misrepresentation. The issue then is to determine the legal consequences of a wrongful rescission. Both parties agree that a substantial failure of contractual performance, often described in other contexts as a fundamental breach, may relieve the non-breaching party from future executory obligations under the contract. The extent of disagreement between the parties concerns whether Guarantee's actions constituted a fundamental breach, and whether a time limitation provision is one such executory obligation from which the non-breaching party, here Gordon, is excused.

Si jamais, dans sa demande d'assurance contre les détournements, Gordon n'a pas fait de déclaration inexacte quant à l'étendue du risque en cause, nous pouvons supposer, aux fins de ce volet de l'analyse, que Guarantee a eu tort de refuser d'indemniser Gordon pour ce motif. Il s'agit alors de déterminer les conséquences juridiques d'une résiliation injustifiée. Les deux parties conviennent que l'inexécution substantielle d'un contrat par une partie, souvent appelée «inexécution fondamentale» dans d'autres contextes, peut libérer l'autre partie de l'exécution future des obligations qui lui incombent en vertu du contrat. Le désaccord des parties porte sur la question de savoir si les actes de Guarantee constituaient une inexécution fondamentale et si une disposition relative au délai de prescription est une obligation non encore exécutée dont l'autre partie, en l'occurrence Gordon, est dispensée.

49 Guarantee submits that, in the event that its wrongful rescission amounts to fundamental

Guarantee prétend que, si la résiliation injustifiée de sa part équivaut à une inexécution

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breach, the legal consequences are governed by the decision of the Court in *Hunter Engineering*, *supra*. For the purposes of this appeal, the relevant portion of the decision dealt with the scope of an exclusion clause limiting liability in a contract between the purchaser, Syncrude Canada Ltd. and the vendor, Allis-Chalmers Ltd. for the supply of extraction gearboxes for Syncrude's synthetic oil plant. The supply contract included a warranty limiting Allis-Chalmer's liability to 24 months from the date of shipment or 12 months from the date the equipment was put into operation, whichever occurred first. In addition, the contract contained a clause excluding Allis-Chalmer's liability pursuant to statutory warranties or conditions. The extraction boxes were put into service in November, 1977. It was not until nearly two years later, in September 1979, that the extraction boxes were found to be defective. Allis-Chalmers did not consider itself responsible for the costs of repair as the contractual warranty period had expired. Syncrude then sued Allis-Chalmers for breach of contract to cover the costs. At issue was whether Allis-Chalmers could enforce the clause excluding liability under the longer statutory warranty period.

fondamentale, les conséquences juridiques sont régies par l'arrêt *Hunter Engineering*, précité, de notre Cour. Aux fins du présent pourvoi, la partie pertinente de cet arrêt traite de la portée d'une clause d'exclusion limitant la responsabilité qui figurait dans un contrat intervenu entre l'acheteur Syncrude Canada Ltd. et le vendeur Allis-Chalmers Ltd., pour la fourniture de boîtes d'engrenage d'extraction destinées à l'usine de pétrole synthétique de Syncrude. Le contrat d'approvisionnement comportait une garantie limitant la responsabilité d'Allis-Chalmers à 24 mois à compter de la date de livraison ou à 12 mois à compter de la date de mise en service du matériel, selon la première échéance. En outre, le contrat renfermait une clause exonérant Allis-Chalmers de toute responsabilité fondée sur des garanties ou conditions légales. Les boîtes d'engrenage ont été mises en service en novembre 1977. Ce n'est que presque deux ans plus tard, en septembre 1979, que ces boîtes se sont révélées défectueuses. Allis-Chalmers ne se considérait pas responsable du coût des réparations vu que la garantie contractuelle était expirée. Syncrude a alors intenté contre Allis-Chalmers une action fondée sur l'inexécution d'un contrat afin d'obtenir le remboursement de ces coûts. Il s'agissait de savoir si Allis-Chalmers pouvait mettre à exécution la clause d'exonération de responsabilité en vertu de la période de garantie légale plus longue.

50 The Court was called upon to consider the doctrine of fundamental breach, defined as a failure in the breaching party's performance of its obligations under the contract that deprives the non-breaching party of substantially the whole benefit of the agreement. Notwithstanding that in two separate minority reasons, Dickson C.J. (La Forest J. concurring) and Wilson J. (L'Heureux-Dubé J. concurring) concluded that the seriousness of the defects in the extraction boxes did not amount to a fundamental breach, both Dickson C.J. and Wilson J. discussed the legal consequences in the event that a fundamental breach had occurred. As to the circumstances in which the doctrine applied, Wilson J., at pp. 499-500, noted that the distinction between a mere contractual breach and a breach that is more appropriately characterized as funda-

Notre Cour était appelée à examiner le principe de l'inexécution fondamentale définie comme étant l'omission de l'une des parties de s'acquitter de ses obligations contractuelles, qui a pour effet de priver l'autre partie de la quasi-totalité du bénéfice du contrat. Même si, dans leurs motifs minoritaires respectifs, ils ont conclu que la gravité des défectuosités des boîtes d'engrenage n'équivalait pas à une inexécution fondamentale, le juge en chef Dickson (avec l'appui du juge La Forest) et le juge Wilson (avec l'appui du juge L'Heureux-Dubé) ont analysé les conséquences juridiques éventuelles d'une inexécution fondamentale. Quant aux circonstances dans lesquelles le principe s'appliquait, le juge Wilson a souligné, aux pp. 499 et 500, que la différence entre une simple inexécution de contrat et une inexécution qu'il convient

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mental is the exceptional nature of the remedy; while the traditional remedy for contractual breach is the obligation to pay damages, a fundamental breach permits the non-breaching party to elect instead to put to an end all remaining performance obligations between the parties. Given the exceptional nature of the remedy, Wilson J. rightly noted that the purpose of the restrictive definition of a fundamental breach is to limit the remedy to those circumstances where the entire foundation of the contract has been undermined.

davantage de qualifier de fondamentale réside dans la nature exceptionnelle de la réparation accordée; alors que la réparation traditionnelle pour une inexécution de contrat est l'obligation de payer des dommages-intérêts, l'inexécution fondamentale permet à l'autre partie au contrat de choisir plutôt de mettre fin à toutes les obligations non encore exécutées par les parties. Étant donné la nature exceptionnelle de la réparation, le juge Wilson a fait remarquer à juste titre que la définition restrictive de l'inexécution fondamentale a pour but de limiter la réparation prévue au cas où le fondement du contrat est miné au complet.

51 As to the appropriate methodology, both Dickson C.J. and Wilson J. noted the existence of two competing views of the consequences of fundamental breach within both Canada and the United Kingdom. The traditional approach was to apply a rule of law whereby the legal effect of a fundamental breach is to bring the contract to an end. The result would be that the breaching party would be unable to rely on any contractual provisions excluding liability pursuant to common law doctrines or statutory regimes, given that the contract was treated as at an end. The alternative approach addressed the consequences of fundamental breach as a matter of construction of the terms of the contract rather than a categorical rule of law. Courts are required to determine whether the contract, properly interpreted, provides that exclusion clauses shall be enforceable in the event of fundamental breach. If, as a matter of contractual interpretation, the parties clearly intended an exclusion clause to continue to apply in the event of fundamental breach, courts were required to enforce the bargain agreed to by the parties, rather than applying a rule of law to rewrite the terms of the contract.

En ce qui concerne la méthodologie appropriée, le juge en chef Dickson et le juge Wilson soulignent tous deux l'existence, au Canada et au Royaume-Uni, de deux perceptions opposées des conséquences de l'inexécution fondamentale. La méthode traditionnelle consistait à appliquer une règle de droit selon laquelle l'inexécution fondamentale avait pour effet juridique de mettre fin au contrat. La partie coupable de l'inexécution était donc incapable d'invoquer des dispositions contractuelles d'exonération de responsabilité en application d'un principe de common law ou d'un régime législatif, étant donné que le contrat était considéré comme ayant pris fin. Selon l'autre méthode, les conséquences de l'inexécution fondamentale dépendaient de l'interprétation du contrat, et non d'une règle de droit catégorique. Les tribunaux doivent déterminer si le contrat, interprété correctement, prévoit que les clauses d'exclusion s'appliqueront en cas d'inexécution fondamentale. Si, sur le plan de l'interprétation du contrat, les parties avaient clairement voulu qu'une clause d'exclusion continue de s'appliquer en cas d'inexécution fondamentale, les tribunaux devaient mettre à exécution le contrat conclu par les parties, au lieu d'appliquer une règle de droit pour récrire le contrat.

52 Noting that the contractual interpretation approach was adopted in England in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.), and in prior jurisprudence of the Court (see *B.G. Linton Construction Ltd. v. Canadian National Railway Co.*, [1975] 2 S.C.R. 678;

Faisant observer que la méthode de l'interprétation du contrat a été adoptée en Angleterre dans l'arrêt *Photo Production Ltd. c. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.), et dans des arrêts antérieurs de notre Cour (*B.G. Linton Construction Ltd. c. Compagnie des chemins de fer*

Beaufort Realties (1964) Inc. v. Chomedey Aluminum Co., [1980] 2 S.C.R. 718), both Dickson C.J. and Wilson J. affirmed that whether fundamental breach prevents the breaching party from continuing to rely on an exclusion clause is a matter of construction rather than a rule of law. The only limitation placed upon enforcing the contract as written in the event of a fundamental breach would be to refuse to enforce an exclusion of liability in circumstances where to do so would be unconscionable, according to Dickson C.J., or unfair, unreasonable or otherwise contrary to public policy, according to Wilson J.

nationaux du Canada, [1975] 2 R.C.S. 678; *Beaufort Realties (1964) Inc. c. Chomedey Aluminum Co.*, [1980] 2 R.C.S. 718), le juge en chef Dickson et le juge Wilson ont confirmé que la question de savoir si l'inexécution fondamentale empêche la partie qui en est l'auteur de continuer d'invoquer une clause d'exclusion est une question d'interprétation plutôt que de règle de droit. En cas d'inexécution fondamentale, la seule restriction à l'exécution du contrat tel que rédigé consisterait à refuser d'appliquer une exonération de responsabilité dans le cas où il serait inique de le faire, selon le juge en chef Dickson, ou injuste, déraisonnable ou par ailleurs contraire à l'ordre public, selon le juge Wilson.

53 Guarantee submits, pursuant to *Hunter Engineering*, *supra*, that it is entitled to enforce the contractual time limitation period based on the intent of the parties that the provision would survive a wrongful rescission. Gordon contends, however, that the differences between exclusion of liability clauses and time limitation provisions is sufficiently substantial that the reasoning in *Hunter Engineering*, *supra*, cannot be extended to apply to the factual circumstances of this appeal. We note that in *Hunter Engineering*, *supra*, at p. 463, Dickson C.J. expressly confined his reasons to the use of fundamental breach in the context of clauses excluding liability. In our opinion, however, the policy rationale in support of the construction approach as applied to exclusion clauses is equally applicable to provisions limiting the time in which an action can be initiated.

Guarantee invoque l'arrêt *Hunter Engineering*, précité, pour faire valoir qu'elle a le droit d'appliquer le délai de prescription contractuel du fait que les parties ont voulu que la disposition continue de s'appliquer malgré une résiliation injustifiée. Gordon soutient cependant que la différence entre les clauses d'exonération de responsabilité et les dispositions prévoyant un délai de prescription est suffisamment importante pour que l'application du raisonnement de l'arrêt *Hunter Engineering*, précité, ne puisse pas être étendue aux faits du présent pourvoi. Nous remarquons que, à la p. 463 de cet arrêt, le juge en chef Dickson limite expressément ses motifs au recours à l'inexécution fondamentale dans le contexte de clauses d'exonération de responsabilité. Or, à notre avis, le raisonnement de principe qui sous-tend l'application de la méthode de l'interprétation aux clauses d'exclusion est tout autant applicable aux dispositions qui prescrivent le délai dans lequel une action peut être intentée.

54 As discussed by Dickson C.J. in *Hunter Engineering*, *supra*, at p. 458, when the House of Lords rejected the rule of law approach to fundamental breach in its decision in *Photo Production*, *supra*, Lord Wilberforce articulated the underlying policy rationale in favour of the construction approach as a matter of allowing the parties to make their own bargain, at p. 843, as follows:

Comme l'indique le juge en chef Dickson, à la p. 458 de l'arrêt *Hunter Engineering*, précité, lorsque, dans l'arrêt *Photo Production*, précité, la Chambre des lords a rejeté la façon d'aborder l'inexécution fondamentale sous l'angle d'une règle de droit, lord Wilberforce a énoncé ainsi le raisonnement de principe favorable à une méthode d'interprétation selon laquelle les parties sont autorisées à conclure leur propre contrat (à la p. 843):

At the stage of negotiation as to the consequences of a breach, there is everything to be said for allowing the

[TRADUCTION] Au stade des négociations portant sur les conséquences de l'inexécution, il y a toutes les

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parties to estimate their respective claims according to the contractual provisions they have themselves made . . . .

At the judicial stage there is still more to be said for leaving cases to be decided straightforwardly on what the parties have bargained for rather than upon analysis, which becomes progressively more refined, of decisions in other cases leading to inevitable appeals.

raisons du monde de permettre aux parties d'évaluer leurs réclamations respectives en fonction de leurs propres stipulations contractuelles . . .

Au stade des poursuites judiciaires, il y a encore plus de raisons de trancher les affaires simplement en fonction de ce que les parties ont prévu dans leur contrat plutôt que de se fonder sur une analyse, de plus en plus subtile, de décisions rendues dans d'autres affaires, ce qui mène inévitablement à des appels.

Wilson J. noted that Lord Diplock, in his concurring reasons in *Photo Production*, *supra*, articulated a similar policy concern, stressing that in circumstances where the parties possess equal bargaining power, they should be permitted to make their own bargain and should be held to its terms accordingly, at p. 851:

55 Le juge Wilson a souligné que, dans les motifs concordants qu'il a rédigés dans l'arrêt *Photo Production*, précité, lord Diplock a formulé un principe semblable selon lequel, lorsque les parties ont négocié à armes égales, il doit leur être permis de conclure leur propre contrat, et celui-ci doit les régir (à la p. 851):

In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only. . . .

[TRADUCTION] En matière de contrats commerciaux passés entre hommes d'affaires aptes à protéger leurs intérêts et à déterminer la façon la plus avantageuse d'assumer les risques inhérents à l'exécution de divers types de contrats (généralement en souscrivant une assurance), il n'y a pas lieu, à mon avis, d'interpréter au-delà des mots une clause d'exclusion, lorsque ces mots sont clairs et suffisamment exempts d'ambiguïté . . .

Contrary to Gordon's submission, our analysis is more properly focussed not on formal comparisons between exclusion clauses and time limitation provisions, but on the underlying policy rationale that directs courts to the appropriate circumstances for intervention. In terms of negotiating the consequences of a breach of contract, including a fundamental breach, and the role of courts in upholding the bargain struck by commercial parties with equal bargaining power, we do not see any principled distinction between clauses excluding liability and those setting out the applicable limitation periods such that courts should respect the bargain made by the parties in the former case but not in the latter. Indeed, the argument for applying the construction approach may be even more compelling in the case of contractual limitation periods, as the subject matter directly relates to the parties' intentions in the event of non-performance. Given that no reason exists in terms of policy to limit the construction approach to fundamental breach to exclusion clauses alone, we consider the circumstances of this appeal appropriate for extending the

56 Contrairement à ce que prétend Gordon, il convient davantage que notre analyse porte non pas sur des comparaisons formelles entre les clauses d'exclusion et les dispositions établissant un délai de prescription, mais sur le raisonnement de principe sous-jacent qui guide les tribunaux quant aux circonstances dans lesquelles il y a lieu d'intervenir. Pour ce qui est de négocier les conséquences de l'inexécution d'un contrat, y compris l'inexécution fondamentale, et du rôle joué par les tribunaux en confirmant le contrat conclu par des parties commerciales ayant négocié à armes égales, nous ne voyons aucune distinction fondée sur des principes entre les clauses d'exonération de responsabilité et celles qui établissent les délais de prescription applicables, qui ferait en sorte que les tribunaux devraient respecter le contrat conclu par les parties dans le premier cas, mais non dans le second cas. En fait, l'argument en faveur de l'application de la méthode de l'interprétation peut même être plus convaincant dans le cas des délais de prescription contractuels, étant donné que ce sujet touche directement les intentions des parties

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relevant principles set out in *Hunter Engineering*, *supra*, to interpretation of contractual time limitation periods.

en cas d'inexécution. Comme il n'y a, en principe, aucune raison de restreindre aux seules clauses d'exclusion la façon d'aborder l'inexécution fondamentale sous l'angle de l'interprétation, nous estimons que les circonstances du présent pourvoi se prêtent à une application des principes pertinents énoncés dans l'arrêt *Hunter Engineering*, précité, à l'interprétation des délais de prescription contractuels.

57 We find additional judicial support for our position in the reasons of the Privy Council in *Port Jackson Stevedoring Pty. Ltd. v. Salmond & Spraggon (Australia) Pty. Ltd.*, [1981] 1 W.L.R. 138. An employee of the Port Jackson Stevedoring Pty. Ltd. had mistakenly delivered goods in the care of the consignee, Salmond & Spraggon (Australia) Pty. Ltd., to unauthorized persons such that the shipment was in effect stolen. The bill of lading contained a "Himalaya clause" extending the benefit of defences and immunities from the carrier to independent contractors employed by the carrier, as well as a contractual limitation period barring any action not initiated within one year after the delivery of the goods. The stevedore relied upon both of these provisions as a defence to the action by the consignee. The consignee argued, however, that owing to the fundamental nature of the breach, the stevedore was no longer entitled to rely on the time bar provision. The basis of the consignee's submission on this point was that the requirement to bring suit within one year was an executory obligation imposed upon the non-breaching party, and that the stevedore's fundamental breach relieved the consignee of performing this obligation.

Notre point de vue trouve également appui dans les motifs du Conseil privé dans *Port Jackson Stevedoring Pty. Ltd. c. Salmond & Spraggon (Australia) Pty. Ltd.*, [1981] 1 W.L.R. 138. Un employé de Port Jackson Stevedoring Pty. Ltd. avait livré par erreur à des personnes non autorisées des marchandises sous la garde du consignataire, Salmond & Spraggon (Australia) Pty. Ltd., de sorte que la cargaison avait en fait été volée. Le connaissement comportait une «clause Himalaya» qui étendait le bénéfice des moyens de défense et des immunités du transporteur aux entrepreneurs indépendants dont il retenait les services, ainsi qu'un délai de prescription d'un an à compter de la livraison des marchandises pour intenter une action. L'entreprise d'arrimage invoquait ces deux dispositions pour se défendre contre l'action du consignataire. Ce dernier faisait cependant valoir que, en raison du caractère fondamental de l'inexécution, l'entreprise d'arrimage ne pouvait plus invoquer la disposition relative au délai de prescription. Le consignataire fondait son argument à ce propos sur le fait que l'exigence d'engager des poursuites dans un délai d'un an constituait une obligation non encore exécutée incombant à la partie innocente et que l'inexécution fondamentale de l'entreprise d'arrimage libérait le consignataire de cette obligation.

58 Delivering the judgment of the Privy Council, Lord Wilberforce dismissed the consignee's arguments on this point as both "unsound" and "unreal" (p. 145). He reasoned that a provision setting out a time limitation period for bringing a cause of action cannot be characterized as an executory obligation. Instead, the provision becomes relevant precisely at the point when performance becomes impossible, as it regulates the time period

En rendant le jugement du Conseil privé, lord Wilberforce a rejeté les arguments du consignataire sur ce point comme étant [TRADUCTION] «boiteux» et «invraisemblables» (p. 145). Selon lui, une disposition qui assujettit un droit d'action à un délai ne saurait être qualifiée d'obligation non encore exécutée. Au contraire, la disposition devient utile au moment précis où l'exécution devient impossible, car elle prévoit le délai à

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in which liability for breach of contract is to be established. Adopting the construction approach to fundamental breach from *Photo Production*, *supra*, Lord Wilberforce concluded at p. 145 that "on construction and analysis", the contractual limitation period "plainly operates to exclude the consignee's claim".

l'intérieur duquel la responsabilité de l'inexécution du contrat doit être établie. Adoptant la façon énoncée dans l'arrêt *Photo Production*, précité, d'aborder l'inexécution fondamentale sous l'angle de l'interprétation, lord Wilberforce conclut, à la p. 145, que [TRADUCTION] «sur les plans de l'interprétation et de l'analyse», le délai de prescription contractuel «a clairement pour effet d'écarter la demande du consignataire».

Given that the decision of the Privy Council in *Port Jackson*, *supra*, and that of the Court in *Hunter Engineering*, *supra*, share a common doctrinal antecedent in *Photo Production*, *supra*, we consider the decision in *Port Jackson* to be persuasive authority in support of Guarantee's submission that the principles in *Hunter Engineering*, *supra*, concerning fundamental breach can apply to determine the status of the contractual limitation period in the event of Guarantee's purported wrongful rescission of the Bond. There is no sound basis in policy, principle or existing jurisprudence in support of Gordon's submission that the construction approach to fundamental breach should be limited to cases of exclusion clauses alone.

59 Vu que les arrêts *Port Jackson*, précité, du Conseil privé et *Hunter Engineering*, précité, de notre Cour s'appuient tous les deux sur les principes établis dans *Photo Production*, précité, nous considérons que l'arrêt *Port Jackson* est un élément convaincant qui appuie l'argument de Guarantee selon lequel les principes de l'arrêt *Hunter Engineering*, précité, concernant l'inexécution fondamentale peuvent s'appliquer pour déterminer ce qui en est du délai de prescription contractuel dans le cas de sa prétendue résiliation injustifiée de la police. Il n'existe, que ce soit sur le plan de la politique générale, des principes ou de la jurisprudence, aucun fondement logique étayant l'argument de Gordon selon lequel la façon d'aborder l'inexécution fondamentale sous l'angle de l'interprétation ne devrait s'appliquer qu'aux clauses d'exclusion.

Having established that the construction approach to fundamental breach as set out in *Hunter Engineering*, *supra*, can apply to circumstances involving a contractual limitation period, we must now decide whether, as a matter of contractual interpretation, Guarantee and Gordon intended section 5(d) of the Bond, limiting the time period for initiating an action to 24 months, to survive a wrongful rescission on the part of Guarantee. To answer this question, we do not find it necessary to decide whether a wrongful rescission constitutes a fundamental breach. If the wrongful rescission was just a simple breach, then the limitation period applies. Even if the wrongful rescission was a fundamental breach, then the limitation period will still apply, for the reasons we give below. Therefore, as the limitation period will apply in any event, it is unnecessary to decide

60 Après avoir établi que la façon d'aborder l'inexécution fondamentale sous l'angle de l'interprétation, énoncée dans l'arrêt *Hunter Engineering*, précité, peut s'appliquer aux circonstances dans lesquelles il est question d'un délai de prescription contractuel, nous devons maintenant déterminer si, aux fins de l'interprétation du contrat, Guarantee et Gordon ont voulu que l'article 5d) de la police, qui limite à 24 mois le délai imparti pour intenter une action, continue de s'appliquer après la résiliation injustifiée du contrat par Guarantee. Pour répondre à cette question, nous ne jugeons pas nécessaire de décider si une résiliation injustifiée est une inexécution fondamentale. Si la résiliation injustifiée était une simple inexécution, alors le délai de prescription s'appliquerait. Même si la résiliation injustifiée était une inexécution fondamentale, le délai de prescription s'appliquera

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whether the wrongful rescission constitutes a fundamental breach.

quand même pour les raisons exposées plus loin. Par conséquent, vu que le délai de prescription s'applique en tout état de cause, il n'est pas nécessaire de décider si la résiliation injustifiée est une inexécution fondamentale.

61 Applying the construction approach from *Hunter Engineering*, *supra*, to the present appeal, we conclude that the limitations period survives. In determining whether it was the intention of the parties that the contractual limitation period would survive a purported wrongful rescission by Guarantee such that the present action by Gordon is time-barred, commercial reality is often the best indicator of contractual intention in circumstances such as this. If a given construction of the contract would lead to an absurd result, the assumption is that this result could not have been intended by rational commercial actors in making their bargain, absent some explanation to the contrary.

Appliquant au présent pourvoi la méthode de l'interprétation établie dans *Hunter Engineering*, précité, nous concluons que le délai de prescription continue de s'appliquer. Lorsqu'il s'agit de déterminer si les parties ont voulu que le délai de prescription contractuel continue de s'appliquer après une résiliation apparemment injustifiée de la part de Guarantee, de sorte que la présente action de Gordon est prescrite, la réalité commerciale est souvent le meilleur indice de l'intention des parties contractantes dans des circonstances comme celles-ci. Si une interprétation donnée du contrat menait à un résultat absurde, on supposerait qu'en l'absence d'explication contraire des acteurs commerciaux rationnels ne peuvent pas avoir voulu un tel résultat en concluant leur contrat.

62 We are also unable to accept Gordon's submission that the time limitation clause could not be invoked once Guarantee had taken steps to enforce the contractual provision permitting rescission on the basis of a purported misrepresentation by Gordon during the application process. This would lead to an absurd result in that Guarantee, when faced with a potential misrepresentation concerning the degree of risk it has agreed to underwrite, would be placed in the untenable position of subjecting itself to a longer statutory limitation period than would otherwise apply in circumstances where coverage has been denied for other reasons. Commercial reality cannot accommodate the implication of Gordon's submission, which would be that Guarantee agreed to a bargain whereby it would be exposed to a longer period of uncertainty concerning future claims from an insured who has purportedly engaged in misrepresentation than one who has complied with all of the contractual terms.

Nous sommes également incapables de retenir l'argument de Gordon selon lequel la clause du délai de prescription ne pouvait pas être invoquée une fois que Guarantee avait pris des mesures pour faire appliquer la clause contractuelle autorisant la résiliation fondée sur les déclarations apparemment inexactes que Gordon avait faites en faisant sa demande. Cela mènerait à un résultat absurde du fait que Guarantee, face à une éventuelle déclaration inexacte concernant l'ampleur du risque qu'elle a accepté d'assurer, se retrouverait dans la situation intenable où elle s'imposerait un délai de prescription légal plus long que celui qui s'appliquerait par ailleurs dans le cas où l'indemnisation est refusée pour d'autres motifs. La réalité commerciale est incompatible avec l'implication de l'argument de Gordon voulant que Guarantee ait accepté par contrat de s'exposer à une plus longue période d'incertitude en ce qui concerne les réclamations futures d'un assuré qui a apparemment fait une déclaration inexacte qu'en ce qui concerne celles d'un assuré qui a respecté toutes les dispositions contractuelles.

63 We are also of the view that notwithstanding Gordon's contention that the contractual limitation

Nous sommes également d'avis que, malgré l'argument de Gordon que la disposition contrac-

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provision should be narrowly construed so as to exclude the present action from its scope, the language of section 5(d) in terms of "any loss hereunder" is unambiguous. While Gordon submits that the placement of the provision in the claims section of the Bond is dispositive of the matter, we attach more significance to the fact that the contractual limitation period was not subject to qualifying language of any kind limiting the scope of the phrase to the claims process alone. Instead, upon a true construction of the contract, and taking into account the stated purpose of a contractual limitation period as a device whereby the insurer can both quantify and limit risk, we conclude that the intention of the parties was that section 5(d), setting out the 24-month limitation period, was intended to include the process of bringing a claim against the insurer in circumstances of contractual breach, whether fundamental or otherwise.

tuelle en matière de prescription devrait être interprétée strictement de façon à ne pas s'appliquer à la présente action, l'expression [TRADUCTION] «tout sinistre visé aux présentes» utilisée à l'article 5d) est sans équivoque. Même si Gordon fait valoir que la présence de cette disposition dans la rubrique de la police relative aux réclamations est déterminante à ce sujet, nous accordons plus d'importance au fait que le délai de prescription contractuel ne fait l'objet d'aucune réserve qui en limite l'application au processus de réclamation seulement. Selon une interprétation exacte du contrat et compte tenu de l'objet explicite d'un délai de prescription contractuel en tant que mécanisme permettant à l'assureur de quantifier et de limiter le risque, nous concluons plutôt que les parties ont voulu que l'article 5d), qui établit le délai de prescription de 24 mois, s'applique à l'engagement d'une action contre l'assureur à la suite d'une inexécution de contrat, qu'elle soit fondamentale ou autre.

At this point, we now turn to consider the additional qualification set out in *Hunter Engineering*, *supra*, whereby the parties are held to the terms of their agreement provided that the result is not unconscionable, as *per* Dickson C.J., or unfair, unreasonable or otherwise contrary to public policy, as *per* Wilson J. As we have already noted, the parties to this appeal, an insurance company and an investment dealer and brokerage firm, are sophisticated commercial actors. In addition, both parties were represented by counsel. In *Hunter Engineering*, *supra*, these factors were sufficient for both Dickson C.J. and Wilson J. to conclude that had the doctrine of fundamental breach applied, no reason existed for the Court to refuse to enforce the bargain made between the parties in terms of the clause governing exclusion of liability. Similarly, we conclude that it would not be unconscionable, unfair, unreasonable or otherwise contrary to public policy to uphold the intentions of the parties concerning the operation of the contractual limitation period in these circumstances.

64 Nous allons maintenant examiner l'autre restriction énoncée dans l'arrêt *Hunter Engineering*, précité, selon laquelle les parties sont liées par les conditions de leur accord pourvu que le résultat ne soit pas inique, selon le juge en chef Dickson, ou injuste, déraisonnable ou par ailleurs contraire à l'ordre public, selon le juge Wilson. Comme nous l'avons déjà souligné, les parties au présent pourvoi, une compagnie d'assurance et une maison de courtage de valeurs mobilières, sont des acteurs commerciaux avisés. En outre, elles étaient toutes les deux représentées par des avocats. Dans *Hunter Engineering*, précité, le juge en chef Dickson et le juge Wilson ont estimé que ces facteurs étaient suffisants pour conclure que, si le principe de l'inexécution fondamentale s'était appliqué, notre Cour n'aurait eu aucune raison de refuser de mettre à exécution la clause régissant l'exonération de responsabilité qui figurait dans le contrat liant les parties. De même, nous croyons qu'il ne serait pas inique, injuste, déraisonnable ou par ailleurs contraire à l'ordre public de respecter l'intention des parties concernant l'application du délai de prescription contractuel dans les présentes circonstances.

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IV. Disposition

65 We have concluded that the motions judge did not err in determining that the record was sufficient to deal with Guarantee's motion for summary judgment. O'Brien J. was correct in concluding, pursuant to section 3 of the Bond pertaining to discovery of loss, that it could reasonably be inferred from the record that a loss of the type covered by the policy was or would be incurred. We also see no reason to disturb his finding that a genuine issue of credibility did not exist. As to the legal consequences of a valid rescission, we have concluded that the limitations period is irrelevant because the contract would be treated as being void *ab initio*, releasing Guarantee from any liability thereunder. In addition, assuming that Guarantee's conduct amounted to wrongful rescission, upon a true construction of the time limitation provision, the parties intended the limitation period to govern the litigation process post-breach, whether fundamental or otherwise. To enforce the bargain made by the parties in these circumstances would not be unconscionable, unfair, unreasonable, or otherwise violate public policy.

66 Accordingly, we would allow the appeal, set aside the judgment of the Court of Appeal of Ontario, and restore the decision of O'Brien J. granting summary judgment in favour of Guarantee, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: Borden & Elliot, Toronto.

Solicitors for the respondent Gordon Capital Corporation: McCarthy Tétrault, Toronto.

Solicitors for the respondent Chubb Insurance Company of Canada: Poss & Halfnight, Toronto.

IV. Dispositif

Nous sommes arrivés à la conclusion que le juge des requêtes n'a commis aucune erreur en décidant que le dossier était suffisant pour qu'il examine la motion de Guarantee visant à obtenir un jugement sommaire. Le juge O'Brien a eu raison de conclure, conformément à l'article 3 de la police ayant trait à la découverte d'un sinistre, qu'on pouvait raisonnablement déduire du dossier qu'un sinistre du genre visé par la police était survenu ou surviendrait. Nous ne voyons aucune raison non plus de modifier sa conclusion qu'aucune véritable question de crédibilité ne se posait. En ce qui a trait aux conséquences juridiques d'une résiliation valide, nous avons conclu que le délai de prescription n'est pas pertinent étant donné que le contrat serait considéré comme étant nul au départ et que Guarantee serait ainsi libérée de toute responsabilité lui incombant en vertu de celui-ci. De plus, en supposant que la conduite de Guarantee a constitué une résiliation injustifiée, il ressort d'une interprétation exacte de la disposition en matière de prescription que les parties ont voulu que le délai de prescription s'applique à toutes poursuites résultant d'une inexécution fondamentale ou autre. Dans ces circonstances, mettre à exécution le contrat conclu par les parties ne serait pas inique, injuste, déraisonnable ni par ailleurs contraire à l'ordre public.

En conséquence, nous sommes d'avis d'accueillir le pourvoi, d'annuler l'arrêt de la Cour d'appel de l'Ontario et de rétablir la décision du juge O'Brien de rendre un jugement sommaire en faveur de Guarantee, avec dépens dans toutes les cours.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante: Borden & Elliot, Toronto.

Procureurs de l'intimée Gordon Capital Corporation: McCarthy Tétrault, Toronto.

Procureurs de l'intimée Chubb Insurance Company of Canada: Poss & Halfnight, Toronto.

Solicitors for the respondent Laurentian General Insurance Company Inc.: Ogilvy Renault, Ottawa.

Procureurs de l'intimée Laurentian General Insurance Company Inc.: Ogilvy Renault, Ottawa.

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TAB 5

Resolute FP Canada Inc. *Appellant*

v.

Her Majesty The Queen as represented by the Ministry of the Attorney General and Weyerhaeuser Company Limited *Respondents*

- and -

Her Majesty The Queen as represented by the Ministry of the Attorney General *Appellant*

v.

Weyerhaeuser Company Limited and Resolute FP Canada Inc. *Respondents*

- and -

Weyerhaeuser Company Limited *Appellant*

v.

Her Majesty The Queen as represented by the Ministry of the Attorney General *Respondent*

and

Attorney General of British Columbia *Intervener*

Produits forestiers Résolu *Appelante*

c.

Sa Majesté la Reine représentée par le ministère du procureur général et Compagnie Weyerhaeuser Limitée *Intimées*

- et -

Sa Majesté la Reine représentée par le ministère du procureur général *Appelante*

c.

Compagnie Weyerhaeuser Limitée et Produits forestiers Résolu *Intimées*

- et -

Compagnie Weyerhaeuser Limitée *Appelante*

c.

Sa Majesté la Reine représentée par le ministère du procureur général *Intimée*

et

Procureur général de la Colombie-Britannique *Intervenant*

Indexed as: Resolute FP Canada Inc. *v.* Ontario (Attorney General)

2019 SCC 60

File No.: 37985.

2019: March 28; 2019: December 6.

Present: Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Répertorié : Produits forestiers Résolu *c.* Ontario (Procureur général)

2019 CSC 60

N° du greffe : 37985.

2019 : 28 mars; 2019 : 6 décembre.

Présents : Les juges Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe et Martin.

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

2019 SCC 60 (CanLII)

Contracts — Interpretation — Indemnity — River system contaminated by mercury waste discharged by operation of pulp and paper mill — Action for damages commenced against mill owners in relation to contamination — Province granting indemnity in context of settlement of action to current and former mill owners in relation to environmental damage caused by mercury discharge — Remediation order later issued by provincial environment regulator in relation to waste disposal site on mill property — Whether indemnity applies to cover costs of complying with remediation order.

Contrats — Interprétation — Indemnité — Réseau hydrographique contaminé par des déchets mercuriels rejetés par l'exploitation d'une usine de pâtes et papiers — Action en dommages-intérêts intentée contre les propriétaires de l'usine pour la contamination — Indemnité accordée par la province dans le cadre du règlement de l'action aux propriétaires actuels et aux anciens propriétaires de l'usine pour le dommage environnemental causé par le rejet de mercure — Arrêté de remédiation pris plus tard par une autorité provinciale de l'environnement en ce qui concerne le lieu d'élimination des déchets situé sur la propriété de l'usine — L'indemnité s'applique-t-elle aux frais engagés pour se conformer à l'arrêté de remédiation?

In 1985, Ontario granted an indemnity (the "Indemnity") to Reed Ltd. and Great Lakes Forest Products Limited, both former owners of a pulp and paper mill located in Dryden, Ontario, as well as to their successors and assigns, "from and against any obligation, liability, damage, loss, costs or expenses incurred by any of them" after the date of the Indemnity, "as a result of any claim, action or proceeding, whether statutory or otherwise", because of "any damage, loss, event or circumstances, caused or alleged to be caused by or with respect to, either in whole or in part, the discharge or escape or presence of any pollutant by Reed or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or premises", as set out in para. 1 of the Indemnity. The Indemnity was agreed to by the parties pursuant to the settlement of litigation brought by two First Nations in relation to the mercury waste contamination of two rivers caused by the operation of the Dryden mill.

En 1985, l'Ontario a accordé une indemnité (l'« Indemnité ») à Reed Ltd. et à Great Lakes Forest Products Limited, toutes deux anciennement propriétaires d'une usine de pâtes et papiers située à Dryden, en Ontario, ainsi qu'à leurs successeurs et ayants droit, à l'égard de « l'ensemble des obligations, responsabilités, dommages, pertes, frais ou dépenses qu'est susceptible d'entraîner pour l'une ou l'autre d'entre elles », après la date de l'Indemnité, « toute réclamation, action ou procédure, qu'elle soit prévue par la loi ou autrement », du fait de « dommages, pertes, événements ou circonstances dus ou présumés dus ou en ce qui a trait, en tout ou en partie, au rejet ou à la fuite de polluants, notamment le mercure ou toute autre substance, par Reed ou ses prédécesseurs, à partir des usines, des terrains ou des lieux [. . .], ou encore à la présence de tels polluants dans ces usines, terrains ou lieux », tel qu'énoncé au par. 1 de l'Indemnité. L'Indemnité a été convenue entre les parties dans le cadre du règlement de la poursuite intentée par deux Premières Nations pour la contamination de deux rivières par des déchets mercuriels, contamination causée par l'exploitation de l'usine de Dryden.

Twenty-six years later, the Ministry of the Environment and Climate Change issued a remediation order in relation to monitoring and maintaining a mercury waste disposal site at the Dryden mill. In the intervening period, ownership of the mill had changed hands in several transactions. The Director's order was issued to both Resolute, Great Lakes' corporate successor, and Weyerhaeuser, who also owned the Dryden property for a time. Weyerhaeuser commenced an action in Superior Court, seeking a declaration that the terms of the Indemnity required Ontario to compensate it for the cost of complying with the Director's order. Resolute sought leave to intervene in order to claim the same protection. Weyerhaeuser, Resolute and Ontario each moved for summary judgment.

Vingt-six ans plus tard, un arrêté de remédiation a été pris par le ministère de l'Environnement et de l'Action en matière de changement climatique en ce qui concerne la surveillance et l'entretien d'un lieu d'élimination de déchets mercuriels à l'usine de Dryden. Dans l'intervalle, l'usine avait changé de propriétaires à la suite de plusieurs opérations. L'arrêté du directeur a été adressé à Résolu, société ayant succédé à Great Lakes, et à Weyerhaeuser, à qui avait également déjà appartenu la propriété de Dryden pendant une certaine période. Weyerhaeuser a intenté une action devant la Cour supérieure et sollicité un jugement déclaratoire portant que, selon les modalités de l'Indemnité, l'Ontario était tenu de l'indemniser pour les frais engagés pour se conformer à l'arrêté du directeur. Résolu a demandé l'autorisation d'intervenir pour réclamer la même protection. Weyerhaeuser, Résolu et l'Ontario ont chacun présenté une motion en jugement sommaire.

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The motion judge held that the Indemnity applied to a statutory claim brought by an agent of the Province and that both Resolute and Weyerhaeuser were entitled to indemnification for their costs of complying with the Director's order. He therefore granted summary judgment in their favour. Ontario appealed. The majority at the Court of Appeal agreed with the motion judge's finding that the Indemnity applied to the Director's order, but held that Resolute was not entitled to indemnification and remitted Weyerhaeuser's entitlement to indemnification to the Superior Court. The dissenting judge would have allowed Ontario's appeal. In his view, the motion judge made reversible errors in his interpretation of the Indemnity; properly construed, the Indemnity was intended to cover only pollution claims brought by third parties, not first party regulatory claims such as the Director's order. Ontario, Weyerhaeuser and Resolute appeal to the Court.

Le juge des motions a conclu que l'Indemnité s'appliquait aux réclamations prévues par la loi présentées par un agent de la province, et que Résolu et Weyerhaeuser avaient toutes deux droit à une indemnisation pour les frais engagés pour se conformer à l'arrêté du directeur. Il a donc rendu un jugement sommaire en leur faveur. L'Ontario a interjeté appel. Les juges majoritaires de la Cour d'appel ont souscrit à la conclusion du juge des motions selon laquelle l'Indemnité visait l'arrêté du directeur, mais ont conclu que Résolu n'avait pas droit à une indemnisation et ont renvoyé à la Cour supérieure la question du droit de Weyerhaeuser à une indemnité. Le juge dissident aurait fait droit à l'appel interjeté par l'Ontario. À son avis, le juge des motions a commis des erreurs justifiant infirmation dans son interprétation de l'Indemnité; interprétée comme il se doit, celle-ci devait s'appliquer seulement aux réclamations pour pollution présentées par des tiers, et non aux réclamations réglementaires de première partie, tel l'arrêté du directeur. L'Ontario, Weyerhaeuser et Résolu interjettent appel devant la Cour.

Held (Côté, Brown and Rowe JJ. dissenting in part): Ontario's appeal should be allowed and summary judgment granted in its favour. Resolute and Weyerhaeuser's appeals should be dismissed.

Arrêt (les juges Côté, Brown et Rowe sont dissidents en partie) : Le pourvoi de l'Ontario est accueilli et un jugement sommaire est rendu en sa faveur. Les pourvois de Résolu et de Weyerhaeuser sont rejetés.

Per Abella, Moldaver, Karakatsanis and Martin JJ.: The Indemnity does not cover the Director's order. As the dissenting judge in the Court of Appeal concluded, the motion judge made palpable and overriding errors of fact and failed to give sufficient regard to the factual matrix when interpreting the scope of the Indemnity, justifying appellate intervention.

Les juges Abella, Moldaver, Karakatsanis et Martin : L'Indemnité ne s'applique pas à l'arrêté du directeur. Comme l'a conclu le juge dissident de la Cour d'appel, le juge des motions a commis des erreurs de fait manifestes et déterminantes et n'a pas tenu suffisamment compte du fondement factuel dans son interprétation du champ d'application de l'Indemnité, ce qui justifie une intervention en appel.

The motion judge erred when he found that the waste disposal site continues to discharge mercury into the environment. His mistaken finding that discharges of mercury from the waste disposal site were an ongoing source of serious environmental liability undoubtedly drove his conclusion that these discharges could give rise to pollution claims, and that unless the Indemnity covered first party claims, Resolute and Weyerhaeuser would be exposed to significant liability. The motion judge misconstrued the purpose and effect of the waste disposal site — this site was not a source of ongoing mercury contamination or environmental liability, and therefore its creation would not give rise to a pollution claim. Rather, the waste disposal site was created and used as a solution to the mercury pollution problem, effectively as a burial site for mercury-contaminated waste. There was no evidence of mercury-contaminated waste being discharged from the waste disposal site. This erroneous factual finding was key

Le juge des motions s'est trompé en concluant que le lieu d'élimination des déchets continuait de rejeter du mercure dans l'environnement. Sa conclusion erronée suivant laquelle les rejets de mercure depuis le lieu d'élimination des déchets constituaient une source constante de lourde responsabilité environnementale l'a sans nul doute amené à conclure que les rejets en question pourraient donner lieu à des réclamations pour pollution, et qu'à moins que l'Indemnité ne s'applique aux réclamations de première partie, Résolu et Weyerhaeuser seraient exposées à une responsabilité considérable. Le juge des motions a mal interprété l'objet et l'effet du lieu d'élimination des déchets — ce site n'était pas une source constante de contamination par le mercure ou de responsabilité environnementale, et sa création n'était donc pas susceptible de donner lieu à une réclamation pour pollution. Le lieu d'élimination des déchets a plutôt été créé et utilisé en tant que solution au problème de pollution au mercure, c'est-à-dire,

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to his conclusion that the Director's order was a pollution claim within the meaning of the Indemnity.

dans les faits, en tant que site d'enfouissement pour les déchets contaminés par le mercure. Rien ne prouvait que des déchets contaminés par le mercure étaient rejetés du lieu d'élimination des déchets. Cette conclusion de fait erronée a joué un rôle déterminant dans la conclusion du juge selon laquelle l'arrêté du directeur constituait une réclamation pour pollution au sens de l'Indemnité.

Furthermore, the Indemnity was a schedule to a broader settlement agreement, so its scope was limited to the issues defined in that agreement, namely the discharge by Reed and its predecessors of mercury and any other pollutants into the river systems, and the continued presence of any such pollutants discharged by Reed and its predecessors in the related ecosystems. The motion judge failed to consider this context when interpreting the scope of the Indemnity. Properly interpreted, the Indemnity was intended to cover only proceedings arising from the discharge or continued presence of mercury in the related ecosystems, not those related to the mere presence of mercury contained in the waste disposal site.

De plus, l'Indemnité constituait une annexe à une convention de règlement plus large, de sorte que son champ d'application se limitait aux points en litige définis dans cette convention, à savoir le rejet par Reed et ses prédécesseurs de mercure et de tout autre polluant dans le réseau hydrographique, ainsi que la présence continue de ces polluants dans les écosystèmes connexes. Le juge des motions n'a pas tenu compte de ce contexte lorsqu'il a interprété le champ d'application de l'Indemnité. Interprétée comme il se doit, l'Indemnité était censée s'appliquer seulement aux procédures découlant du rejet ou de la présence continue de mercure dans les écosystèmes connexes, et non à celles liées à la simple présence de mercure dans le lieu d'élimination des déchets.

The Indemnity must be read in the context of two prior indemnities given by Ontario in 1979 and 1982 in the context of the litigation brought by the First Nations. The Indemnity was given in partial consideration for Great Lakes and Reed releasing Ontario from its obligations under those prior indemnities. It is clear that the 1979 and 1982 indemnities were in response to the ongoing litigation, which involved claims brought by third parties, not by Ontario directly. There is no language in those indemnities that would imply Ontario intended to provide protection against the costs of regulatory compliance.

L'Indemnité doit être interprétée à la lumière de deux indemnités accordées précédemment par l'Ontario en 1979 et en 1982 dans le cadre de la poursuite intentée par les Premières Nations. L'Indemnité a été accordée en contrepartie partielle du fait que Great Lakes et Reed avaient déchargé l'Ontario de ses obligations en vertu de ces précédentes indemnités. Il est clair que les indemnités de 1979 et de 1982 ont été consenties en réponse au litige qui était en instance, et qui concernait des réclamations présentées par des tiers, et non par l'Ontario directement. Rien dans le libellé de ces indemnités ne tend à indiquer que l'Ontario avait l'intention d'offrir une protection à l'égard des frais engagés pour se conformer à la réglementation.

The motion judge's view of the importance of the phrase "statutory or otherwise" in the Indemnity and of why the parties entered into the Indemnity was materially affected by a palpable and overriding factual error. The motion judge found that the Indemnity was provided in consideration for commitments from Great Lakes to make significant financial investments in the Dryden plant. Given what he found to be the rationale for entering into the Indemnity, the motion judge concluded that it would be commercially absurd if Ontario could still impose remediation costs. However, Great Lakes' financial commitments were actually provided as part of the prior 1979 indemnity. Later, Great Lakes gave no new commitments to modernize in consideration for the Indemnity. The motion judge thus premised his interpretation of the Indemnity on an incorrect

L'opinion que s'est formée le juge des motions sur l'importance des mots « prévue par la loi ou autrement » dans l'Indemnité ainsi que sur les raisons pour lesquelles les parties ont conclu l'Indemnité a été entachée de manière importante par une erreur de fait manifeste et déterminante. Le juge des motions a estimé que l'Indemnité avait été accordée en contrepartie des engagements pris par Great Lakes de procéder à des investissements financiers considérables dans l'usine de Dryden. Étant donné ce qui, à son avis, constituait la raison d'être de l'Indemnité, il a conclu qu'il serait absurde sur le plan commercial que l'Ontario puisse toujours imposer des frais de remédiation. Cependant, les engagements financiers de Great Lakes étaient en réalité prévus dans la précédente indemnité de 1979. Par la suite, Great Lakes n'a pris aucun nouvel

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factual basis — one that led him to place too much emphasis on a change in language and misconstrue the bargain actually struck in the Indemnity.

The motion judge also erred by failing to consider the Indemnity as a whole when determining whether or not the Director's order fell within its scope. Paragraphs 2 and 3 of the Indemnity are critical to its interpretation. Paragraph 2 provides that in any pollution claim, Ontario has the right to elect to take carriage of the defence or to participate in the defence and/or settlement of the claim and any proceeding relating thereto as it deems appropriate. Paragraph 3 requires the parties to cooperate with Ontario in the defence of a claim. These clauses would be utterly meaningless for first party claims. Their inclusion is completely inconsistent with the notion that para. 1 of the Indemnity contemplates first party claims. Nothing in the Indemnity suggests that pollution claims included both first and third party claims, but that the requirements of paras. 2 and 3 would apply only to the subset of pollution claims brought by third parties. To the contrary, para. 2 applies in "any Pollution Claim". The fact that the requirements of paras. 2 and 3 would be utterly meaningless in first party claims implies that pollution claims encompass only those brought by third parties. Properly interpreted, the Indemnity only applies to third party claims, and therefore does not cover the Director's order.

Per Côté, Brown and Rowe JJ. (dissenting in part): The appeals brought by Ontario and Weyerhaeuser should be dismissed and the appeal brought by Resolute should be allowed. The Indemnity enures to the benefit of the successors and assigns of the Province, Reed and Great Lakes. Resolute is entitled to rely on the Indemnity to cover past and future costs incurred in complying with the Director's order as a corporate successor of Great Lakes, but Weyerhaeuser is neither an assignee of the benefit of the Indemnity nor a corporate successor of either Great Lakes or Reed, and it has no entitlement to benefit under the Indemnity.

The Indemnity is a contract which must be interpreted with a view to ascertaining the objective intentions and reasonable expectations of the contracting parties with respect to the meaning of the contractual provision. The

engagement de modernisation en contrepartie de l'Indemnité. Le juge des motions a donc fait reposer son interprétation de l'Indemnité sur un fondement factuel erroné, lequel l'a amené à accorder trop d'importance à la modification au libellé et à mal interpréter la transaction réellement intervenue dans l'Indemnité.

Le juge des motions a également eu tort de ne pas considérer l'Indemnité globalement au moment de déterminer si l'arrêté du directeur entrait ou non dans son champ d'application. Les paragraphes 2 et 3 de l'Indemnité revêtent une importance cruciale pour son interprétation. Le paragraphe 2 dispose que, dans toute réclamation pour pollution, l'Ontario a le droit de choisir d'assumer la défense ou de participer à la défense et/ou au règlement de la réclamation et de toute procédure y afférente, selon ce qu'il estime approprié. Le paragraphe 3 exige des parties qu'elles collaborent avec l'Ontario à la défense d'une réclamation. Ces clauses seraient dénuées de tout sens en ce qui a trait aux réclamations de première partie. Leur inclusion est tout à fait incompatible avec l'idée selon laquelle le par. 1 de l'Indemnité vise les réclamations de première partie. Rien dans l'Indemnité ne tend à indiquer que les réclamations pour pollution comprenaient aussi bien les réclamations de première partie que celles de tiers, mais que les exigences des par. 2 et 3 s'appliqueraient seulement au sous-ensemble des réclamations pour pollution présentées par des tiers. Au contraire, le par. 2 s'applique à « toute réclamation pour pollution ». Le fait que les exigences des par. 2 et 3 soient dénuées de tout sens en ce qui a trait aux réclamations de première partie signifie que les réclamations pour pollution englobent seulement celles présentées par des tiers. Interprétée comme il se doit, l'Indemnité s'applique seulement aux réclamations de tiers et ne vise donc pas l'arrêté du directeur.

Les juges Côté, Brown et Rowe (dissidents en partie) : Les pourvois interjetés par l'Ontario et Weyerhaeuser devraient être rejetés et le pourvoi de Résolu devrait être accueilli. L'Indemnité bénéficie aux successeurs et ayants droit de la province, de Reed et de Great Lakes. Résolu a le droit de bénéficier de l'Indemnité pour couvrir les frais passés et futurs engagés pour se conformer à l'arrêté du directeur à titre de successeur corporatif de Great Lakes, mais Weyerhaeuser n'est ni cessionnaire du bénéfice de l'Indemnité ni un successeur corporatif de Great Lakes ou de Reed, et elle n'a donc pas droit au bénéfice de l'Indemnité.

L'Indemnité est un contrat qui doit être interprété dans le but de déterminer les intentions objectives et les attentes raisonnables des parties contractantes en ce qui concerne la signification des dispositions contractuelles. L'approche

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approach is rooted in practicalities and common sense. It considers the language that the parties employed to express their agreement, objective evidence of the background facts that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting, and the principle of commercial reasonableness and efficacy. The factual matrix cannot overwhelm the words of the contract and cannot change the words of the contract in a manner that would modify the rights and obligations that the parties assumed.

The Indemnity covers the costs of complying with the Director's order. The motion judge did not make any of the four errors alleged by the Province in interpreting the Indemnity.

First, he did not err in failing to consider the text of the Indemnity with reference to the factual matrix, including the two earlier indemnities, the asset purchase agreement in which Reed sold the entire property to Great Lakes, the settlement agreement to which the Indemnity was a schedule, and certain provisions added to the *Environmental Protection Act* in 1985. Like the Indemnity, the two earlier indemnities addressed the mercury contamination, but they represent distinct agreements given for distinct purposes in distinct sets of negotiations. The Indemnity captures a broad scope relative to the other indemnities. In addition, the earlier indemnities were replaced by the Indemnity, which suggests that the parties themselves did not view those earlier indemnities as being co-extensive in scope with the Indemnity. The Indemnity is a separate agreement and must be interpreted by considering the words the parties used in it, not a previous agreement. The asset purchase agreement is of substantially the same scope as the Indemnity, but it exempted the costs of complying with an earlier regulatory order. The Province was aware of its terms, and nothing prevented the parties to the Indemnity from expressly providing that such orders would not fall within the scope of the Indemnity, as the parties to the asset purchase agreement had done. As to the settlement agreement, the issues which that agreement was intended to address included government actions taken in consequence of the mercury contamination. Further, the Indemnity expressly applies in respect of the presence of mercury in the affected lands, and the settlement agreement cannot overwhelm the text in the Indemnity. As for the statutory amendments, even accepting that they are objective and admissible evidence of what the parties had or ought to have had in contemplation when entering into the Indemnity, it is a far leap to the conclusion that they would have understood the reference to statutory claims in the Indemnity to refer solely to claims brought under the amendments or other third party statutory claims which

se fonde sur des considérations pratiques et sur le bon sens. Elle prend en compte les termes employés par les parties pour exprimer leur accord, la preuve objective des renseignements qui appartenaient ou auraient raisonnablement dû appartenir aux connaissances des deux parties à la date de signature ou avant celle-ci, et le principe de la raisonnabilité et de l'efficacité commerciales. Le fondement factuel ne peut pas supplanter les termes du contrat et ne peut changer ceux-ci de manière à modifier les droits et les obligations des parties.

L'Indemnité couvre les frais engagés pour se conformer à l'arrêté du directeur. Le juge des requêtes n'a commis aucune des quatre erreurs invoquées par la province en interprétant l'Indemnité.

Premièrement, il n'a pas commis d'erreur en n'examinant pas le libellé de l'Indemnité à la lumière du fondement factuel, y compris les deux indemnités précédentes, la convention d'achat d'actifs dans laquelle Reed a vendu l'ensemble de la propriété à Great Lakes, la convention de règlement dont l'Indemnité était une annexe et certaines dispositions incorporées dans la *Loi sur la protection de l'environnement* en 1985. Tout comme l'Indemnité, les deux indemnités antérieures visaient à corriger la contamination par le mercure, mais il s'agit d'ententes distinctes conclues à des fins distinctes dans le cadre de négociations distinctes. L'Indemnité a un large champ d'application par rapport à celui des autres indemnités. De plus, les indemnités antérieures ont été remplacées par l'Indemnité, ce qui tend à indiquer que les parties elles-mêmes ne considéraient pas qu'elles avaient le même champ d'application que l'Indemnité. Cette dernière est une entente distincte que l'on doit interpréter en tenant compte des mots employés par les parties à celle-ci et non d'une entente intervenue antérieurement. La convention d'achat d'actifs a essentiellement le même champ d'application que celui de l'Indemnité, mais elle soustrayait les frais engagés pour se conformer à une ordonnance réglementaire antérieure. La province en connaissait les modalités et rien n'empêchait les parties à l'Indemnité de prévoir expressément que de telles ordonnances ne seraient pas visées par l'Indemnité, comme les parties à la convention d'achat d'actifs l'avaient fait. En ce qui concerne la convention de règlement, les points en litige que cette convention visait à régler incluaient les mesures gouvernementales prises à l'égard de la contamination par le mercure. De plus, l'Indemnité s'applique expressément à la présence de mercure dans les terrains touchés et la convention de règlement ne saurait supplanter le texte de l'Indemnité. Pour ce qui est des modifications législatives, même en acceptant qu'elles constituent une preuve objective et admissible de ce que les parties avaient envisagé ou auraient dû envisager au moment de conclure l'Indemnité,

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could have been brought at that time. Moreover, reading the Indemnity as excluding first party claims cannot be reconciled with the amendments' creation of a right of action for the Province, or the Indemnity's references to "any province" and statutory actors.

il est difficile de conclure que les parties comprenaient que la mention de réclamations prévues par la loi dans l'Indemnité renvoyait seulement aux réclamations présentées en vertu des modifications ou aux autres réclamations statutaires qui auraient pu être présentées par des tiers à ce moment-là. De plus, une interprétation de l'Indemnité selon laquelle celle-ci exclut les réclamations de première partie n'est pas conciliable avec le fait que les modifications créent un droit d'action en faveur de la province, ou que l'Indemnité renvoie à « toute province » et à tout acteur statutaire.

Second, the motion judge did not err in failing to interpret the indemnification clause in para. 1 of the Indemnity in light of the agreement as a whole. His reading of that clause was consistent with the notice/control and cooperation provisions at paras. 2 and 3 of the Indemnity, which are typical of third party indemnities and are meaningful only for third party claims against the indemnified parties.

Deuxièmement, le juge des requêtes n'a pas commis l'erreur de ne pas avoir interprété la clause d'indemnisation figurant au par. 1 de l'Indemnité à la lumière de l'entente dans son ensemble. Sa lecture de cette clause était compatible avec les dispositions d'avis/contrôle et de collaboration aux par. 2 et 3 de l'Indemnité, qui sont typiques des indemnités de tiers et n'ont de sens qu'à l'égard des réclamations de tiers présentées à l'encontre des parties indemnisées.

Third, the motion judge did not make any palpable and overriding errors in characterizing the reason Great Lakes expended certain money or in concluding that the waste disposal site was the source of the mercury contamination. To the extent that these were errors, they could not possibly have had an overriding effect on the conclusion reached by the motion judge. Such minor and collateral factual findings could not determine the outcome of the case, particularly where the motion judge's ultimate conclusion on the scope of the Indemnity rested on different factual and contextual considerations.

Troisièmement, le juge des requêtes n'a pas commis d'erreurs manifestes et déterminantes en décrivant les raisons qui ont poussé Great Lakes à faire certaines dépenses ou en concluant que le lieu d'élimination des déchets était la source de la contamination par le mercure. Dans la mesure où il s'agissait d'erreurs, celles-ci ne sauraient avoir eu d'effet déterminant sur la conclusion du juge des requêtes. Pareilles conclusions de fait mineures et accessoires ne pouvaient déterminer l'issue de l'affaire, en particulier lorsque la conclusion finale du juge des requêtes sur le champ d'application de l'Indemnité reposait sur des considérations factuelles et contextuelles différentes.

Fourth, the motion judge did not err in interpreting the Indemnity so as to impermissibly fetter the legislature's law-making powers, thereby rendering the Indemnity unenforceable. As a matter of constitutional law, the executive of the Canadian state cannot bind or restrict the legislature's sovereign law-making power, whether by contract or otherwise. It follows that a contract entered into by the executive that purports to require that a certain law be enacted, amended or repealed cannot be enforced by way of injunction or specific performance. However, there is an important difference between a contract that impermissibly fetters the legislature's power to enact, amend and repeal legislation, and a contract whose breach by the Crown exposes it to liability. Where the legislature exercises its law-making power in a manner inconsistent with the terms of a contract, the Crown may still face consequences in the form of liability in damages. While the possibility of such liability may deter the legislature

Quatrièmement, le juge des requêtes n'a pas commis l'erreur d'avoir interprété l'Indemnité de manière à entraver de manière inacceptable les pouvoirs de légiférer de la législature, de sorte que l'Indemnité est devenue non exécutoire. Sur le plan constitutionnel canadien, le pouvoir exécutif ne peut lier l'exercice souverain du pouvoir législatif ni restreindre celui-ci, que ce soit par contrat ou autrement. Il s'ensuit qu'un contrat conclu par le pouvoir exécutif qui vise à obliger à ce qu'une certaine loi soit adoptée, modifiée ou abrogée ne peut faire l'objet d'une exécution par injonction ou en nature. Toutefois, il y a une différence importante entre un contrat qui entrave de façon inacceptable le pouvoir de la législature d'adopter, de modifier et d'abroger une loi, et un contrat dont une violation par la Couronne expose celle-ci à une responsabilité. Si la législature exerce son pouvoir de légiférer d'une manière incompatible avec les modalités d'un contrat, la Couronne peut quand même être exposée à des conséquences prenant

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from acting in a manner that runs contrary to the Crown's contractual promises — sometimes referred to as an "indirect fetter" — the legislature is not thereby truly fettered.

la forme d'une responsabilité pour dommages. Bien que l'éventualité d'une telle responsabilité puisse dissuader la législature d'agir d'une manière qui va à l'encontre des promesses contractuelles de la Couronne, ce qu'on appelle parfois une « entrave indirecte », la législature n'est pas de ce fait véritablement entravée.

In this case, the enactment of new statutory claims might expose the Province to greater liability under the Indemnity, but the Indemnity in no way prevents the legislature from exercising its sovereign authority to make or unmake any law whatever, and deterring or otherwise discouraging the legislature from exercising its law-making power in a certain way would not render it unenforceable at law. The legislature's freedom of action is not impacted.

En l'espèce, l'édiction de mesures permettant de nouvelles réclamations statutaires pourrait exposer la province à une plus grande responsabilité en vertu de l'Indemnité, mais l'Indemnité n'empêche nullement la législature d'exercer son droit souverain de faire ou d'abroger quelque loi que ce soit, et dissuader ou autrement décourager la législature d'exercer son pouvoir de légiférer d'une certaine façon ne rendrait pas cette indemnité non exécutoire en droit. La liberté d'action de la législature n'est pas touchée.

As to whether Resolute and Weyerhaeuser could benefit from the Indemnity as successors and assigns of Great Lakes, the motion judge made no error in interpreting the Indemnity as covering the costs imposed on the successors and assigns of Great Lakes by the Director's order. Although his analysis on this point was rooted primarily in the wording of the Indemnity, he also considered its meaning in light of the agreement as a whole and the circumstances surrounding its formation in 1985. However, he found that neither supported an interpretation of the Indemnity that would exclude coverage for first party claims.

En ce qui concerne la question de savoir si Résolu et Weyerhaeuser pouvaient bénéficier de l'Indemnité à titre de successeurs et ayants droit de Great Lakes, le juge des requêtes n'a commis aucune erreur en interprétant l'Indemnité comme couvrant les frais que l'arrêté du directeur a imposés aux successeurs et ayants droit de Great Lakes. Bien que son analyse sur ce point ait reposé principalement sur le libellé de l'Indemnité, le juge s'est aussi penché sur sa signification à la lumière de l'entente dans son ensemble et des circonstances ayant entouré sa conclusion en 1985. Cependant, il est arrivé à la conclusion que ni l'une ni l'autre de ces considérations n'étayait une interprétation de l'Indemnité qui exclurait les réclamations de première partie.

However, the motion judge did err in principle in holding that a predecessor of Resolute had assigned the benefit of the Indemnity to Weyerhaeuser. He failed to read the impugned contractual term in light of the factual matrix and in a commercially sensible way, focussing his analysis solely on the text of the relevant provisions of the asset purchase agreement between the predecessor and Weyerhaeuser. Although an indemnified party cannot continue to enjoy the benefit of the Indemnity after it assigns its rights thereunder to a third party, the parties structured the agreement in a way that imposed all risk in relation to environmental liabilities on the predecessor while the predecessor relinquished its own protection. This risk-allocation structure makes commercial sense only if the predecessor's interests remained protected by the Indemnity.

Le juge des requêtes a toutefois commis une erreur de principe en concluant qu'un prédécesseur de Résolu avait cédé le bénéfice de l'Indemnité à Weyerhaeuser. Il n'a pas lu la clause contractuelle contestée à la lumière du fondement factuel et d'une manière qui a du sens sur le plan commercial, et a centré son analyse exclusivement sur le libellé des dispositions pertinentes de la convention d'achat d'actifs entre le prédécesseur et Weyerhaeuser. Bien qu'une partie indemnisée ne puisse continuer à jouir du bénéfice de l'Indemnité après avoir consenti à un tiers une cession des droits qu'elle lui confère, les parties ont structuré la convention de façon à ce que le prédécesseur assume tous les risques en matière de responsabilités environnementales tout en renonçant à sa propre protection. Cette structure de répartition du risque n'a de sens sur le plan commercial que si l'Indemnité continuait à protéger les intérêts du prédécesseur.

The motion judge also committed a palpable and overriding error when he concluded that the Indemnity's enurement clause extended the benefit of the Indemnity

Le juge des requêtes a également commis une erreur manifeste et déterminante en concluant que la clause d'extension des bénéfices de l'Indemnité étendait le bénéfice

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to successors-in-title of the Dryden property. The Indemnity's enurement clause is a standard contractual term and certainty in commercial transactions is best protected where courts give effect to the common understanding and inclusion of such terms in contracts, absent any indication that the parties intended them to have a different effect. When used in relation to corporations, a "successor" generally denotes another corporation which, through some type of legal succession, assumes the burdens and becomes vested with the rights of the first corporation. Nothing in the language of the Indemnity or in the circumstances surrounding the formation of the contract suggests that "successor" in the Indemnity should extend to both corporate successors of Great Lakes and successors-in-title to the Dryden property. However, it may be possible, in other circumstances, for the term "successors" to refer to a successor-in-title.

de celle-ci aux successeurs en titre quant à la propriété de Dryden. La clause d'extension des bénéfices de l'Indemnité est une clause contractuelle type et la certitude en matière d'opérations commerciales est mieux protégée lorsque les tribunaux donnent effet au sens courant et à l'inclusion de telles clauses figurant dans les contrats, en l'absence d'indication que les parties ont voulu que celles-ci aient un effet différent. Employé à l'égard de sociétés, le terme « successeur » désigne généralement une autre société qui, par une forme de succession juridique, assume les obligations et acquiert les droits de la première société. Rien dans le libellé de l'Indemnité ou dans les circonstances entourant la conclusion du contrat ne suggère que le terme « successeurs » dans l'Indemnité devrait s'étendre aux successeurs corporatifs de Great Lakes et aux successeurs en titre quant à la propriété de Dryden. Cependant, il se peut que dans d'autres circonstances, le terme « successeurs » renvoie aux successeurs en titre.

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APPEALS from a judgment of the Ontario Court of Appeal (Laskin, Lauwers and Brown JJ.A.), 2017 ONCA 1007, 13 C.E.L.R. (4th) 28, 77 B.L.R. (5th) 175, [2017] O.J. No. 6654 (QL), 2017 CarswellOnt 20156 (WL Can.), reversing a decision of Hainey J., 2016 ONSC 4652, 3 C.E.L.R. (4th) 278, 60 B.L.R. (5th) 237, [2016] O.J. No. 3900 (QL), 2016 CarswellOnt 11807 (WL Can.). Appeal of Resolute FP Canada Inc. dismissed, Côté, Brown and Rowe JJ. dissenting. Appeal of Her Majesty The Queen as represented by the Ministry of the Attorney General allowed, Côté, Brown and Rowe JJ. dissenting. Appeal of Weyerhaeuser Company Limited dismissed.

Andrew Bernstein, *Jeremy Opolsky* and *Jonathan Silver*, for the appellant/respondent Resolute FP Canada Inc.

Leonard F. Marsello, *Tamara D. Barclay* and *Nansy Ghobrial*, for the appellant/respondent Her Majesty The Queen as represented by the Ministry of the Attorney General.

Christopher D. Bredt and *Markus Kremer*, for the appellant/respondent Weyerhaeuser Company Limited.

Elizabeth J. Rowbotham, for the intervener the Attorney General of British Columbia.

The following is the judgment delivered by

[1] Abella, Moldaver, Karakatsanis and Martin JJ. — In 1985, the Province of Ontario granted an indemnity (the "1985 Indemnity") to Reed Ltd. and Great Lakes Forest Products Limited, both former owners of a pulp and paper mill located in Dryden, Ontario, as well as their successors and assigns, for "any damage, loss, event or circumstances, caused or alleged to be caused by or with respect to, either in whole or in part, the discharge or escape or presence of any pollutant by Reed or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or

Waddams, Stephen M. *The Law of Contracts*, 7th ed., Toronto, Thomson Reuters, 2017.

POURVOIS contre un arrêt de la Cour d'appel de l'Ontario (les juges Laskin, Lauwers et Brown), 2017 ONCA 1007, 13 C.E.L.R. (4th) 28, 77 B.L.R. (5th) 175, [2017] O.J. No. 6654 (QL), 2017 CarswellOnt 20156 (WL Can.), qui a infirmé une décision du juge Hainey, 2016 ONSC 4652, 3 C.E.L.R. (4th) 278, 60 B.L.R. (5th) 237, [2016] O.J. No. 3900 (QL), 2016 CarswellOnt 11807 (WL Can.). Pourvoi de Produits forestiers Résolu rejeté, les juges Côté, Brown et Rowe sont dissidents. Pourvoi de Sa Majesté la Reine représentée par le ministère du procureur général accueilli, les juges Côté, Brown et Rowe sont dissidents. Pourvoi de Compagnie Weyerhaeuser Limitée rejeté.

Andrew Bernstein, *Jeremy Opolsky* et *Jonathan Silver*, pour l'appelante/intimée Produits forestiers Résolu.

Leonard F. Marsello, *Tamara D. Barclay* et *Nansy Ghobrial*, pour l'appelante/intimée Sa Majesté la Reine représentée par le ministère du procureur général.

Christopher D. Bredt et *Markus Kremer*, pour l'appelante/intimée Compagnie Weyerhaeuser Limitée.

Elizabeth J. Rowbotham, pour l'intervenant le procureur général de la Colombie-Britannique.

Version française du jugement rendu par

[1] Les juges Abella, Moldaver, Karakatsanis et Martin — En 1985, la province d'Ontario a accordé une indemnité (l'« Indemnité de 1985 ») à Reed Ltd. et à Great Lakes Forest Products Limited, toutes deux anciennement propriétaires d'une usine de pâtes et papiers située à Dryden, en Ontario, ainsi qu'à leurs successeurs et ayants droit, pour les [traduction] « dommages, pertes, événements ou circonstances dus ou présumés dus ou en ce qui a trait, en tout ou en partie, au rejet ou à la fuite de polluants, notamment le mercure ou toute autre substance, par Reed ou ses prédécesseurs, à partir des usines, des

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premises". The 1985 Indemnity was agreed to by the parties in the context of the settlement of litigation brought by two First Nations in relation to mercury pollution caused by the operation of the Dryden mill.

terrains ou des lieux [. . .], ou encore à la présence de tels polluants dans ces usines, terrains ou lieux ». L'Indemnité de 1985 a été convenue entre les parties dans le cadre du règlement de la poursuite intentée par deux Premières Nations relativement à la pollution par le mercure causée par l'exploitation de l'usine de Dryden.

[2] Twenty-six years later, the Director of the Ministry of the Environment and Climate Change issued a remediation order in relation to monitoring and maintaining a mercury disposal site at the Dryden mill. In the intervening period, ownership of the mill had changed hands in several transactions. The Director's Order was issued to both Resolute, Great Lakes' corporate successor, and Weyerhaeuser, which also owned the Dryden property for a time. Both Resolute and Weyerhaeuser sought indemnification from Ontario for the costs of complying with the Director's Order.

[2] Vingt-six ans plus tard, un arrêté de remédiation a été pris par le directeur du ministère de l'Environnement et de l'Action en matière de changement climatique en ce qui concerne la surveillance et l'entretien d'un lieu d'élimination du mercure à l'usine de Dryden. Dans l'intervalle, l'usine avait changé de propriétaires à la suite de plusieurs opérations. L'arrêté du directeur a été adressé à Résolu, société ayant succédé à Great Lakes, et à Weyerhaeuser, à qui avait également déjà appartenu la propriété de Dryden pendant une certaine période. Tant Résolu que Weyerhaeuser ont réclamé une indemnité à l'Ontario pour les frais engagés pour se conformer à l'arrêté du directeur.

[3] Although the parties in these appeals raise a number of issues relating to Resolute and Weyerhaeuser's claims for indemnification, the threshold question is whether the 1985 Indemnity covers the Director's Order. In our view, and for the dissenting reasons of Laskin J.A. (2017 ONCA 1007, 77 B.L.R. (5th) 175), it does not. We would, therefore, allow Ontario's appeal, and grant Ontario's motion for summary judgment.

[3] Bien que les parties aux présents pourvois aient soulevé un certain nombre de questions liées aux demandes d'indemnisation de Résolu et de Weyerhaeuser, la question préliminaire qui se pose est celle de savoir si l'Indemnité de 1985 s'applique à l'arrêté du directeur. À notre avis, et pour les motifs dissidents exprimés par le juge Laskin de la Cour d'appel (2017 ONCA 1007, 77 B.L.R. (5th) 175), elle ne s'y applique pas. En conséquence, nous sommes d'avis d'accueillir le pourvoi de l'Ontario ainsi que la motion en jugement sommaire de l'Ontario.

[4] In the 1960s, the Dryden Paper Company Limited owned and operated a pulp and paper mill in Dryden. As part of the operation of the paper mill, Dryden Paper — through a related company, Dryden Chemicals Limited — operated a mercury cathode chlor-alkali plant on property near the mill. The chlor-alkali plant released untreated mercury waste into the English and Wabigoon rivers, which resulted in harm to the health of some local residents, the closure of a commercial fishery and damage to the region's tourism industry. Many of the affected people were members of the Grassy Narrows and

[4] Dans les années 1960, la société Dryden Paper Company Limited possédait et exploitait une usine de pâtes et papiers à Dryden. Dans le cadre de l'exploitation de l'usine, Dryden Paper, par l'intermédiaire d'une société affiliée, Dryden Chemicals Limited, exploitait une usine de chlore et de soude caustique utilisant le procédé à cathode de mercure sur une propriété située près de l'usine. Cette usine de chlore et de soude caustique a rejeté des déchets mercuriels non traités dans les rivières English et Wabigoon, ce qui a eu un effet préjudiciable sur la santé de certains résidents locaux, en plus d'avoir

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Islington First Nations who lived on reserves downstream.

entraîné la fin de la pêche commerciale et causé du tort à l'industrie touristique de la région. Bon nombre des personnes touchées étaient des membres des Premières Nations de Grassy Narrows et d'Islington qui vivaient dans des réserves situées en aval.

[5] In 1971, Dryden Paper constructed a waste disposal site on its lands to serve as a burial site for mercury-contaminated waste from the chlor-alkali plant. Six monitoring wells were installed when the waste disposal site was created, with three additional wells installed in 2002, and one in 2010. These monitoring wells were sampled and analyzed twice per year. Since 1977, the waste disposal site has been the subject of various certificates under the *Environmental Protection Act*, R.S.O. 1990, c. E.19. The initial Provisional Certificate of Approval required the monitoring of groundwater and surface water by the owner of the waste disposal site. In 2011, the site was thought to have 35 years remaining in its "contaminating lifespan".

[5] En 1971, Dryden Paper a construit sur ses terres un lieu d'élimination des déchets devant servir de site d'enfouissement des déchets contaminés par le mercure qui provenaient de l'usine de chlore et de soude caustique. Six puits de surveillance ont été installés lors de la création du lieu d'élimination des déchets, auxquels se sont ajoutés trois puits supplémentaires en 2002, puis un autre en 2010. Ces puits de surveillance faisaient l'objet d'un échantillonnage et d'une analyse deux fois par année. Depuis 1977, le lieu d'élimination des déchets a été visé par plusieurs certificats sous le régime de la *Loi sur la protection de l'environnement*, L.R.O. 1990, c. E.19. Selon le certificat d'autorisation provisoire initial, le propriétaire du lieu d'élimination était tenu d'assurer la surveillance des eaux souterraines et des eaux de surface. En 2011, on estimait qu'il restait 35 années à la « durée de vie de la charge contaminante » du site.

[6] In 1976, Dryden Paper and Dryden Chemicals amalgamated to form Reed.

[6] En 1976, Dryden Paper et Dryden Chemicals ont fusionné pour former la société Reed.

[7] In June 1977, the two First Nations bands sued Reed, Dryden Paper and Dryden Chemicals for damages in relation to the mercury waste contamination of the rivers (the "Grassy Narrows Litigation").

[7] En juin 1977, les deux Premières Nations ont intenté une poursuite en dommages-intérêts contre Reed, Dryden Paper et Dryden Chemicals pour la contamination des rivières par les déchets mercuriels (le « litige de Grassy Narrows »).

[8] In 1978, the Ministry of the Environment issued two further Provisional Certificates of Approval that required Reed to maintain the water monitoring program at the waste disposal site.

[8] En 1978, le ministère de l'Environnement a délivré deux autres certificats d'autorisation provisoires selon lesquels Reed était tenue de maintenir le programme de surveillance des eaux au lieu d'élimination des déchets.

[9] By 1979, Reed wanted to sell its Dryden properties. Its prospective purchaser, Great Lakes, expressed reluctance to complete the sale because of the Grassy Narrows Litigation. Concerned that the local economy would suffer if the pulp and paper mill closed, Ontario intervened. It agreed to limit the combined liability of Great Lakes and Reed for any environmental damages caused by Reed prior

[9] En 1979, Reed a voulu vendre ses propriétés de Dryden. L'acheteuse potentielle, Great Lakes, s'est montrée réticente à finaliser la vente en raison du litige de Grassy Narrows. Craignant que l'économie locale ne souffre de la fermeture de l'usine de pâtes et papiers, l'Ontario est intervenu et a accepté de limiter à 15 millions de dollars la responsabilité combinée de Great Lakes et de Reed pour les dommages

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to Great Lakes' purchase of the Dryden operation to $15 million. Great Lakes and Reed agreed to share the financial consequences of the Grassy Narrows Litigation up to that limit. Great Lakes also agreed to spend approximately $200 million on the expansion and modernization of the Dryden facilities in consideration for the indemnity granted by Ontario (the "1979 Indemnity").

environnementaux causés par Reed avant l'achat par Great Lakes de l'exploitation de Dryden. Great Lakes et Reed ont convenu de partager les conséquences financières du litige de Grassy Narrows jusqu'à concurrence de ce montant. Great Lakes a également accepté de consacrer environ 200 millions de dollars à l'agrandissement et à la modernisation des installations de Dryden en contrepartie de l'indemnité accordée par l'Ontario (l'« Indemnité de 1979 »).

[10] On December 4, 1979, the Ministry of the Environment issued another Provisional Certificate of Approval. It required Reed to register the certificate against title to the waste disposal site. That same month, the sale of the Dryden properties to Great Lakes closed in accordance with the terms set out in a Memorandum of Agreement dated December 7, 1979.

[10] Le 4 décembre 1979, le ministère de l'Environnement a délivré un autre certificat d'autorisation provisoire selon lequel Reed était tenue d'enregistrer le certificat sur le titre de propriété du lieu d'élimination des déchets. Le même mois, la vente des propriétés de Dryden à Great Lakes a été conclue conformément aux modalités énoncées dans un protocole d'entente daté du 7 décembre 1979.

[11] In January 1980, the Ministry issued another Provisional Certificate of Approval requiring Great Lakes to maintain the groundwater monitoring and testing program at the waste disposal site.

[11] En janvier 1980, le Ministère a délivré un autre certificat d'autorisation provisoire, cette fois pour exiger de Great Lakes qu'elle maintienne le programme de surveillance et d'analyse des eaux souterraines au lieu d'élimination des déchets.

[12] Contemporaneously, the Governments of Ontario and Canada engaged in mediation with the Islington and Grassy Narrows First Nations to address the harms caused by mercury discharge. These discussions involved the Grassy Narrows Litigation. Great Lakes, meanwhile, was reluctant to contribute to any settlement of the litigation unless it obtained a release from liability. On January 28, 1982, the then Provincial Secretary for Resources Development wrote to Great Lakes, indicating that Ontario was "prepared to indemnify Great Lakes Forest Products Limited against any claims related to mercury pollution" (the "1982 Indemnity" (A.R., vol. III, at p. 176)). The 1982 Indemnity stated that Ontario would indemnify Great Lakes for any damages awarded by a court or any settlement above $15 million. Any mercury pollution-related actions were to be brought to the attention of Ontario, which would then become involved in the litigation.

[12] À la même époque, les gouvernements de l'Ontario et du Canada ont pris part à un processus de médiation avec les Premières Nations d'Islington et de Grassy Narrows visant à réparer les préjudices causés par le rejet de mercure. Les discussions ont porté sur le litige de Grassy Narrows. Pendant cette période, Great Lakes était réticente à participer à tout règlement du litige, à moins d'avoir obtenu une décharge de responsabilité. Le 28 janvier 1982, le secrétaire provincial du Développement des ressources de l'époque a écrit à Great Lakes pour lui faire savoir que l'Ontario était [TRADUCTION] « prêt à indemniser Great Lakes Forest Products Limited pour toute réclamation relative à la pollution au mercure » (« Indemnité de 1982 » (d.a., vol. III, p. 176)). L'Indemnité de 1982 précisait que l'Ontario indemniserait Great Lakes pour toute somme accordée à titre de dommages-intérêts par un tribunal ou pour tout règlement s'élevant à plus de 15 millions de dollars. Toute procédure associée à la pollution au mercure devait être portée à l'attention de l'Ontario, qui prendrait alors part au litige.

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[13] In late 1985, the Grassy Narrows Litigation settled. The terms of the settlement were set out in a Memorandum of Agreement dated November 22, 1985, entered into by Canada, Ontario, the Islington and Grassy Narrows First Nations, Reed and Great Lakes. The issues, as defined in the Memorandum of Agreement, pertained to "[t]he discharge by Reed and its predecessors of mercury and any other pollutants into the English and Wabigoon and related river systems, and the continu[ed] presence of any such pollutants discharged by Reed and its predecessors . . . in the related ecosystems". Significantly for the purposes of the present appeals, para. 2.4 of the Memorandum of Agreement stipulated that Ontario would indemnify Great Lakes and Reed with respect to the issues, and Great Lakes and Reed would provide Ontario releases in respect of the 1979 and 1982 Indemnities.

[14] The indemnification required by para. 2.4 of the Memorandum of Agreement is contained in a schedule to the settlement agreement entitled the "Ontario Indemnity" (referred to herein as the "1985 Indemnity") which was signed by Ontario, Great Lakes, Reed and Reed International. These appeals involve the interpretation of the 1985 Indemnity, and particularly para. 1, which reads:

1. Ontario hereby covenants and agrees to indemnify Great Lakes, Reed, International and any company which was at the Closing Date a subsidiary or affiliate company (whether directly or indirectly) of International, harmless from and against any obligation, liability, damage, loss, costs or expenses incurred by any of them after the date hereof as a result of any claim, action or proceeding, whether statutory or otherwise, existing at December 17, 1979 or which may arise or be asserted thereafter (including those arising or asserted after the date of this agreement), whether by individuals, firms, companies, governments (including the Federal Government of Canada and any province or municipality thereof or any agency, body or authority created by statutory or other authority) or any group or groups of the foregoing, because of or relating to any damage, loss, event or circumstances, caused or alleged to be caused by or with respect to, either in whole or in part, the discharge or escape or presence of any pollutant by Reed or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or premises forming part of the Dryden assets sold by Reed Ltd. to Great Lakes

[13] Le litige de Grassy Narrows a été réglé à la fin de 1985. Les modalités du règlement ont été énoncées dans un protocole d'entente daté du 22 novembre 1985 conclu entre le Canada, l'Ontario, les Premières Nations d'Islington et de Grassy Narrows, Reed et Great Lakes. Les points en litige, tels qu'ils ont été définis dans le protocole d'entente, portaient sur [TRADUCTION] « [l]e rejet par Reed et ses prédécesseurs de mercure et de tout autre polluant dans le réseau hydrographique English-Wabigoon, ainsi que la présence continue de ces polluants [. . .] dans les écosystèmes connexes ». Fait important pour les besoins des présents pourvois, le par. 2.4 du protocole d'entente précisait que l'Ontario indemniserait Great Lakes et Reed relativement aux points en litige, et que Great Lakes et Reed décharger aient l'Ontario de ses obligations en vertu des Indemnités de 1979 et de 1982.

[14] L'indemnisation requise aux termes du par. 2.4 du protocole d'entente est énoncée dans une annexe à la convention de règlement, intitulée [TRADUCTION] « Indemnité de l'Ontario » (ici appelée « Indemnité de 1985 ») et qui a été signée par l'Ontario, Great Lakes, Reed et Reed International. Les pourvois en l'espèce portent sur l'interprétation de l'Indemnité de 1985, et en particulier son par. 1, ainsi rédigé :

[TRADUCTION] 1. L'Ontario s'engage et consent à tenir Great Lakes, Reed, International et toute société qui, à la date de clôture, était (directement ou indirectement) une filiale ou une société affiliée d'International, à couvert de l'ensemble des obligations, responsabilités, dommages, pertes, frais ou dépenses qu'est susceptible d'entraîner pour l'une ou l'autre d'entre elles, après la date des présentes, toute réclamation, action ou procédure, qu'elle soit prévue par la loi ou autrement, qui existait au 17 décembre 1979 ou qui était susceptible de prendre naissance ou d'être présentée par la suite (y compris celles ayant pris naissance ou ayant été présentées après la date des présentes), par des particuliers, des firmes, des sociétés, des gouvernements (y compris le gouvernement fédéral du Canada et toute province ou municipalité du Canada, ou tout organisme ou autorité créé en vertu d'un pouvoir légal ou d'un autre pouvoir) ou un ou plusieurs groupes de ceux-ci, du fait ou à l'égard des dommages, pertes, événements ou circonstances dus ou présumés dus ou en ce qui a trait, en tout ou en partie, au rejet ou à la fuite de polluants, notamment le mercure ou toute autre

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under the Dryden Agreement (hereinafter referred to as "Pollution Claims"). It is hereby expressly acknowledged and agreed that in respect of Ontario's covenant and agreement hereunder to indemnify Great Lakes that the term "Pollution Claims" shall include any obligation, liability, damage, loss, costs or expenses incurred by Great Lakes as a result of any claim, action or proceeding resulting from or in connection with the indemnity agreement of even date herewith made between Great Lakes, Reed and International. [A.R., vol. IV, at pp. 189-90]

substance, par Reed ou ses prédécesseurs, à partir des usines, des terrains ou des lieux faisant partie des actifs de Dryden que Reed Ltd. a vendus à Great Lakes en vertu de la convention de Dryden, ou encore à la présence de tels polluants dans ces usines, terrains ou lieux (ci-après appelées les « réclamations pour pollution »). Il est expressément reconnu et convenu par les présentes qu'en ce qui concerne l'engagement et le consentement de l'Ontario à indemniser Great Lakes, l'expression « réclamations pour pollution » comprend l'ensemble des obligations, responsabilités, dommages, pertes, frais ou dépenses qu'est susceptible d'entraîner pour Great Lakes toute réclamation, action ou procédure qui découle de l'entente d'indemnisation conclue à la même date que les présentes entre Great Lakes, Reed et International, ou qui y est liée. [d.a., vol. IV, p. 189-190]

[15] Paragraph 2 of the 1985 Indemnity requires Great Lakes or Reed to give Ontario prompt notice of any Pollution Claim as defined in para. 1, at which point Ontario could take carriage of or participate in the litigation. Great Lakes and Reed must cooperate with Ontario in relation to the investigation of any Pollution Claims (para. 3). The 1985 Indemnity is "valid without limitation as to time" (para. 4). An enurement clause contained in para. 6 provided that "[t]he indemnity shall be binding upon and enure to the benefit of the respective successors and assigns of Ontario, Reed, International and Great Lakes, provided however that Ontario shall not be entitled to assign this indemnity without the prior written consent of the other parties hereto" (A.R., vol. IV, at pp. 191-92).

[15] Le paragraphe 2 de l'Indemnité de 1985 exige que Great Lakes ou Reed avisent rapidement l'Ontario de toute réclamation pour pollution, telle qu'elle est définie au par. 1, et l'Ontario peut alors se charger du litige ou y participer. Great Lakes et Reed doivent collaborer avec l'Ontario à l'enquête sur toute réclamation pour pollution (par. 3). L'Indemnité de 1985 n'est [TRADUCTION] « assujettie à aucune limite de temps » (par. 4). La clause d'extension des bénéfices contenue au par. 6 prévoit ce qui suit : « L'indemnité lie les successeurs et ayants droit respectifs de l'Ontario, de Reed, d'International et de Great Lakes et bénéficie à ceux-ci, à condition toutefois que l'Ontario ne soit pas autorisé à céder l'indemnité sans le consentement préalable écrit des autres parties » (d.a., vol. IV, p. 191-192).

[16] In accordance with the Memorandum of Agreement, Reed and Great Lakes released Ontario from its obligations under the 1979 and 1982 Indemnities. The settlement of the Grassy Narrows Litigation was approved by the Supreme Court of Ontario on June 26, 1986.

[16] Conformément au protocole d'entente, Reed et Great Lakes ont déchargé l'Ontario de ses obligations en vertu des Indemnités de 1979 et de 1982. Le règlement du litige de Grassy Narrows a été approuvé par la Cour suprême de l'Ontario le 26 juin 1986.

[17] In subsequent years, both Reed and Great Lakes underwent corporate changes. After amalgamating with other corporations, Reed's successor corporation dissolved in 1993. In 1998, Great Lakes became Bowater which, in 2010, became part of Abitibi-Consolidated Inc. In 2012, it became Resolute.

[17] Au cours des années suivantes, Reed et Great Lakes ont subi des changements organisationnels. Après avoir fusionné avec d'autres sociétés, la société ayant succédé à Reed a été dissoute en 1993. En 1998, Great Lakes est devenue Bowater, qui a été intégrée à Abitibi-Consolidated Inc. en 2010. En 2012, la société a pris le nom de Résolu.

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[18] In August 1998, Weyerhaeuser entered into an agreement with Bowater, Great Lakes' corporate successor, to purchase certain assets used in the Dryden pulp and paper business. Given the potential environmental liabilities, Weyerhaeuser initially sought to exclude the waste disposal site from the purchased assets. However, this exclusion required severing the waste disposal site from title, which could not be effected before the closing of the sale. As a result, when the transaction closed, Bowater conveyed title to the waste disposal site to Weyerhaeuser, which then immediately leased it back to Bowater. When severance finally occurred some two years later, Weyerhaeuser reconveyed the waste disposal site to Bowater. Title was registered in Weyerhaeuser's name from September 30, 1998, to August 25, 2000. In 2007, Weyerhaeuser sold the Dryden paper plant to Domtar Inc.

[19] In April 2009, Bowater and its related companies filed for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In the course of the *CCAA* proceedings, with court approval, the waste disposal site was abandoned in April 2011.

[20] On August 25, 2011, the Ministry of the Environment issued a Director's Order to Weyerhaeuser (as a former owner of the waste disposal site) and Bowater, Resolute's corporate predecessor. This order imposed three main obligations: (1) to repair certain site erosion, perform specific groundwater and surface water testing, and file annual reports containing specified information; (2) to deliver to the Ministry of the Environment the sum of $273,063 as financial assurance in respect of the waste disposal site; and (3) to "take all reasonable measures to ensure that any discharge of a contaminant to the natural environment is prevented and any adverse effect that may result from such a discharge is dealt with according to all legal requirements" (A.R., vol. IV, at p. 27).

[18] En août 1998, Weyerhaeuser a conclu une entente avec Bowater, la société ayant succédé à Great Lakes, en vue de l'achat de certains actifs utilisés dans l'entreprise de pâtes et papiers de Dryden. Étant donné les responsabilités environnementales possibles, Weyerhaeuser a d'abord cherché à exclure le lieu d'élimination des déchets des actifs visés par l'achat. Toutefois, pour procéder à cette exclusion, il fallait séparer ce lieu du titre, ce qui ne pouvait s'effectuer avant la clôture de la vente. En conséquence, à la clôture de l'opération, Bowater a transféré le titre de propriété du lieu d'élimination des déchets à Weyerhaeuser, qui a immédiatement loué celui-ci à Bowater. Lorsque la séparation en question a finalement eu lieu quelque deux années plus tard, Weyerhaeuser a rétrocédé le site à Bowater. Le titre a été enregistré au nom de Weyerhaeuser du 30 septembre 1998 au 25 août 2000. En 2007, Weyerhaeuser a vendu l'usine de pâtes et papiers de Dryden à Domtar Inc.

[19] En avril 2009, Bowater et ses sociétés affiliées ont demandé à être placées sous la protection de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »). Dans le cadre des procédures fondées sur la *LACC*, et avec l'approbation du tribunal, le lieu d'élimination des déchets a été abandonné en avril 2011.

[20] Le 25 août 2011, le ministère de l'Environnement a pris un arrêté du directeur adressé à Weyerhaeuser (à titre d'ancienne propriétaire du lieu d'élimination des déchets) et à Bowater, la société ayant précédé Résolu. Cet arrêté imposait trois obligations principales : (1) réparer une certaine érosion du site, effectuer une analyse déterminée d'eaux souterraines et d'eaux de surface, et déposer des rapports annuels contenant des renseignements déterminés; (2) remettre au ministère de l'Environnement la somme de 273 063 $ à titre de garantie financière pour le lieu d'élimination des déchets; et (3) [TRADUCTION] « prendre toutes les mesures raisonnables pour éviter le rejet d'un contaminant dans l'environnement naturel et pour remédier aux conséquences préjudiciables pouvant résulter d'un tel rejet conformément à toutes les exigences légales » (d.a., vol. IV, p. 27).

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[21] Weyerhaeuser filed a notice of appeal to the Environmental Review Tribunal, seeking to revoke or amend the Director's Order.

[22] In May 2013, Weyerhaeuser commenced an action in Superior Court seeking a declaration that the terms of the 1985 Indemnity required Ontario to compensate it for the cost of complying with the Director's Order. Resolute sought leave to intervene. Ontario submitted it was not responsible for the costs of complying with the Director's Order. All three parties moved for summary judgment.

[23] The motion judge held that the 1985 Indemnity clearly applied to a statutory claim or proceeding brought by an agent of the Province and that *both* Resolute and Weyerhaeuser were entitled to indemnification under the 1985 Indemnity for their costs of complying with the Director's Order. He therefore granted summary judgment in favour of Resolute and Weyerhaeuser (2016 ONSC 4652, 60 B.L.R. (5th) 237).

[24] Ontario appealed. The majority at the Court of Appeal for Ontario agreed with the motion judge with respect to the scope of the 1985 Indemnity, namely that it applied to the Director's Order. The majority concluded, however, that Resolute was not entitled to indemnification and remitted the issue of Weyerhaeuser's entitlement to indemnification to the Superior Court.

[25] Justice Laskin, dissenting, would have allowed Ontario's appeal. In his view, the motion judge made reversible errors in his interpretation of the 1985 Indemnity. Properly construed, the 1985 Indemnity was intended to cover *only* pollution claims brought by third parties. First party regulatory claims, such as the Director's Order, did not fall within the scope of the 1985 Indemnity.

[21] Weyerhaeuser a déposé un avis d'appel auprès du Tribunal de l'environnement afin de demander la révocation ou la modification de l'arrêté du directeur.

[22] En mai 2013, Weyerhaeuser a intenté une action devant la Cour supérieure et sollicité un jugement déclaratoire portant que, selon les modalités de l'Indemnité de 1985, l'Ontario était tenu de l'indemniser pour les frais engagés pour se conformer à l'arrêté du directeur. Résolu a demandé l'autorisation d'intervenir. L'Ontario a fait valoir qu'elle n'était pas responsable des frais engagés pour se conformer à l'arrêté du directeur. Les trois parties ont présenté une motion en jugement sommaire.

[23] Le juge des motions a conclu que l'Indemnité de 1985 s'appliquait clairement aux réclamations ou procédures prévues par la loi présentées par un agent de la province, et que Résolu et Weyerhaeuser avaient *toutes deux* droit à une indemnisation au titre de l'Indemnité de 1985 pour les frais engagés pour se conformer à l'arrêté du directeur. Il a donc rendu un jugement sommaire en faveur de Résolu et de Weyerhaeuser (2016 ONSC 4652, 60 B.L.R. (5th) 237).

[24] L'Ontario a interjeté appel. Les juges majoritaires de la Cour d'appel de l'Ontario ont souscrit à l'opinion du juge des motions en ce qui a trait au champ d'application de l'Indemnité de 1985, à savoir qu'elle visait l'arrêté du directeur. Ils ont toutefois conclu que Résolu n'avait pas droit à une indemnisation et ils ont renvoyé à la Cour supérieure la question du droit de Weyerhaeuser à une indemnité.

[25] Le juge Laskin, dissident, aurait fait droit à l'appel interjeté par l'Ontario. À son avis, le juge des motions a commis des erreurs justifiant infirmation dans son interprétation de l'Indemnité de 1985. Interprétée comme il se doit, celle-ci devait s'appliquer *seulement* aux réclamations pour pollution présentées par des tiers. Les réclamations réglementaires de première partie, tel l'arrêté du directeur, n'entraient pas dans le champ d'application de l'Indemnité de 1985.

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Analysis

[26] The overriding issue in this case is the scope of the 1985 Indemnity. We would, with respect, allow Ontario's appeal substantially for the reasons of Laskin J.A. We conclude, as he did, that the motion judge made palpable and overriding errors of fact and failed to give sufficient regard to the factual matrix when interpreting the scope of the 1985 Indemnity justifying appellate intervention. We find it difficult to improve on his reasons, and would add only the following brief comments.

[27] Both Laskin J.A. and the majority at the Court of Appeal agreed that the motion judge erred when he found that the waste disposal site continues to discharge mercury into the environment. In the words of Laskin J.A.:

> The motion judge's mistaken finding that discharges of mercury from the [waste disposal site] were an ongoing source of "serious environmental liability" undoubtedly drove his conclusion that these discharges could give rise to "pollution claims", and that unless the 1985 Indemnity covered first party claims, the respondents would be exposed to significant financial liability. His conclusion is wrong.
>
> The motion judge misconstrued the purpose and effect of the [waste disposal site]. The [waste disposal site] was not a source of ongoing mercury contamination or environmental liability. Its creation would not give rise to a pollution claim. Quite the opposite. The [waste disposal site] was created and used as a solution to the mercury pollution problem, effectively as a burial site for mercury-contaminated waste. Again, there was no evidence of mercury-contaminated waste being discharged from the [waste disposal site]. Neither respondent submitted otherwise. [paras. 233-34]

[28] We agree that this erroneous factual finding was key to the motion judge's conclusion that the

Analyse

[26] La question primordiale en l'espèce concerne le champ d'application de l'Indemnité de 1985. En toute déférence, nous sommes d'avis d'accueillir le pourvoi formé par l'Ontario, essentiellement pour les motifs énoncés par le juge Laskin. Nous concluons, comme il l'a fait, que le juge des motions a commis des erreurs de fait manifestes et déterminantes et n'a pas tenu suffisamment compte du fondement factuel dans son interprétation du champ d'application de l'Indemnité de 1985, ce qui justifie une intervention en appel. Il nous paraît difficile d'améliorer ses motifs; aussi nous contenterons-nous de formuler les brèves remarques qui suivent.

[27] Le juge Laskin et les juges majoritaires de la Cour d'appel ont convenu que le juge des motions s'était trompé en concluant que le lieu d'élimination des déchets continuait de rejeter du mercure dans l'environnement. Pour reprendre les propos du juge Laskin :

> [TRADUCTION] La conclusion erronée du juge des motions suivant laquelle les rejets de mercure depuis le [lieu d'élimination des déchets] constituaient une source constante de « lourde responsabilité environnementale » l'a sans nul doute amené à conclure que les rejets en question pourraient donner lieu à des « réclamations pour pollution », et qu'à moins que l'Indemnité de 1985 ne s'applique aux réclamations de première partie, les intimées seraient exposées à une responsabilité financière considérable. Sa conclusion est erronée.
>
> Le juge des motions a mal interprété l'objet et l'effet du [lieu d'élimination des déchets]. Celui-ci n'était pas une source constante de contamination par le mercure ou de responsabilité environnementale. Sa création n'était pas susceptible de donner lieu à une réclamation pour pollution. Bien au contraire. Le [lieu d'élimination des déchets] a été créé et utilisé en tant que solution au problème de pollution au mercure, c'est-à-dire, dans les faits, en tant que site d'enfouissement pour les déchets contaminés par le mercure. Encore une fois, rien ne prouvait que des déchets contaminés par le mercure étaient rejetés du [lieu d'élimination des déchets]. Aucune des intimées n'a fait valoir le contraire. [par. 233-234]

[28] Nous convenons que cette conclusion de fait erronée a joué un rôle déterminant dans la conclusion

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Director's Order, which imposed maintenance and monitoring obligations, was a "Pollution Claim" within the meaning of the 1985 Indemnity.

du juge des motions selon laquelle l'arrêté du directeur, qui imposait des obligations en matière d'entretien et de surveillance, constituait une [TRADUCTION] « réclamation pour pollution » au sens de l'Indemnité de 1985.

[29] Yet, as Laskin J.A. noted, the 1985 Indemnity was a schedule to the broader Memorandum of Agreement settling the Grassy Narrows Litigation. The scope of the 1985 Indemnity was limited to the issues defined in that agreement, namely, "[t]he discharge by Reed and its predecessors of mercury and any other pollutants into the English and Wabigoon and related river systems, and the continu[ed] presence of any such pollutants discharged by Reed and its predecessors . . . in the related ecosystems" (A.R., vol. IV, at p. 140). The motion judge failed to consider this context when interpreting the scope of the 1985 Indemnity. We agree with Laskin J.A. that, properly interpreted, the 1985 Indemnity was intended to cover only proceedings arising from the discharge or continued presence of mercury *in the related ecosystems*, not those related to the mere presence of mercury contained in the waste disposal site.

[29] Pourtant, comme l'a souligné le juge Laskin, l'Indemnité de 1985 constituait une annexe au protocole d'entente plus large réglant le litige de Grassy Narrows. Le champ d'application de l'Indemnité de 1985 se limitait aux points en litige définis dans cette entente, à savoir : [TRADUCTION] « [l]e rejet par Reed et ses prédécesseurs de mercure et de tout autre polluant dans le réseau hydrographique English-Wabigoon, ainsi que la présence continue de ces polluants [. . .] dans les écosystèmes connexes » (d.a., vol. IV, p. 140). Le juge des motions n'a pas tenu compte de ce contexte lorsqu'il a interprété le champ d'application de l'Indemnité de 1985. Nous sommes d'accord avec le juge Laskin pour dire qu'interprétée comme il se doit, l'Indemnité de 1985 était censée s'appliquer seulement aux procédures découlant du rejet ou de la présence continue de mercure *dans les écosystèmes connexes*, et non à celles liées à la simple présence de mercure dans le lieu d'élimination des déchets.

[30] We also agree with Laskin J.A. that the 1985 Indemnity must be read in the context of the 1979 and 1982 Indemnities. Indeed, the 1985 Indemnity was given in partial consideration for Great Lakes and Reed releasing Ontario from its obligations under those prior indemnities. It is clear that the 1979 and 1982 Indemnities were in response to the ongoing Grassy Narrows Litigation, which involved claims brought by *third parties*, not by Ontario directly. As Laskin J.A. observed, there is no language in those indemnities that would imply Ontario intended to provide protection against the costs of regulatory compliance.

[30] Nous souscrivons également à l'opinion du juge Laskin selon laquelle l'Indemnité de 1985 doit être interprétée à la lumière des Indemnités de 1979 et de 1982. En fait, l'Indemnité de 1985 a été accordée en contrepartie partielle du fait que Great Lakes et Reed avaient déchargé l'Ontario de ses obligations en vertu de ces précédentes indemnités. Il est clair que les Indemnités de 1979 et de 1982 ont été consenties en réponse au litige de Grassy Narrows qui était en instance, et qui concernait des réclamations présentées par des *tiers*, et non par l'Ontario directement. Comme l'a fait observer le juge Laskin, rien dans le libellé de ces indemnités ne tend à indiquer que l'Ontario avait l'intention d'offrir une protection à l'égard des frais engagés pour se conformer à la réglementation.

[31] Although the motion judge concluded that the addition of the phrase "statutory or otherwise" in the 1985 Indemnity expanded the scope of protection beyond that provided previously, we agree

[31] Bien que le juge des motions ait conclu que l'ajout des mots [TRADUCTION] « prévue par la loi ou autrement » dans l'Indemnité de 1985 élargissait l'étendue de la protection au-delà de ce qui était

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with Laskin J.A. that the motion judge's view of the importance of that phrase and *why* the parties entered into the 1985 Indemnity was materially affected by a palpable and overriding factual error. The motion judge found that the 1985 Indemnity was provided in consideration for commitments from Great Lakes to make significant financial investments in the Dryden plant. Given what he found to be the rationale for entering into the 1985 Indemnity, the motion judge concluded that it would be commercially absurd if Ontario could still impose remediation costs. However, Great Lakes' financial commitments were actually provided as part of the prior 1979 Indemnity. Later, Great Lakes gave no new commitments to modernize in consideration for the 1985 Indemnity. The motion judge thus premised his interpretation of the 1985 Indemnity on an incorrect factual basis — one that, as Laskin J.A. noted, led him to place too much emphasis on a change in language and misconstrue the bargain actually struck in the 1985 Indemnity.

prévu auparavant, nous sommes d'accord avec le juge Laskin pour dire que l'opinion que s'est formée le juge des motions sur l'importance de ces mots ainsi que sur les *raisons* pour lesquelles les parties ont conclu l'Indemnité de 1985 a été entachée de manière importante par une erreur de fait manifeste et déterminante. Le juge des motions a estimé que l'Indemnité de 1985 avait été accordée en contrepartie des engagements pris par Great Lakes de procéder à des investissements financiers considérables dans l'usine de Dryden. Étant donné ce qui, à son avis, constituait la raison d'être de l'Indemnité de 1985, le juge des motions a conclu qu'il serait absurde sur le plan commercial que l'Ontario puisse toujours imposer des frais de remédiation. Cependant, les engagements financiers de Great Lakes étaient en réalité prévus dans la précédente Indemnité de 1979. Par la suite, Great Lakes n'a pris aucun nouvel engagement de modernisation en contrepartie de l'Indemnité de 1985. Le juge des motions a donc fait reposer son interprétation de cette indemnité sur un fondement factuel erroné, lequel, comme l'a souligné le juge Laskin, l'a amené à accorder trop d'importance à la modification au libellé et à mal interpréter la transaction réellement intervenue dans l'Indemnité de 1985.

[32] Moreover, as Laskin J.A. found, the motion judge erred by failing to consider the 1985 Indemnity as a whole when determining whether or not the Director's Order fell within its scope. Paragraphs 2 and 3 of the 1985 Indemnity are critical in this regard. Paragraph 2 provides that, in "any Pollution Claim . . . Ontario shall have the right to elect to either take carriage of the defence or to participate in the defence and/or settlement of the Pollution Claim and any proceeding relating thereto as Ontario deems appropriate" (A.R., vol. IV, at p. 190). Paragraph 3 of the 1985 Indemnity also requires the parties to cooperate with Ontario in the defence of a claim. We agree with Laskin J.A. that these clauses would be "utterly meaningless for first party claims".

[32] De plus, comme l'a conclu le juge Laskin, le juge des motions a eu tort de ne pas considérer l'Indemnité de 1985 globalement au moment de déterminer si l'arrêté du directeur entrait ou non dans son champ d'application. Les paragraphes 2 et 3 de l'Indemnité de 1985 revêtent une importance cruciale à cet égard. Le paragraphe 2 dispose que, dans [TRADUCTION] « toute réclamation pour pollution [. . .], l'Ontario a le droit de choisir d'assumer la défense ou de participer à la défense et/ou au règlement de la réclamation pour pollution et de toute procédure y afférente, selon ce qu'il estime approprié » (d.a., vol. IV, p. 190). Le paragraphe 3 de l'Indemnité de 1985 exige également des parties qu'elles collaborent avec l'Ontario à la défense d'une réclamation. Nous sommes d'accord avec le juge Laskin pour dire que ces clauses seraient [TRADUCTION] « dénuées de tout sens en ce qui a trait aux réclamations de première partie ».

[33] Indeed, the inclusion of paras. 2 and 3 in the 1985 Indemnity is completely inconsistent with the

[33] De fait, l'inclusion des par. 2 et 3 à l'Indemnité de 1985 est tout à fait incompatible avec l'idée

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notion that para. 1 contemplates first party claims. Nothing in the 1985 Indemnity suggests that pollution claims included both first and third party claims, but that the requirements of paras. 2 and 3 would apply only to the *subset* of pollution claims brought by third parties. To the contrary, para. 2 applies in "*any* Pollution Claim" (emphasis added). The fact that the requirements of paras. 2 and 3 would be "utterly meaningless" in first party claims implies that pollution claims encompass *only* those brought by third parties. It follows that we agree with Laskin J.A. that the motion judge erred by failing to read the 1985 Indemnity as a whole. Properly interpreted, the 1985 Indemnity only applies to third party claims.

[34] In sum, we agree with Laskin J.A.'s conclusion that the 1985 Indemnity does not cover the Director's Order and we would allow Ontario's appeal on that basis. As a result, we find it unnecessary to address the remaining arguments raised in these appeals.

Conclusion

[35] We would allow Ontario's appeal and grant summary judgment in its favour, with costs throughout. Resolute and Weyerhaeuser's appeals are dismissed.

The reasons of Côté, Brown and Rowe JJ. were delivered by

CÔTÉ AND BROWN JJ. (dissenting in part) —

I. Overview

[36] During the 1960s, the owner of a pulp mill in Dryden, Ontario (the corporate predecessor of Reed Ltd.), stemmed the discharge of untreated mercury waste into a nearby river system by burying the waste at an adjacent disposal site. In 1979, Reed — by then the owner — sold the entire property (including the

selon laquelle le par. 1 vise les réclamations de première partie. Rien dans l'Indemnité de 1985 ne tend à indiquer que les réclamations pour pollution comprenaient aussi bien les réclamations de première partie que celles de tiers, mais que les exigences des par. 2 et 3 s'appliqueraient seulement au *sous-ensemble* des réclamations pour pollution présentées par des tiers. Au contraire, le par. 2 s'applique à « *toute* réclamation pour pollution » (italiques ajoutés). Le fait que les exigences des par. 2 et 3 soient [TRADUCTION] « dénuées de tout sens » en ce qui a trait aux réclamations de première partie signifie que les réclamations pour pollution englobent *seulement* celles présentées par des tiers. Nous sommes donc d'accord avec le juge Laskin pour dire que le juge des motions a commis une erreur en n'interprétant pas globalement l'Indemnité de 1985. Interprétée comme il se doit, cette indemnité s'applique seulement aux réclamations de tiers.

[34] En somme, nous souscrivons à la conclusion du juge Laskin selon laquelle l'Indemnité de 1985 ne s'applique pas à l'arrêté du directeur et nous sommes d'avis d'accueillir le pourvoi de l'Ontario pour ce motif. Nous n'estimons donc pas nécessaire de traiter des autres arguments soulevés dans les présents pourvois.

Conclusion

[35] Nous sommes d'avis d'accueillir le pourvoi de l'Ontario et de rendre un jugement sommaire en sa faveur, avec dépens dans toutes les cours. Les pourvois de Résolu et de Weyerhaeuser sont rejetés.

Version française des motifs des juges Côté, Brown et Rowe rendus par

LES JUGES CÔTÉ ET BROWN (dissidents en partie) —

I. Aperçu

[36] Au cours des années 1960, le propriétaire d'une usine de pâtes et papiers située à Dryden, en Ontario (la société ayant précédé Reed Ltd.), a mis fin au rejet de déchets mercuriels non traités dans un réseau hydrographique voisin en enterrant ces déchets dans un lieu d'élimination adjacent. En 1979,

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waste disposal site) and the pulp and paper operation to Great Lakes Forest Products Limited. As part of a settlement of claims related to the earlier mercury waste discharge, the Province of Ontario granted an environmental liability indemnity to both Reed and Great Lakes (the "Ontario Indemnity"). This indemnity was to inure to the benefit of those corporations' successors and assigns.

Reed — alors propriétaire — a vendu l'ensemble de la propriété (y compris le lieu d'élimination des déchets) ainsi que l'exploitation de pâtes et papiers à Great Lakes Forest Products Limited. Dans le cadre d'un règlement des réclamations liées au rejet des déchets mercuriels, la province d'Ontario a accordé à Reed et à Great Lakes une indemnité au titre de la responsabilité environnementale (l'« Indemnité de l'Ontario »). Cette indemnité devait bénéficier aux successeurs et ayants droit de ces sociétés.

[37] Our reasons address three appeals. At issue in the appeal brought by the Province is whether the scope of the Ontario Indemnity covers the costs of compliance with first party regulatory orders, including those made under legislation enacted after the execution of the agreement. The appeals brought by Weyerhaeuser Company Limited and Resolute FP Canada Inc. go to whether either or both of those corporations can benefit from the Ontario Indemnity as successors and assigns of Great Lakes.

[37] Les présents motifs visent trois pourvois. Dans le pourvoi interjeté par la province, nous sommes appelés à déterminer si l'Indemnité de l'Ontario couvre les frais engagés pour se conformer aux ordonnances réglementaires de première partie, y compris celles prises en vertu d'une loi adoptée après la signature de l'entente. Les pourvois interjetés par la Compagnie Weyerhaeuser Limitée et Produits forestiers Résolu se rapportent à la question de savoir si l'une ou l'autre des sociétés, ou les deux, peuvent bénéficier de l'Indemnité de l'Ontario à titre de successeurs et ayants droit de Great Lakes.

[38] These appeals also present an opportunity for this Court to apply the principles of contractual interpretation articulated in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, and *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, to a series of complex commercial arrangements. The Province's appeal also invites us to consider the doctrine of fettering as it applies to the legislature's law-making powers.

[38] Les présents pourvois offrent aussi à notre Cour l'occasion d'appliquer les principes d'interprétation contractuelle énoncés dans les arrêts *Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633, et *Ledcor Construction Ltd. c. Société d'assurance d'indemnisation Northbridge*, 2016 CSC 37, [2016] 2 R.C.S. 23, à un ensemble d'ententes commerciales complexes. Dans le pourvoi interjeté par la province, nous sommes aussi invités à nous pencher sur l'application de la doctrine de l'entrave aux pouvoirs de légiférer de la législature.

[39] For the reasons that follow, we would dismiss the appeals brought by the Province and Weyerhaeuser, and allow the appeal brought by Resolute.

[39] Pour les motifs qui suivent, nous sommes d'avis de rejeter les pourvois interjetés par la province et Weyerhaeuser, et d'accueillir celui de Résolu.

II. Factual Background

II. Contexte factuel

A. *Mercury Contamination of the English and Wabigoon Rivers in the 1960s and 1970s*

A. *La contamination par le mercure des rivières English et Wabigoon dans les années 1960 et 1970*

[40] During the 1960s and 1970s, Dryden Chemicals Limited and Dryden Paper Company Limited operated

[40] Au cours des années 1960 et 1970, Dryden Chemicals Limited et Dryden Paper Company Limited

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a mercury cathode chlor-alkali plant and a pulp and paper mill, respectively, on property located in Dryden (the "Dryden Property"). Together, their operations produced various pollutants, including untreated mercury waste, which they released into the nearby English and Wabigoon rivers, harming the health and industry of those nearby, including members of the Grassy Narrows and Islington First Nations. To dispose of these environmental contaminants, Dryden Paper constructed a waste disposal site on the Dryden Property in 1971. Since 1977, the waste disposal site has been subject to compliance requirements imposed by the Province.

[41] In 1976, Dryden Paper and Dryden Chemicals amalgamated to form Reed.

[42] In 1977, the Grassy Narrows and Islington First Nations sued Reed, Dryden Paper and Dryden Chemicals for damage they say was caused by the contamination of the rivers (the "Grassy Narrows Litigation").

B. *The Sale of the Dryden Property to Great Lakes in 1979*

[43] In 1979, Reed entered into negotiations to sell the operations at the Dryden Property to Great Lakes. Great Lakes was reluctant to proceed with the purchase, however, due to potential liabilities relating to the mercury contamination, including the Grassy Narrows Litigation. At the same time, the Province was anxious to see a successful sale, to ensure the continuing viability of Dryden's local economy. It therefore agreed to indemnify both Reed and Great Lakes for any environmental damages caused by Reed in excess of $15 million (the "1979 Indemnity"). In exchange, Great Lakes and Reed agreed to spend around $200 million to modernize and expand the pulp mill. The terms of this agreement were set out in a letter dated November 6, 1979, from the Treasurer of Ontario to the President of Great Lakes. The relevant portion of this letter reads as follows:

The continued viability of the Dryden facilities and the undertaking of major modernization expenditures with

ont exploité, respectivement, une usine de chlore et de soude caustique utilisant le procédé à cathode de mercure et une usine de pâtes et papiers sur une propriété située à Dryden (la « propriété de Dryden »). Ensemble, elles ont produit divers polluants, dont des déchets mercuriels non traités, qu'elles ont rejeté dans les rivières English et Wabigoon situées à proximité, nuisant à la santé et aux entreprises de la population environnante, y compris des membres des Premières Nations de Grassy Narrows et d'Islington. Pour éliminer ces contaminants environnementaux, Dryden Paper a, en 1971, construit un lieu d'élimination des déchets sur la propriété de Dryden. Depuis 1977, ce site est assujetti à des exigences provinciales en matière de conformité.

[41] En 1976, Dryden Paper et Dryden Chemicals ont fusionné pour former Reed.

[42] En 1977, les Premières Nations de Grassy Narrows et d'Islington ont poursuivi Reed, Dryden Paper et Dryden Chemicals pour le préjudice que leur avait causé, selon elles, la contamination des rivières (le « litige de Grassy Narrows »).

B. *La vente de la propriété de Dryden à Great Lakes en 1979*

[43] En 1979, Reed a entamé des négociations en vue de vendre à Great Lakes ses opérations sur la propriété de Dryden. Great Lakes était toutefois réticente à procéder à cet achat en raison des responsabilités susceptibles de découler de la contamination par le mercure, dont celles en cause dans le litige de Grassy Narrows. Par ailleurs, la province tenait à ce que la vente se conclue afin d'assurer la viabilité économique locale de Dryden. La province a donc convenu d'indemniser Reed et Great Lakes pour tout dommage environnemental causé par Reed excédant 15 millions de dollars (l'« Indemnité de 1979 »). En retour, Great Lakes et Reed ont accepté de dépenser environ 200 millions de dollars pour la modernisation et l'agrandissement de l'usine de pâtes et papiers. Les modalités de cette entente ont été énoncées dans une lettre datée du 6 novembre 1979 du trésorier de l'Ontario au président de Great Lakes. Voici le passage pertinent de la lettre en question :

[TRADUCTION] La viabilité des installations de Dryden et l'engagement de dépenses majeures pour leur

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respect to them are of considerable importance to the people of this Province. The substantial and beneficial employment and economic effects that the operation of a modernized facility will have on the population and economy of Dryden is of real significance.

In the event that Great Lakes negotiations with the Reed group of companies are successful then in the event that Great Lakes is required to pay any monies as a result of any final decision of a court against Great Lakes, Reed Ltd. or any other person prior to the year 2010 in respect of pollution caused by Reed Ltd. or any of its predecessor companies in the Dryden area prior to the date upon which Great Lakes acquires the assets and undertaking of the Dryden complex of Reed Ltd. or in the event that any settlement with any claimant is made the amount of which settlement has been approved by the Attorney General of Ontario, I have been authorized by the Executive Council of Ontario to advise you that I will make a Recommendation to the Executive Council of Ontario that the Government of Ontario take effective steps to ensure that Great Lakes Forest Products Limited will not be required to pay any monies in excess of the maximum amount of $15 million referred to in paragraph 2 of this letter, provided that over the next three to four years Great Lakes expends in the order of $200 million for the modernization and expansion of the Dryden facilities.

(A.R., vol. IV, at pp. 135-36)

[44] Great Lakes purchased the pulp mill in December 1979 by way of an asset purchase agreement (the "1979 Dryden Agreement"). That agreement addressed, among other things, environmental responsibilities respecting the Dryden Property. In particular, clause 5.3 of the 1979 Dryden Agreement created a regime for the sharing of costs arising from pollution claims, pursuant to which Reed and Great Lakes were to share the costs of environmental liabilities up to $15 million, leaving Great Lakes exclusively responsible for anything exceeding that amount. Clause 11.4 carves out of this regime the costs of compliance with a control order that the Province had issued in 1979 (the "Control Order"), making Great Lakes solely responsible for those costs.

modernisation revêtent une importance considérable pour les gens de cette province. Les effets bénéfiques marqués qu'aura l'exploitation d'une installation modernisée sur l'emploi et l'économie de Dryden sont d'une grande importance.

Si les négociations entre Great Lakes et le groupe d'entreprises Reed aboutissent, et que Great Lakes est tenue de verser une quelconque somme d'argent par suite d'une décision judiciaire définitive rendue avant 2010 contre Great Lakes, Reed Ltd. ou toute autre personne relativement à la pollution causée par Reed Ltd. ou l'une des sociétés qui l'ont précédée dans la région de Dryden avant la date d'acquisition par Great Lakes des actifs et de l'entreprise du complexe de Reed Ltd. situé à Dryden, ou qu'un règlement est conclu avec un demandeur, règlement dont le montant aura été approuvé par le procureur général de l'Ontario, j'ai été autorisé par le Conseil exécutif de l'Ontario à vous aviser que je recommanderai au Conseil exécutif de l'Ontario de faire en sorte que le gouvernement de l'Ontario prenne les mesures nécessaires pour que Great Lakes Forest Products Limited ne soit pas tenue de verser une somme qui dépasse le montant maximal de 15 millions de dollars dont il est question au paragraphe 2 de la présente lettre, pourvu que Great Lakes consacre une somme de l'ordre de 200 millions de dollars à la modernisation et à l'agrandissement des installations de Dryden au cours des trois ou quatre prochaines années.

(d.a., vol. IV, p. 135-136)

[44] Great Lakes a acheté l'usine de pâtes et papiers en décembre 1979 aux termes d'une convention d'achat d'actifs (la « convention de Dryden de 1979 »). Cette convention portait entre autres sur les responsabilités environnementales relatives à la propriété de Dryden. Plus particulièrement, la clause 5.3 de la convention créait un régime de partage des frais découlant des réclamations pour pollution, en vertu duquel Reed et Great Lakes devaient partager les frais liés aux responsabilités environnementales jusqu'à concurrence de 15 millions de dollars, laissant ainsi à Great Lakes l'entière responsabilité de tous les frais excédant ce montant. La clause 11.4 excluait de ce régime les frais engagés pour se conformer à un arrêté d'intervention pris par la province en 1979 (l'« arrêté d'intervention »), de sorte que Great Lakes en assumait seule la responsabilité.

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C. *The Settlement of the Grassy Narrows Litigation in 1985*

[45] The Governments of Canada and Ontario initiated a mediation process with the Islington and Grassy Narrows First Nations to address the problems regarding the mercury contamination and to settle the Grassy Narrows Litigation. Great Lakes was reluctant to participate in any such settlement without releases from liability in relation to the mercury pollution caused by Reed and its predecessors. To overcome this impasse, Ontario's Provincial Secretary for Resources Development, the Honourable R. H. Ramsay, wrote to Great Lakes on January 28, 1982 (the "1982 Ramsay Letter"), stating that the Province would indemnify Great Lakes against any claims related to mercury pollution:

> The purpose of this letter is to facilitate a settlement of the current negotiations . . . .
>
> The Government of Ontario recognizes the distinct advantage of the Indian people obtaining a settlement in the very near future. Accordingly, the Government is prepared to indemnify Great Lakes Forest Products Limited against any claims related to mercury pollution such that the Company's total payments to all claimants in respect of damages awarded by any court or for any settlement approved by the Attorney General of Ontario attributable to the operations of Reed Paper Ltd. or any of its predecessor companies in the Dryden area will be limited to $15 million. The Government of Ontario will assume responsibility for any damages awarded by any court or for any settlement approved by the Attorney General of Ontario, after $15 million has been paid by the Great Lakes Forest Products Limited, Reed Ltd., Reed International Ltd., Dryden Chemicals Ltd. and Dryden Paper Co. Ltd. in connection with the above mentioned mercury pollution claims. Such claims include personal injury, property damage and economic claims of any claimants, including adults, minors and those yet unborn, related to mercury pollution.

C. *Le règlement du litige de Grassy Narrows en 1985*

[45] Les gouvernements du Canada et de l'Ontario ont amorcé un processus de médiation avec les Premières Nations d'Islington et de Grassy Narrows dans le but de résoudre les problèmes liés à la contamination par le mercure et de régler le litige de Grassy Narrows. Great Lakes était réticente à l'idée de participer à un règlement de litige de ce genre sans avoir obtenu de décharges de responsabilité pour la pollution au mercure causée par Reed et ses prédécesseurs. Pour sortir de cette impasse, le secrétaire provincial du Développement des ressources de l'Ontario, l'honorable R. H. Ramsay, a écrit à Great Lakes le 28 janvier 1982 (la « lettre de 1982 de Ramsay ») pour l'informer que la province l'indemniserait pour toute réclamation relative à la pollution au mercure :

> [TRADUCTION] La présente lettre vise à faciliter le dénouement des négociations en cours . . .
>
> Le gouvernement de l'Ontario reconnaît que le fait de parvenir à un règlement dans un avenir très rapproché représente un net avantage pour les peuples autochtones. Par conséquent, le gouvernement est prêt à indemniser Great Lakes Forest Products Limited pour toute réclamation relative à la pollution au mercure de sorte que le total des sommes versées par l'entreprise à titre de dommages-intérêts octroyés par un tribunal ou versées par l'entreprise dans le cadre d'un règlement approuvé par le procureur général de l'Ontario pour des dommages imputables aux activités de Reed Paper Ltd. ou de l'une des sociétés l'ayant précédée dans la région de Dryden sera limité à 15 millions de dollars. Le gouvernement de l'Ontario assumera la responsabilité de toute somme accordée à titre de dommages-intérêts par un tribunal ou de tout règlement approuvé par le procureur général de l'Ontario une fois que les 15 millions de dollars auront été payés par Great Lakes Forest Products Limited, Reed Ltd., Reed International Ltd., Dryden Chemicals Ltd. et Dryden Paper Co. Ltd. en ce qui touche les réclamations relatives à la pollution au mercure dont il est question précédemment. Ces réclamations incluent les réclamations relatives à la pollution au mercure fondées sur des dommages corporels, des dommages matériels et des pertes économiques, peu importe le demandeur, qu'il s'agisse d'un adulte, d'un mineur ou d'un enfant à naître.

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It must be understood that any legal proceedings which could result in the Government of Ontario becoming liable to make payments pursuant to this undertaking must be brought to the attention of the Government of Ontario immediately upon such proceedings being launched, and the Government of Ontario shall have the right either to take carriage of or to participate in the defence and/or settlement of the litigation. Failure to give such notification or to allow the Government of Ontario to either take carriage of or to participate in the defence and/or settlement of the litigation will preclude the making of any payments by the Province with regard to the action in question.

(A.R., vol. III, at pp. 175-76)

[46] The Grassy Narrows Litigation was settled on terms formalized in a Memorandum of Agreement (the "Settlement Agreement") executed on November 22, 1985, by Canada, the Province, the Grassy Narrows and Islington First Nations, Reed, and Great Lakes. Its terms were approved by the Supreme Court of Ontario in 1986 (*Mandamin v. Reed Ltd.*, No. 14716/77, June 26, 1986), and were given effect by both Parliament and the Ontario Legislature (*Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act*, S.C. 1986, c. 23; *English and Wabigoon River Systems Mercury Contamination Settlement Agreement Act, 1986*, S.O. 1986, c. 23).

[47] The Settlement Agreement provides that "[t]he parties agree, without admission of liability by any party and subject to the terms of this Agreement, that the settlement is to settle all claims and causes of action, past, present and future, arising out of the issues" (A.R., vol. IV, at p. 141 (emphasis added)). The "issues" were defined in the recitals as follows:

The discharge by Reed and its predecessors of mercury and any other pollutants into the English and Wabigoon and related river systems, and the continuing presence of any such pollutants discharged by Reed and its predecessors, including the continuing but now diminishing presence of methylmercury in the related ecosystems since its initial identification in 1969, and governmental actions taken in consequence thereof, may have had and may continue to have effects and raise concerns in respect of the

Il est entendu que toute procédure judiciaire à l'issue de laquelle le gouvernement de l'Ontario pourrait être tenu de verser des sommes d'argent conformément à cet engagement doit être portée à l'attention dudit gouvernement dès qu'elle est introduite et celui-ci a le droit d'assumer la défense ou de participer à la défense et/ou au règlement du litige. Le fait de ne pas donner cet avis ou de ne pas permettre au gouvernement de l'Ontario d'assumer la défense ou de participer à la défense et/ou au règlement du litige fera obstacle au versement par la province de toute somme d'argent en ce qui concerne l'action en question.

(d.a., vol. III, p. 175-176)

[46] Le litige de Grassy Narrows fut réglé suivant des modalités officialisées dans un protocole d'entente (la « Convention de règlement ») signé le 22 novembre 1985 par le Canada, la province, les Premières Nations de Grassy Narrows et d'Islington, Reed et Great Lakes. Ces modalités furent approuvées par la Cour suprême de l'Ontario en 1986 (*Mandamin c. Reed Ltd.*, n° 14716/77, 26 juin 1986), et furent mises en œuvre par le Parlement et par la législature ontarienne (*Loi sur le règlement des revendications des bandes indiennes de Grassy Narrows et d'Islington (pollution par le mercure)*, L.C. 1986, c. 23; *Loi de 1986 sur la convention de règlement relative à la contamination par le mercure du réseau hydrographique English-Wabigoon*, L.O. 1986, c. 23).

[47] La Convention de règlement prévoit que [TRADUCTION] « [l]es parties conviennent, sans pour autant admettre leur responsabilité et sous réserve des modalités de la présente convention, que le règlement vise à régler toute réclamation et tout droit d'action, passés, présents et futurs, découlant des points en litige » (d.a., vol. IV, p. 141 (nous soulignons)). Les « points en litige » sont définis comme suit dans les attendus :

[TRADUCTION] Le rejet par Reed et ses prédécesseurs de mercure et de tout autre polluant dans le réseau hydrographique English-Wabigoon, ainsi que la présence continue de ces polluants, ce qui inclut la présence continue mais en voie de diminution de mercure méthylé dans les écosystèmes connexes depuis qu'on a constaté sa présence en 1969, et les mesures gouvernementales prises à cet égard, peuvent avoir eu des incidences et continuer d'en avoir et de soulever des préoccupations en ce qui concerne

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social and economic circumstances and the health of the present and future members of the Bands ("the issues").

(A.R., vol. IV, at p. 140)

[48] The Settlement Agreement also required the Province to indemnify Great Lakes and Reed "in respect of the issues" (para. 2.4(a)), which led to the Ontario Indemnity (A.R., vol. IV, at p. 6). That indemnity was incorporated into Schedule F of the Settlement Agreement. In return, Great Lakes and Reed released the Province from any obligations under the 1979 Indemnity and the 1982 Ramsay Letter (para. 2.4(b); A.R., vol. IV, at p. 6).

[49] Paragraph 1 of the Ontario Indemnity — the meaning of which lies at the heart of this appeal — reads, in part, as follows:

> Ontario hereby covenants and agrees to indemnify Great Lakes, Reed, International and any company which was at the Closing Date [December 17, 1979] a subsidiary or affiliate company (whether directly or indirectly) of International, harmless from and against any obligation, liability, damage, loss, costs or expenses incurred by any of them after the date hereof as a result of any claim, action or proceeding, whether statutory or otherwise, existing at December 17, 1979 or which may arise or be asserted thereafter (including those arising or asserted after the date of this agreement), whether by individuals, firms, companies, governments (including the Federal Government of Canada and any province or municipality thereof or any agency, body or authority created by statutory or other authority) or any group or groups of the foregoing, because of or relating to any damage, loss, event or circumstances, caused or alleged to be caused by or with respect to, either in whole or in part, the discharge or escape or presence of any pollutant by Reed or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or premises forming part of the Dryden assets sold by Reed Ltd. to Great Lakes under the [1979] Dryden Agreement (hereinafter referred to as "Pollution Claims").

(A.R., vol. IV, at pp. 189-90)

la conjoncture économique et sociale ainsi que la santé des membres actuels et futurs des bandes en question (« les points en litige »).

(d.a., vol. IV, p. 140)

[48] Aux termes de la Convention de règlement, la province devait aussi indemniser Great Lakes et Reed [TRADUCTION] « à l'égard des points en litige » (par. 2.4(a)), ce qui a mené à l'Indemnité de l'Ontario (d.a., vol. IV, p. 6). Cette indemnité a été incorporée à l'annexe F de la Convention de règlement. En retour, Great Lakes et Reed ont libéré la province de toutes les obligations découlant de l'Indemnité de 1979 et de la lettre de 1982 de Ramsay (par. 2.4(b); d.a., vol. IV, p. 6).

[49] Le paragraphe 1 de l'Indemnité de l'Ontario — dont le sens est au cœur du présent pourvoi — est, en partie, ainsi libellé :

> [TRADUCTION] L'Ontario s'engage et consent à tenir Great Lakes, Reed, International et toute société qui, à la date de clôture [soit le 17 décembre 1979], était (directement ou indirectement) une filiale ou une société affiliée d'International, à couvert de l'ensemble des obligations, responsabilités, dommages, pertes, frais ou dépenses qu'est susceptible d'entraîner pour l'une ou l'autre d'entre elles, après la date des présentes, toute réclamation, action ou procédure, qu'elle soit prévue par loi ou autrement, qui existait au 17 décembre 1979 ou qui était susceptible de prendre naissance ou d'être présentée par la suite (y compris celles ayant pris naissance ou ayant été présentées après la date des présentes), par des particuliers, des firmes, des sociétés, des gouvernements (y compris le gouvernement fédéral du Canada et toute province ou municipalité du Canada, ou tout organisme ou autorité créé en vertu d'un pouvoir légal, ou d'un autre pouvoir) ou un ou plusieurs groupes de ceux-ci, du fait ou à l'égard des dommages, pertes, événements ou circonstances dus ou présumés dus ou en ce qui a trait, en tout ou en partie, au rejet ou à la fuite de polluants, notamment le mercure ou toute autre substance, par Reed ou ses prédécesseurs, à partir des usines, des terrains ou des lieux faisant partie des actifs de Dryden que Reed Ltd. a vendus à Great Lakes en vertu de la convention de Dryden [de 1979], ou encore à la présence de tels polluants dans ces usines, terrains ou lieux (ci-après appelées les « réclamations pour pollution »).

(d.a., vol. IV, p. 189-190)

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[50] Paragraph 2 of the Ontario Indemnity requires the party seeking indemnification to promptly notify the Province of the receipt of any notice of "Pollution Claims" (defined in para. 1), and gives the Province the right either to take carriage of the defence, or to participate in the pollution claim's defence and settlement; para. 3 requires Great Lakes to cooperate with the Province in the investigation, defence and settlement of a pollution claim; para. 4 states that the indemnity shall be valid without limitation as to time; and para. 6 provides that the indemnity enures to the benefit of the parties' respective successors and assigns. That provision reads as follows:

> The indemnity shall be binding upon and enure to the benefit of the respective successors and assigns of Ontario, Reed, International and Great Lakes, provided however that Ontario shall not be entitled to assign this indemnity without the prior written consent of the other parties hereto.

(A.R., vol. IV, at pp. 191-92)

[51] Great Lakes provided an indemnity to Reed in respect of environmental liabilities contemporaneously, as part of the Settlement Agreement. The parties contemplated that these two indemnities (this indemnity and the Ontario Indemnity) would operate in tandem; to the extent that Reed claimed on its indemnity against Great Lakes, Great Lakes would be indemnified under the Ontario Indemnity. This linkage was expressly recognized in the closing words of para. 1 of the Ontario Indemnity:

> It is hereby expressly acknowledged and agreed that in respect of Ontario's covenant and agreement hereunder to indemnify Great Lakes that the term "Pollution Claims" shall include any obligation, liability, damage, loss, costs or expenses incurred by Great Lakes as a result of any claim, action or proceeding resulting from or in connection with the indemnity agreement of even date herewith made between Great Lakes, Reed and International.

(A.R., vol. IV, at p. 190)

[50] Le paragraphe 2 de l'Indemnité de l'Ontario oblige la partie qui demande une indemnisation à aviser rapidement la province de la réception d'un avis de « réclamations pour pollution » (définies au par. 1), et donne à la province le droit d'assumer la défense, ou encore de participer à la défense et au règlement de la réclamation pour pollution. Aux termes du par. 3, Great Lakes doit collaborer avec la province à l'enquête, à la défense et au règlement d'une réclamation pour pollution. Le paragraphe 4 précise que l'indemnité n'est assujettie à aucune limite de temps, et le par. 6 prévoit que l'indemnité bénéficie aux successeurs et ayants droit respectifs des parties. Cette disposition est ainsi libellée :

> [TRADUCTION] L'indemnité lie les successeurs et ayants droit respectifs de l'Ontario, de Reed, d'International et de Great Lakes et bénéficie à ceux-ci, à condition toutefois que l'Ontario ne soit pas autorisé à céder l'indemnité sans le consentement préalable écrit des autres parties.

(d.a., vol. IV, p. 191-192)

[51] En même temps, dans le cadre de la Convention de règlement, Great Lakes accordait une indemnité à Reed pour ses responsabilités environnementales. Les parties envisageaient que ces deux indemnités (cette indemnité et celle de l'Ontario) s'appliqueraient de concert; si Reed demandait à Great Lakes de l'indemniser, Great Lakes serait indemnisée en vertu de l'Indemnité de l'Ontario. Ce lien a été expressément reconnu à la toute fin du par. 1 de l'Indemnité de l'Ontario :

> [TRADUCTION] Il est expressément reconnu et convenu par les présentes qu'en ce qui concerne l'engagement et le consentement de l'Ontario à indemniser Great Lakes, l'expression « réclamations pour pollution » comprend l'ensemble des obligations, responsabilités, dommages, pertes, frais ou dépenses qu'est susceptible d'entraîner pour Great Lakes toute réclamation, action ou procédure qui découle de l'entente d'indemnisation conclue à la même date que les présentes entre Great Lakes, Reed et International, ou qui y est liée.

(d.a., vol. IV, p. 190)

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[52] After the parties executed the Settlement Agreement but before they signed the Ontario Indemnity, the *Environmental Protection Act*, R.S.O. 1980, c. 141, was amended to confer a statutory right of action on the Province and third parties against certain polluters. The amendments arose out of *An Act to amend The Environmental Protection Act, 1971*, S.O. 1979, c. 91, also known as the "Spills Bill". Although the Spills Bill never came into force, elements of it were incorporated into the 1980 *Environmental Protection Act*. The relevant provisions came into force in November 1985. For convenience, those amendments will be referred to as the "Spills Bill".

D. *The Changes in Corporate Status Between 1985 and 1998*

[53] Reed subsequently amalgamated with other corporations, and its successor corporation was dissolved in 1993. For its part, Great Lakes became Bowater Pulp and Paper Canada Inc. in July 1998.

E. *Weyerhaeuser's Purchase of the Dryden Property in 1998*

[54] On September 30, 1998, Weyerhaeuser bought the Dryden Property from Bowater, along with certain assets used in the pulp and paper operation. This sale was recorded in the "1998 Asset Purchase Agreement". Because of possible environmental liabilities associated with the waste disposal site, Weyerhaeuser initially sought to exclude the parcel of land on which it was constructed from the transaction, and Bowater agreed to this. This parcel could not be severed from the property before the closing date, however, and the deal was therefore restructured such that Bowater conveyed title to the entire Dryden Property — including the waste disposal site — to Weyerhaeuser. Weyerhaeuser then immediately leased the waste disposal site back to Bowater. Once title to the waste disposal site was severed from the rest of the Dryden Property, it was to be transferred back to Bowater.

[52] Après que les parties eurent signé la Convention de règlement, mais avant qu'elles signent l'Indemnité de l'Ontario, la *Loi sur la protection de l'environnement*, L.R.O. 1980, c. 141, a été modifée afin de conférer à la province et aux tiers un droit d'action contre certains pollueurs. Les modifications découlaient d'une loi intitulée *An Act to amend The Environmental Protection Act, 1971*, S.O. 1979, c. 91, et étaient également connues sous le nom de « loi sur les déversements ». Bien que la loi sur les déversements ne soit jamais entrée en vigueur, certains de ses éléments ont été incorporés dans la *Loi sur la protection de l'environnement* de 1980. Les dispositions pertinentes sont entrées en vigueur en novembre 1985. Par souci de commodité, ces modifications seront appelées « loi sur les déversements » dans les présents motifs.

D. *Les modifications apportées au statut de la société entre 1985 et 1998*

[53] Reed a subséquemment fusionné avec d'autres sociétés et la société qui lui a succédé a été dissoute en 1993. Pour sa part, Great Lakes est devenue Bowater Pâtes et papiers Canada Inc. en juillet 1998.

E. *L'achat par Weyerhaeuser de la propriété de Dryden en 1998*

[54] Le 30 septembre 1998, Weyerhaeuser a acheté de Bowater la propriété de Dryden ainsi que certains actifs utilisés dans l'exploitation de pâtes et papiers. Cette vente a été constatée dans la « convention d'achat d'actifs de 1998 ». En raison des responsabilités environnementales pouvant être associées au lieu d'élimination des déchets, Weyerhaeuser a voulu au départ exclure de l'opération la parcelle de terrain sur laquelle se trouvait le lieu en question, ce à quoi Bowater a consenti. Cette parcelle ne pouvait cependant pas être séparée de la propriété avant la date de clôture; l'accord a donc été restructuré de telle sorte que Bowater a transféré le titre de l'ensemble de la propriété de Dryden — y compris le lieu d'élimination des déchets — à Weyerhaeuser, et cette dernière a ensuite immédiatement loué ce site à Bowater. Une fois le titre du lieu d'élimination des déchets séparé du reste de la propriété de Dryden, ce lieu devait être rétrocédé à Bowater.

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[55] The lease agreement between Bowater and Weyerhaeuser in respect of the waste disposal site (the "Lease Agreement") required Bowater to indemnify Weyerhaeuser for, among other things, "the presence or release of mercury and any other contaminant, substance or waste on or in the Lands" (A.R., vol. V, at p. 126). This indemnity was to survive the term of the lease.

[56] Bowater and Weyerhaeuser acknowledged that they had entered into the Lease Agreement "solely as an interim agreement pending severance approval under the *Planning Act*", at which time title to the waste disposal site was to be transferred back to Bowater (*ibid.*, at p. 123). Approval of the severance was obtained around two years later, and Weyerhaeuser re-conveyed the waste disposal site to Bowater on August 25, 2000.

[57] In 2007, Weyerhaeuser sold the Dryden pulp mill to Domtar Inc.

F. *Bowater's Corporate Restructuring*

[58] In April 2009, Bowater (which by then had become Bowater Canadian Forest Products Inc.) and a number of related companies filed for creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). At this point, Bowater still owned the waste disposal site. As part of the *CCAA* proceedings, Bowater was granted an order authorizing it to transfer the waste disposal site to 4513541 Canada Inc. in October 2010. Several months later, 4513541 Canada Inc.'s receiver obtained court approval to abandon the waste disposal site, with no associated liability.

[59] In 2012, Bowater became Resolute FP Canada Inc.

G. *The 2011 Director's Order*

[60] On August 25, 2011, the Province, through its Ministry of the Environment, issued a Director's

[55] Aux termes de la convention de bail conclue entre Bowater et Weyerhaeuser relativement au lieu d'élimination des déchets (la « Convention de bail »), Bowater devait entre autres indemniser Weyerhaeuser pour [TRADUCTION] « la présence ou le rejet de mercure et de tout autre contaminant, substance ou déchet sur ou dans les terres » (d.a., vol. V, p. 126). Cette clause d'indemnisation devait continuer de s'appliquer après la fin du bail.

[56] Bowater et Weyerhaeuser ont reconnu que la Convention de bail n'était [TRADUCTION] « qu'une entente provisoire en attendant que la séparation soit approuvée en vertu de la *Loi sur l'aménagement du territoire* », après quoi le titre du lieu d'élimination des déchets devait être rétrocédé à Bowater (*ibid.*, p. 123). La séparation a été approuvée environ deux ans plus tard et Weyerhaeuser a rétrocédé le lieu d'élimination des déchets à Bowater le 25 août 2000.

[57] En 2007, Weyerhaeuser a vendu l'usine de pâtes et papiers de Dryden à Domtar Inc.

F. *La restructuration de la société Bowater*

[58] En avril 2009, Bowater (qui était alors devenue Bowater Produits forestiers du Canada Inc.) et un certain nombre de sociétés affiliées déposaient une demande de protection contre les créanciers en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »). Bowater était alors toujours propriétaire du lieu d'élimination des déchets. Dans le cadre de la procédure fondée sur la *LACC*, Bowater a obtenu, en octobre 2010, une ordonnance l'autorisant à transférer le lieu d'élimination des déchets à 4513541 Canada Inc. Plusieurs mois plus tard, le séquestre de 4513541 Canada Inc. a obtenu du tribunal l'autorisation d'abandonner le lieu d'élimination des déchets, sans aucune responsabilité.

[59] En 2012, Bowater est devenue Produits forestiers Résolu.

G. *L'arrêté du directeur de 2011*

[60] Le 25 août 2011, la province, par l'entremise de son ministère de l'Environnement, a délivré

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Order against 4513541 Canada Inc., Weyerhaeuser, Bowater, and several of Bowater's directors, requiring them:

> . . . to repair certain site erosion, perform specified groundwater and surface water testing, and file annual reports containing specified information; (ii) to deliver to the [Ministry of the Environment] the sum of $273,063 as financial assurance in respect of the [Waste Disposal Site]; and (iii) to "take all reasonable measures to ensure that any discharge of a contaminant to the natural environment is prevented and any adverse effect that may result from such a discharge is dealt with according to all legal requirements."

(C.A. reasons, at para. 50, citing the Director's Order, A.R., vol. IV, at p. 27.)

Paragraph 3.1 of the Director's Order described these requirements as "minimum requirements only", adding that their discharge would not relieve the named parties from "complying with any other applicable Order, Statute or Regulation", or from "obtaining any approvals or consents not specified in [the Director's] Order" (A.R., vol. IV, at p. 28).

[61] The Director's Order was issued under the *Environmental Protection Act*, R.S.O. 1990, c. E.19. That statute had been amended in 1990 to empower the Director to impose certain obligations upon *former* owners and those who *previously* held management or control of a given undertaking or property (see *Environmental Protection Statute Law Amendment Act, 1990*, S.O. 1990, c. 18, ss. 18(1) and 21 to 23).

[62] Both Weyerhaeuser and Resolute appealed the Director's Order to the Environmental Review Tribunal. The Province says that these appeals are in abeyance. Weyerhaeuser also filed a proof of claim in Bowater's *CCAA* proceedings (which were still ongoing at the time) for indemnification under the Lease Agreement for the present value of the work required by the Director's Order and estimated legal costs, amounting to approximately $373,063. In settlement of its claim, Weyerhaeuser received shares in a company that emerged from

un arrêté du directeur contre 4513541 Canada Inc., Weyerhaeuser, Bowater et plusieurs administrateurs de Bowater, les obligeant à faire ce qui suit :

> [TRADUCTION] . . . réparer une certaine érosion du site, effectuer une analyse déterminée d'eaux souterraines et d'eaux de surface, et déposer des rapports annuels contenant des renseignements déterminés; (ii) remettre au [ministère de l'Environnement] la somme de 273 063 $ à titre de garantie financière pour le [lieu d'élimination des déchets]; et (iii) « prendre toutes les mesures raisonnables pour éviter le rejet d'un contaminant dans l'environnement naturel et pour remédier aux conséquences préjudiciables pouvant résulter d'un tel rejet conformément à toutes les exigences légales. »

(Motifs de la C.A., par. 50, citant l'arrêté du directeur, d.a., vol. IV, p. 27.)

Aux termes du par. 3.1 de l'arrêté du directeur, ces exigences étaient [TRADUCTION] « des exigences minimales seulement » et le fait d'y satisfaire ne dispensait pas les parties désignées de « se conformer aux autres arrêtés, lois ou règlements applicables » ou d'« obtenir les approbations ou consentements non mentionnés dans [l'] arrêté [du directeur] » (d.a., vol. IV, p. 28).

[61] L'arrêté du directeur a été pris en vertu de la *Loi sur la protection de l'environnement*, L.R.O. 1990, c. E.19. Cette loi avait été modifiée en 1990 afin d'autoriser le directeur à imposer certaines obligations aux *anciens* propriétaires d'une entreprise ou d'un bien et aux personnes qui, *antérieurement*, en assuraient la gestion ou en avaient le contrôle (voir *Environmental Protection Statute Law Amendment Act, 1990*, S.O. 1990, c. 18, par. 18(1) et art. 21 à 23).

[62] Weyerhaeuser et Résolu ont interjeté appel de l'arrêté du directeur auprès du Tribunal de l'environnement. La province affirme que ces appels sont présentement suspendus. Weyerhaeuser a également déposé, dans le cadre de la procédure fondée sur la *LACC* introduite par Bowater (qui était toujours en cours à l'époque), une preuve de réclamation en vue d'être indemnisée, en vertu de la Convention de bail, pour la valeur actuelle des travaux exigés par l'arrêté du directeur et les frais juridiques estimés, soit environ 373 063 $. En règlement de sa réclamation,

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CCAA protection, which shares were subsequently sold in May 2015.

III. Proceedings Below

[63] Shortly after being served with the Director's Order, counsel for Weyerhaeuser provided notice thereof to Ontario's Ministry of the Attorney General, invoking paras. 2 and 6 of the Ontario Indemnity, and claiming indemnity as a successor and assignee of Great Lakes. In response, the Attorney General denied that the costs of complying with the Director's Order fell within the scope of the Ontario Indemnity. Weyerhaeuser sued the Province for an order declaring that it is entitled to be indemnified under the terms of the Ontario Indemnity "for the costs that it has incurred and may incur as a result of [the] Director's Order made effective on September 6, 2011" (A.R., vol. II, at p. 3). Resolute was granted leave to intervene as a party to that proceeding.

A. *Decision of the Ontario Superior Court of Justice, 2016 ONSC 4652, 60 B.L.R. (5th) 237*

[64] All parties brought various motions for summary judgment before the Ontario Superior Court of Justice. At issue was whether the Ontario Indemnity covered the costs of complying with the Director's Order and, if so, whether Weyerhaeuser and Resolute are entitled to benefit thereunder.

[65] The motion judge found in favour of Weyerhaeuser and Resolute, holding that the scope of the Ontario Indemnity, as set out in its own first paragraph, covered first party regulatory orders. He further held that the Ontario Indemnity did not improperly fetter the Ontario Legislature's law-making powers.

[66] The motion judge also held that the enurement clause extended the rights and obligations under the Ontario Indemnity to Resolute and Weyerhaeuser — Resolute as a corporate successor to Great Lakes, and Weyerhaeuser as both a successor-in-title

Weyerhaeuser a reçu des actions d'une compagnie qui n'était plus sous la protection de la *LACC*, actions ayant par la suite été vendues en mai 2015.

III. Décisions des juridictions inférieures

[63] Peu après que l'arrêté du directeur lui eut été signifié, l'avocat de Weyerhaeuser en a avisé le ministère du Procureur général de l'Ontario, invoquant les par. 2 et 6 de l'Indemnité de l'Ontario et demandant que sa cliente soit indemnisée à titre de successeur et ayant droit de Great Lakes. En réponse, le procureur général a nié que les frais engagés pour se conformer à l'arrêté du directeur étaient couverts par l'Indemnité de l'Ontario. Weyerhaeuser a poursuivi la province afin d'obtenir une ordonnance déclarant qu'elle avait le droit d'être indemnisée en vertu de l'Indemnité de l'Ontario [TRADUCTION] « pour les frais qu'elle a engagés et qu'elle pourrait engager par suite de [l]'arrêté du directeur ayant pris effet le 6 septembre 2011 » (d.a., vol. II, p. 3). Résolu a obtenu l'autorisation d'intervenir à titre de partie à l'instance.

A. *La décision de la Cour supérieure de justice de l'Ontario, 2016 ONSC 4652, 60 B.L.R. (5th) 237*

[64] Les parties ont présenté diverses requêtes en jugement sommaire à la Cour supérieure de justice de l'Ontario. La question en litige était de savoir si l'Indemnité de l'Ontario couvrait les frais engagés pour se conformer à l'arrêté du directeur et, dans l'affirmative, si Weyerhaeuser et Résolu avaient le droit d'en bénéficier.

[65] Le juge des requêtes a donné gain de cause à Weyerhaeuser et à Résolu, et a conclu que, comme le prévoit son premier paragraphe, l'Indemnité de l'Ontario s'appliquait aux ordonnances réglementaires de première partie. Il a ajouté que l'Indemnité de l'Ontario n'entravait pas indûment les pouvoirs de légiférer de la législature ontarienne.

[66] Le juge des requêtes a également conclu que la clause d'extension des bénéfices faisait en sorte que les droits et obligations conférés par l'Indemnité de l'Ontario s'étendaient à Résolu et à Weyerhaeuser — Résolu à titre de successeur corporatif de Great Lakes

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to the Dryden Property and an assignee of the Ontario Indemnity from Bowater pursuant to s. 3.1(xiv) of the 1998 Asset Purchase Agreement.

et Weyerhaeuser à titre de successeur en titre quant à la propriété de Dryden et de cessionnaire de l'Indemnité de l'Ontario de Bowater en vertu de l'art. 3.1(xiv) de la convention d'achat d'actifs de 1998.

B. *Decision of the Court of Appeal, 2017 ONCA 1007, 77 B.L.R. (5th) 175*

B. *La décision de la Cour d'appel, 2017 ONCA 1007, 77 B.L.R. (5th) 175*

[67] The Province appealed, arguing the motion judge erred in holding that the Ontario Indemnity covers the costs of complying with the Director's Order, and that Weyerhaeuser and Resolute enjoyed the benefit of indemnification thereunder.

[67] La province a interjeté appel, soutenant que le juge des requêtes avait commis une erreur en concluant que l'Indemnité de l'Ontario couvrait les frais pour se conformer à l'arrêté du directeur, et que Weyerhaeuser et Résolu jouissaient du bénéfice de l'indemnisation qu'elle prévoyait.

[68] At the Court of Appeal, the majority found no error in the motion judge's finding that the Ontario Indemnity covered the costs of complying with first party claims, including the Director's Order. Nor did the majority disturb the finding that the 1998 Asset Purchase Agreement had the effect of transferring the full benefit of the Ontario Indemnity from Bowater to Weyerhaeuser. Given that Weyerhaeuser had subsequently sold the Dryden pulp mill to Domtar in 2007, however, the issue of what rights, if any, Weyerhaeuser possessed as an assignee of the Ontario Indemnity at the time the Director's Order was issued in 2011 was returned to the Ontario Superior Court of Justice for decision. The majority did, however, find palpable and overriding error in the motion judge's conclusion that Weyerhaeuser could claim the benefit of the enurement clause in the Ontario Indemnity, holding that this clause applies only to *corporate* successors.

[68] Les juges majoritaires de la Cour d'appel n'ont relevé aucune erreur dans la conclusion du juge des requêtes selon laquelle l'Indemnité de l'Ontario couvrait les frais engagés pour donner suite aux réclamations de première partie, y compris l'arrêté du directeur. Ils n'ont pas non plus modifié la conclusion selon laquelle la convention d'achat d'actifs de 1998 avait pour effet de transférer de Bowater à Weyerhaeuser le plein bénéfice de l'Indemnité de l'Ontario. Cependant, comme Weyerhaeuser avait vendu l'usine de pâtes et papiers de Dryden à Domtar en 2007, la question de savoir quels droits, s'il en est, détenait Weyerhaeuser à titre de cessionnaire de l'Indemnité de l'Ontario au moment où a été pris l'arrêté du directeur en 2011 a été renvoyée à la Cour supérieure de justice de l'Ontario pour décision. Les juges majoritaires ont toutefois relevé une erreur manifeste et déterminante dans la conclusion du juge des requêtes selon laquelle Weyerhaeuser pouvait se prévaloir de la clause d'extension des bénéfices prévue dans l'Indemnité de l'Ontario, affirmant que cette clause ne s'applique qu'aux successeurs *corporatifs*.

[69] As to Resolute, the majority held that the motion judge erred in finding that Resolute could claim the benefit of the Ontario Indemnity as a corporate successor of Great Lakes, following the assignment of the Ontario Indemnity from Bowater to Weyerhaeuser under the 1998 Asset Purchase Agreement. The effect of this assignment was to extinguish Bowater's interest therein, such that Bowater could not then pass that interest on to Resolute as its corporate successor.

[69] Quant à Résolu, les juges majoritaires ont conclu que le juge des requêtes avait commis une erreur en statuant que Résolu pouvait réclamer l'Indemnité de l'Ontario à titre de successeur corporatif de Great Lakes après que Bowater eut cédé l'indemnité à Weyerhaeuser en vertu de la convention d'achat d'actifs de 1998. Cette cession a eu pour effet d'éteindre l'intérêt de Bowater dans l'indemnité de sorte que Bowater ne pouvait pas par la suite le transférer à Résolu à titre de successeur corporatif.

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[70] In dissent, Laskin J.A. would have found that the Ontario Indemnity did not cover the Director's Order, because it was not intended to cover first party claims, and because the Director's Order does not constitute a "Pollution Claim" as defined in that document. Having so concluded, he found it unnecessary to address the question of whether Resolute and Weyerhaeuser (or either of them) could benefit from the Ontario Indemnity as successors and assignees.

IV. Issues and Positions of the Parties

[71] The Province, Resolute and Weyerhaeuser each appeal to this Court. Although they raise various interrelated issues, these appeals can be resolved by answering the following two questions:

1. Did the motion judge err in concluding that the Ontario Indemnity covers the costs of complying with the Director's Order?

2. Did the motion judge err in concluding that Resolute and Weyerhaeuser benefit from the Ontario Indemnity as successors and assigns of Great Lakes?

[72] The Province argues that the motion judge erred in both these respects and, further, that his interpretation of the Ontario Indemnity has the effect of impermissibly fettering the Ontario Legislature's law-making power. Resolute and Weyerhaeuser seek to uphold the motion judge on both questions, and further argue that the Province's obligation under the Ontario Indemnity does not impose an impermissible fetter upon the Ontario Legislature.

V. Analysis

A. *Principles of Contractual Interpretation*

[73] The Ontario Indemnity is a contract. Today's lawyers are fortunate to live in "an age when there is a galaxy of high appellate guidance on how to interpret contracts" (*Royal Devon and Exeter NHS Foundation*

[70] Dissident, le juge Laskin aurait conclu que l'Indemnité de l'Ontario ne s'appliquait pas à l'arrêté du directeur parce qu'elle ne devait pas viser les réclamations de première partie et que l'arrêté du directeur ne constituait pas une [TRADUCTION] « réclamation pour pollution » au sens de ce document. Vu cette conclusion, il a estimé inutile de trancher la question de savoir si Résolu et Weyerhaeuser (ou l'une d'entre elles) pouvaient bénéficier de l'Indemnité de l'Ontario à titre de successeurs et ayants droit.

IV. Questions en litige et positions des parties

[71] La province, Résolu et Weyerhaeuser se pourvoient toutes les trois en appel devant la Cour. Bien qu'elles soulèvent diverses questions interreliées, il est possible de trancher les présents pourvois en répondant aux deux questions suivantes :

1. Le juge des requêtes a-t-il commis une erreur en concluant que l'Indemnité de l'Ontario couvrait les frais engagés pour se conformer à l'arrêté du directeur?

2. Le juge des requêtes a-t-il commis une erreur en concluant que Résolu et Weyerhaeuser bénéficiaient de l'Indemnité de l'Ontario à titre de successeurs et ayants droit de Great Lakes?

[72] La province soutient que le juge des requêtes a commis une erreur à ces deux égards et que son interprétation de l'Indemnité de l'Ontario a pour effet d'entraver de manière inacceptable le pouvoir de légiférer de la législature ontarienne. Résolu et Weyerhaeuser demandent pour leur part que la décision du juge des requêtes soit confirmée sur ces deux questions. Elles font également valoir que l'obligation qu'a la province en vertu de l'Indemnité de l'Ontario n'impose aucune entrave inacceptable à la législature ontarienne.

V. Analyse

A. *Les principes d'interprétation contractuelle*

[73] L'Indemnité de l'Ontario est un contrat. Les avocats d'aujourd'hui ont de la chance de vivre à [TRADUCTION] « une époque où il existe une multitude de directives formulées par les tribunaux d'appel

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Trust v. ATOS IT Services UK Ltd., [2017] EWCA Civ 2196, [2018] 2 All E.R. (Comm.) 535, at para. 45). While not wishing to add more gas and dark matter to the "galaxy", we do find it helpful here to stress certain first principles which we see as important in interpreting this particular contract.

[74] This Court has described the object of contractual interpretation as being to ascertain the objective intentions of the parties (*Sattva*, at para. 55). It has also described the object of contractual interpretation as discerning the parties' "reasonable expectations with respect to the meaning of a contractual provision" (*Ledcor*, at para. 65). In meeting these objects, the Court has signalled a shift away from an approach to contractual interpretation that is "dominated by technical rules of construction" to one that is instead rooted in "practical[ities and] common-sense" (*Sattva*, at para. 47). This requires courts to read a contract "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (*ibid.*).

[75] We recognize that this Court's references to the *objective intentions* of the parties at the time they entered into the contract, and to parties' *reasonable expectations*, may leave a degree of uncertainty respecting the objects of contractual interpretation (see A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at pp. 673-916). Since there is no suggestion here of a divergence between the parties' *intentions* and their *expectations*, we do not find it necessary to resolve this here, but we simply note the inconsistency.

[76] Contractual interpretation begins with reading the words of the contract. A legitimate interpretation will be consistent with the language that the parties employed to express their agreement (G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 11). As this Court stated in *Sattva*, the meaning of a contract is rooted in the actual language used by the parties (para. 57). A

supérieurs sur la manière d'interpréter des contrats » (*Royal Devon and Exeter NHS Foundation Trust c. ATOS IT Services UK Ltd.*, [2017] EWCA Civ 2196, [2018] 2 All E.R. (Comm.) 535, par. 45). Sans vouloir ajouter à cette multitude de directives, nous estimons utile de souligner certains principes fondamentaux que nous jugeons importants pour l'interprétation du contrat dont il est question en l'espèce.

[74] Notre Cour a affirmé que l'objectif de l'interprétation contractuelle était de déterminer les intentions objectives des parties (*Sattva*, par. 55). Elle a aussi dit que cet objectif était de cerner les « attentes raisonnables des parties en ce qui concerne la signification d'une disposition contractuelle » (*Ledcor*, par. 65). Elle a signalé que, pour satisfaire à ces objectifs, les tribunaux avaient tendance à délaisser l'approche axée « sur des règles de forme en matière d'interprétation » et à appliquer une démarche fondée plutôt sur des « [considérations] pratique[s] [et] sur le bon sens » (*Sattva*, par. 47). Cela les oblige à interpréter le contrat « dans son ensemble, en donnant aux mots y figurant le sens ordinaire et grammatical qui s'harmonise avec les circonstances dont les parties avaient connaissance au moment de la conclusion du contrat » (*ibid.*).

[75] Nous reconnaissons qu'en parlant des *intentions objectives* des parties au moment de conclure le contrat et des *attentes raisonnables* des parties, la Cour peut avoir laissé planer une certaine incertitude quant aux objectifs de l'interprétation contractuelle (voir A. Swan, J. Adamski et A. Y. Na, *Canadian Contract Law* (4e éd. 2018), p. 673-916). Comme rien ne tend ici à indiquer qu'il y a une divergence entre les *intentions* et les *attentes* des parties, nous ne croyons pas qu'il soit nécessaire de régler cette question en l'espèce; nous soulignons simplement l'incohérence.

[76] L'interprétation contractuelle commence par la lecture des mots du contrat; une interprétation légitime sera compatible avec les termes employés par les parties pour exprimer leur accord (G. R. Hall, *Canadian Contractual Interpretation Law* (3e éd. 2016), p. 11). Comme la Cour l'a affirmé dans l'arrêt *Sattva*, la signification d'un contrat est fondée sur les termes mêmes utilisés par les parties (par. 57).

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meaning that strays too far from the actual words fails to give effect to the way in which the parties chose to define their obligations (*Canadian Contractual Interpretation Law*, at p. 9).

[77] This is not to say that the words of the contract are to be read in isolation. This Court's direction in *Sattva* was that the words of the contract are to be read in light of the surrounding circumstances — sometimes referred to as the "factual matrix" — which consist of "objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (para. 58 (citation omitted)). An interpretation that ignores the context in which the contract was formed will not accurately discern what the parties intended to achieve, even if the interpretation is "literally correct" (*Canadian Contractual Interpretation Law*, at p. 9; see also *Sattva*, at para. 57). Put simply, contractual text derives its meaning, in part, from the context.

[78] We stress that text derives its meaning from context *in part*. This leads to an important caveat: the context — that is, the factual matrix — cannot "overwhelm the words" of the contract or support an interpretation that "deviate[s] from the text such that the court effectively creates a new agreement" (*Sattva*, at para. 57). The factual matrix assists in *discerning the meaning* of the words that the parties chose to express their agreement; it is not a means by which to *change* the words of the contract in a manner that would modify the rights and obligations that the parties assumed thereunder (*Canadian Contractual Interpretation Law*, at pp. 33-34).

[79] As we will explain below, contractual interpretation also requires courts to consider the principle of commercial reasonableness and efficacy. Contracts ought therefore to be interpreted "in accordance with sound commercial principles and good business sense" (*Scanlon v. Castlepoint Development Corp.* (1992), 11 O.R. (3d) 744, at p. 770). As Lord Diplock explained in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.*, [1985] 1 A.C. 191 (H.L.), at p. 201, "if detailed semantic and syntactical analysis

Une interprétation qui s'écarte trop de ces termes ne donne pas effet à la façon dont les parties ont choisi de définir leurs obligations (*Canadian Contractual Interpretation Law*, p. 9).

[77] Cela ne veut pas dire que les mots employés dans le contrat doivent être lus isolément. La Cour a indiqué dans l'arrêt *Sattva* que les mots du contrat doivent être lus en tenant compte des circonstances — que l'on appelle parfois le « fondement factuel » — qui consistent en une « preuve objective du contexte factuel au moment de la signature du contrat, c'est-à-dire, les renseignements qui appartenaient ou auraient raisonnablement dû appartenir aux connaissances des deux parties à la date de signature ou avant celle-ci » (par. 58 (référence omise)). Une interprétation qui ne tient pas compte du contexte dans lequel le contrat a été conclu ne permettra pas de cerner les intentions des parties, même si l'interprétation est [TRADUCTION] « littéralement correcte » (*Canadian Contractual Interpretation Law*, p. 9; voir aussi *Sattva*, par. 57). En termes simples, le texte du contrat tire sa signification, en partie, du contexte.

[78] Nous tenons à souligner que le texte tire sa signification *en partie* du contexte. Une mise en garde importante s'impose donc : le contexte — c'est-à-dire le fondement factuel — ne peut pas « supplanter [les termes] » du contrat ou appuyer une interprétation qui « s'écarte [du texte] au point de créer dans les faits une nouvelle entente » (*Sattva*, par. 57). Le fondement factuel aide à *dégager le sens* des mots que les parties ont choisi d'employer pour exprimer leur accord; ce n'est pas un moyen pour *changer* les termes du contrat de manière à modifier les droits et les obligations des parties (*Canadian Contractual Interpretation Law*, p. 33-34).

[79] Comme nous l'expliquerons plus loin, l'interprétation contractuelle requiert aussi que les tribunaux tiennent compte du principe de la raisonnabilité et de l'efficacité commerciales. Les contrats doivent donc être interprétés [TRADUCTION] « conformément aux principes commerciaux reconnus et au bon sens en matière commerciale » (*Scanlon c. Castlepoint Development Corp.* (1992), 11 O.R. (3d) 744, p. 770). Comme l'a expliqué lord Diplock dans l'arrêt *Antaios Compania Naviera S.A. c. Salen Rederierna A.B.*,

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of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense". The principle that requires contracts to be read in a commercially reasonable and efficient manner is therefore an important interpretive aid in construing contractual terms.

[1985] 1 A.C. 191 (H.L.), à la p. 201, [TRADUCTION] « si l'analyse sémantique et syntaxique détaillée de mots contenus dans un contrat commercial mène à une conclusion qui va à l'encontre du bon sens en matière commerciale, c'est le bon sens en matière commerciale qui l'emporte ». Le principe selon lequel les contrats doivent être lus de manière commercialement raisonnable et efficace est donc important dans l'interprétation des modalités d'un contrat.

[80] Ultimately, contractual interpretation involves the application of various tools — including consideration of the factual matrix and the principle of commercial reasonableness — in order to properly understand the meaning of the words used by the parties to express their agreement.

[80] En définitive, l'interprétation contractuelle implique l'application de divers outils — y compris un examen du fondement factuel et du principe de la raisonnabilité commerciale — pour bien comprendre la signification des mots employés par les parties pour exprimer leur accord.

B. *The Province's Appeal*

B. *Le pourvoi de la province*

[81] At issue in the Province's appeal is whether the motion judge erred in concluding that the Province's obligation to indemnify under para. 1 of the Ontario Indemnity extends to the costs of compliance with first party regulatory orders, such as the Director's Order. In so finding, the motion judge placed considerable emphasis on the text of para. 1, which referred to "any claim, action or proceeding, whether statutory or otherwise . . . whether by individuals, firms, companies, governments (including the Federal Government of Canada and any province or municipality thereof or any agency, body or authority created by statutory or other authority)" (A.R., vol. IV, at p. 189 (emphasis added)). In his view, neither a reading of the contract as a whole nor the surrounding circumstances supported reading the Ontario Indemnity as excluding from coverage the costs of compliance with first party regulatory orders.

[81] La question en litige dans le pourvoi de la province est celle de savoir si le juge des requêtes a commis une erreur en concluant que l'obligation qu'avait la province de verser une indemnité en vertu du par. 1 de l'Indemnité de l'Ontario s'étendait aux frais engagés pour se conformer aux ordonnances réglementaires de première partie, comme l'arrêté du directeur. En arrivant à cette conclusion, le juge a accordé une importance considérable au texte du par. 1, où il est question de [TRADUCTION] « toute réclamation, action ou procédure, qu'elle soit prévue par la loi ou autrement, [. . .] par des particuliers, des firmes, des sociétés, des gouvernements (y compris le gouvernement fédéral du Canada et toute province ou municipalité du Canada, ou tout organisme ou autorité créé en vertu d'un pouvoir statutaire ou d'un autre pouvoir) » (d.a., vol. IV, p. 189 (nous soulignons)). À son avis, ni la lecture du contrat dans son ensemble ni les circonstances ne permettaient de considérer que l'Indemnité de l'Ontario excluait les frais engagés pour se conformer aux ordonnances réglementaires de première partie.

[82] The Province sees it differently. It says that para. 1, properly interpreted, covers only "third party claims, whether statutory or at common law, in the nature of those settled in 1985" (Ontario A.F., at para. 3). Because the Director's Order was made in 2011 by the Province's Ministry of the Environment using provisions of the 1990 *Environmental*

[82] La province voit les choses différemment. Elle affirme que, correctement interprété, le par. 1 vise seulement [TRADUCTION] « les réclamations de tiers, prévues par la loi ou par la common law, de la nature de celles réglées en 1985 » (m.a. Ontario, par. 3). Comme l'arrêté du directeur a été pris en 2011 par le ministère provincial de l'Environnement

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Protection Act, which was enacted five years after the Settlement Agreement was executed, the Province says that the obligation to indemnify does not extend to the resulting compliance costs to Weyerhaeuser and Resolute.

[83] More specifically, the Province says the motion judge made four errors: (1) failing to consider the text of the Ontario Indemnity with reference to the factual matrix, which, the Province says, includes the 1979 Indemnity, the 1982 Ramsay Letter, the 1979 Dryden Agreement, the Settlement Agreement, and the Spills Bill; (2) failing to interpret para. 1 of the Ontario Indemnity in light of the remainder of the Ontario Indemnity; (3) making palpable and overriding errors in two factual findings; and (4) interpreting the Ontario Indemnity so as to impermissibly fetter the Legislature's law-making powers, thereby rendering the Ontario Indemnity altogether unenforceable.

[84] Like the majority at the Court of Appeal, we reject each of these arguments, and would dismiss the Province's appeal. The motion judge made no error in interpreting the Ontario Indemnity as covering the costs imposed on the successors and assigns of Great Lakes by the Director's Order. Although his analysis on this point was rooted primarily in the wording of para. 1 of the Ontario Indemnity, the motion judge also considered para. 1's meaning in light of the agreement as a whole, and with reference to the circumstances surrounding its formation in 1985. Far from excluding the context of the agreement as a whole or the surrounding circumstances from consideration, he *considered* them, and then simply found that neither supported an interpretation of the Ontario Indemnity that would exclude coverage for first party claims.

(1) Did the Motion Judge Err in His Appreciation of the Factual Matrix?

[85] The Province submits that the motion judge erred by focusing on the text of the Ontario Indemnity

en vertu de dispositions de la *Loi sur la protection de l'environnement* de 1990, laquelle a été édictée cinq ans après la signature de la Convention de règlement, la province estime que l'obligation d'indemniser ne s'étend pas aux frais engagés par Weyerhaeuser et Résolu pour s'y conformer.

[83] Plus précisément, la province affirme que le juge des requêtes a commis quatre erreurs : (1) il n'a pas examiné le libellé de l'Indemnité de l'Ontario à la lumière du fondement factuel, qui, selon la province, comprend l'Indemnité de 1979, la lettre de 1982 de Ramsay, la convention de Dryden de 1979, la Convention de règlement et la loi sur les déversements; (2) il n'a pas interprété le par. 1 de l'Indemnité de l'Ontario à la lumière du reste de cette indemnité; (3) il a commis des erreurs manifestes et déterminantes dans deux conclusions de fait; et (4) il a interprété l'Indemnité de l'Ontario de manière à entraver de manière inacceptable les pouvoirs de légiférer de la législature, de sorte que l'Indemnité de l'Ontario est devenue complètement non exécutoire.

[84] À l'instar des juges majoritaires de la Cour d'appel, nous rejetons chacun de ces arguments et nous rejetterions le pourvoi de la province. Le juge des requêtes n'a commis aucune erreur en interprétant l'Indemnité de l'Ontario comme couvrant les frais que l'arrêté du directeur a imposés aux successeurs et ayants droit de Great Lakes. Bien que son analyse sur ce point ait reposé principalement sur le libellé du par. 1 de l'Indemnité de l'Ontario, le juge s'est aussi penché sur la signification de cette disposition à la lumière de l'entente dans son ensemble et des circonstances ayant entouré sa conclusion en 1985. Loin d'avoir exclu de son examen le contexte de l'entente dans son ensemble ou les circonstances entourant celle-ci, il en a *tenu compte* et il est tout simplement arrivé à la conclusion que ni l'une ni l'autre de ces considérations n'étayait une interprétation de l'Indemnité de l'Ontario qui exclurait les réclamations de première partie.

(1) Le juge des requêtes a-t-il commis une erreur dans son appréciation du fondement factuel?

[85] La province soutient que le juge des requêtes a commis une erreur en mettant l'accent sur le texte

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and that, in so doing, he "failed to appreciate that events going back to 1979 significantly informed the meaning of the [Ontario] Indemnity" (Ontario A.F., at para. 71). He ought, the Province says, to have considered the interrelationship between the Ontario Indemnity and the 1979 Indemnity, the 1982 Ramsay Letter, the 1979 Dryden Agreement, the Settlement Agreement (inclusive of an escrow agreement and schedules), and the enactment of the Spills Bill.

de l'Indemnité de l'Ontario et que, ce faisant, il [TRADUCTION] « ne s'est pas rendu compte que des événements remontant à 1979 éclairaient considérablement le sens de l'indemnité [de l'Ontario] » (m.a. Ontario, par. 71). Selon elle, le juge aurait dû prendre en considération la corrélation entre, d'une part, l'Indemnité de l'Ontario et, d'autre part, l'Indemnité de 1979, la lettre de 1982 de Ramsay, la convention de Dryden de 1979, la Convention de règlement (y compris un contrat d'entiercement et des annexes) et l'adoption de la loi sur les déversements.

[86] The motion judge's appreciation of the factual matrix in these circumstances is entitled to deference on appeal (*Sattva*, at para. 52). The Province bears the burden of showing that any error in this respect is of a palpable and overriding nature.

[86] L'appréciation que le juge des requêtes a faite du fondement factuel dans les circonstances de l'espèce commande la déférence en appel (*Sattva*, par. 52). Il incombe à la province de prouver que toute erreur commise à cet égard est une erreur de nature manifeste et déterminante.

(a) *The 1979 Indemnity and the 1982 Ramsay Letter*

a) *L'Indemnité de 1979 et la lettre de 1982 de Ramsay*

[87] The Province notes that the 1979 Indemnity, which can only be invoked in the case of a court decision requiring the payment of monies or a settlement approved by the Province, and the 1982 Ramsay Letter which contains similar terms, both evidence an intention, on its part, to indemnify only third party claims. A proper consideration of these elements of the factual matrix, it says, should have led the motion judge to find that the Ontario Indemnity likewise extends only to costs associated with third party obligations arising from court orders or settlements in respect of mercury contamination claims, and does not cover the costs of compliance with first party regulatory orders.

[87] La province souligne que l'Indemnité de 1979, qui ne peut être invoquée que si une décision judiciaire exige le paiement d'une somme d'argent ou si un règlement est approuvé par la province, et la lettre de 1982 de Ramsay, qui est rédigée en termes semblables, démontrent toutes deux qu'elle avait l'intention d'accorder une indemnité seulement pour les réclamations de tiers. Elle fait valoir qu'une prise en compte adéquate de ces éléments du fondement factuel aurait dû amener le juge des requêtes à conclure que l'Indemnité de l'Ontario ne s'étend de la même manière qu'aux frais associés aux obligations qu'ont les tiers en vertu d'ordonnances judiciaires ou de règlements de réclamations relatives à la contamination par le mercure et ne couvre pas les frais engagés pour se conformer aux ordonnances réglementaires de première partie.

[88] Although he did not specifically refer to the 1982 Ramsay Letter in his analysis, the motion judge did reject any comparison between the Ontario Indemnity and the 1979 Indemnity on the basis that the former "is a separate agreement and must be interpreted by considering the words used by the parties in it, not a previous agreement" (para. 48). We see no error in this holding. While it is true that the three

[88] Bien qu'il n'ait pas fait précisément référence à la lettre de 1982 de Ramsay dans son analyse, le juge des requêtes a rejeté toute comparaison entre l'Indemnité de l'Ontario et l'Indemnité de 1979 au motif que la première [TRADUCTION] « est une entente distincte que l'on doit interpréter en tenant compte des mots employés par les parties à celle-ci et non d'une entente intervenue antérieurement »

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indemnities address the same underlying problem (the mercury contamination), our colleagues in the majority do not recognize that they each represent *distinct* agreements given for *distinct* purposes in *distinct* sets of negotiations. Specifically, the 1979 Indemnity was given to encourage Great Lakes to purchase the Dryden Property; the indemnity in the 1982 Ramsay Letter was given to encourage Great Lakes to settle the Grassy Narrows Litigation; and the Ontario Indemnity was given as part of a final settlement of those claims.

(par. 48). Nous ne relevons aucune erreur dans cette conclusion. S'il est vrai que les trois indemnités visent à corriger le même problème sous-jacent (la contamination par le mercure), nos collègues de la majorité ne reconnaissent pas qu'il s'agit d'ententes *distinctes* conclues à des fins *distinctes* dans le cadre de négociations *distinctes*. Plus précisément, l'Indemnité de 1979 a été accordée pour inciter Great Lakes à acheter la propriété de Dryden, l'indemnité dont il est question dans la lettre de 1982 de Ramsay a été versée pour encourager Great Lakes à régler le litige de Grassy Narrows et l'Indemnité de l'Ontario a été accordée dans le cadre du règlement définitif de ces réclamations.

[89] Significantly, the Ontario Indemnity — unlike the 1979 Indemnity or the 1982 Ramsay Letter — captures much more than just court orders and settlements relating to the Reed-era mercury contamination, applying to "any obligation, liability, damage, loss, costs or expenses incurred . . . as a result of any claim, action or proceeding, whether statutory or otherwise" (A.R., vol. IV, at p. 189). This breadth of scope, relative to the other indemnities, is significant to the interpretive exercise.

[89] Fait important, l'Indemnité de l'Ontario — contrairement à l'Indemnité de 1979 ou à la lettre de 1982 de Ramsay — englobe bien plus que les ordonnances judiciaires et les règlements relatifs à la contamination par le mercure remontant à l'époque de Reed; elle s'applique à [TRADUCTION] « l'ensemble des obligations, responsabilités, dommages, pertes, frais ou dépenses qu'est susceptible d'entraîner [. . .] toute réclamation, action ou procédure, qu'elle soit prévue par la loi ou autrement » (d.a., vol. IV, p. 189). Le champ d'application de cette indemnité, par rapport à celui des autres indemnités, est significatif pour l'exercice d'interprétation.

[90] Additionally, the fact that the parties replaced the 1979 Indemnity and the commitment in the 1982 Ramsay Letter with the Ontario Indemnity suggests that the parties *themselves* — whose intentions the motion judge was called upon to discern — did not view those earlier agreements as being co-extensive in scope with the Ontario Indemnity. Tellingly, there would have been no point served by Great Lakes and Reed releasing the Province of its obligations under the 1979 Indemnity and the 1982 Ramsay Letter in Schedule E of the Settlement Agreement, only then to bind the Province to the same terms by executing the Ontario Indemnity at Schedule F of that same agreement.

[90] En outre, le fait que les parties aient remplacé l'Indemnité de 1979 et l'engagement pris dans la lettre de 1982 de Ramsay par l'Indemnité de l'Ontario tend à indiquer que les parties *elles-mêmes* — dont le juge des requêtes devait cerner les intentions — ne considéraient pas que les ententes antérieures avaient le même champ d'application que l'Indemnité de l'Ontario. De toute évidence, il n'aurait servi à rien que Great Lakes et Reed libèrent la province des obligations qui lui incombaient en vertu de l'Indemnité de 1979 et de la lettre de 1982 de Ramsay figurant à l'annexe E de la Convention de règlement pour ensuite imposer à la province les mêmes conditions en signant l'Indemnité de l'Ontario contenue à l'annexe F de la même convention.

[91] We therefore see no palpable and overriding error in the motion judge's refusal to restrict the

[91] Nous concluons donc que le juge des requêtes n'a commis aucune erreur manifeste et déterminante

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scope of the Ontario Indemnity on the basis of the prior indemnities.

(b) *The 1979 Dryden Agreement*

[92] The scope of the Ontario Indemnity is substantially the same as the scope of the indemnity given to Reed by Great Lakes in clause 5.3 of the 1979 Dryden Agreement as part of its cost-sharing regime. As we have already explained, clause 11.4 of that agreement exempted the costs of complying with the Control Order issued by the Ministry of the Environment in 1979, making those costs the responsibility of Great Lakes exclusively. The motion judge found that the existence of this "specific provision that excluded the cost of regulatory compliance supports the conclusion that the Ontario Indemnity includes these costs because it does not contain a similar provision" (para. 48 (emphasis added)).[1]

[93] Before this Court, the Province observes that the 1979 Dryden Agreement "was a private contractual arrangement made between Reed and Great Lakes", such that the absence of any specific exemption in the Ontario Indemnity does not mean that the Province intended to cover regulatory costs (Ontario A.F., at para. 83). While it is true that the Province was not a party to the 1979 Dryden Agreement, it was aware of its terms when it agreed to the Ontario Indemnity (as para. 7 of the Ontario Indemnity makes clear). Moreover, the text used in the indemnity in clause 5.3 of the 1979 Dryden Agreement is almost identical to that used in para. 1 of the Ontario Indemnity. Given the term exempting the Control Order from the scope of the cost-sharing regime in the 1979 Dryden Agreement, the parties must have understood that this regulatory order would otherwise have constituted a "Pollution Claim" for

[1] The motion judge stated that the 1979 Indemnity contained that "specific provision", but given the context, it is clear that he misspoke and was instead referring to the 1979 Dryden Agreement. The Province does not take the position that this amounts to a palpable and overriding error of fact (Ontario A.F., at paras. 81-83).

en refusant de restreindre le champ d'application de l'Indemnité de l'Ontario sur le fondement des indemnités antérieures.

b) *La convention de Dryden de 1979*

[92] Le champ d'application de l'Indemnité de l'Ontario est essentiellement le même que celui de l'indemnité que Great Lakes a accordée à Reed à la clause 5.3 de la convention de Dryden de 1979 dans le cadre de son régime de partage des frais. Comme nous l'avons déjà expliqué, la clause 11.4 de cette convention soustrayait les frais engagés pour se conformer à l'arrêté d'intervention pris par le ministère de l'Environnement en 1979, et laissait à Great Lakes l'entière responsabilité de ces frais. Le juge des requêtes a conclu que l'existence de cette [TRADUCTION] « disposition particulière qui excluait les frais engagés pour se conformer à la réglementation étaye la conclusion selon laquelle l'Indemnité de l'Ontario englobe ces frais parce qu'elle ne renferme pas de disposition semblable » (par. 48 (nous soulignons))[1].

[93] Devant notre Cour, la province fait remarquer que la convention de Dryden de 1979 [TRADUCTION] « était une entente contractuelle privée conclue entre Reed et Great Lakes », de sorte que l'absence d'une exemption particulière dans l'Indemnité de l'Ontario ne signifie pas que la province voulait couvrir les frais engagés pour se conformer à la réglementation (m.a. Ontario, par. 83). Bien qu'il soit vrai que la province n'était pas partie à la convention de Dryden de 1979, elle en connaissait les modalités quand elle a consenti à l'Indemnité de l'Ontario (comme il ressort clairement du par. 7 de l'Indemnité de l'Ontario). En outre, le texte de l'indemnité prévue à la clause 5.3 de la convention de Dryden de 1979 est presque identique à celui utilisé au par. 1 de l'Indemnité de l'Ontario. Vu qu'il existe une disposition soustrayant l'arrêté d'intervention du champ d'application du régime de partage des frais dans la convention de Dryden

[1] Le juge des requêtes a affirmé que l'Indemnité de 1979 renfermait cette [TRADUCTION] « disposition particulière », mais, vu le contexte, il est clair qu'il s'est mal exprimé et qu'il renvoyait plutôt à la convention de Dryden de 1979. La province ne prétend pas qu'il s'agit là d'une erreur de fait manifeste et déterminante (m.a. Ontario, par. 81-83).

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the purpose of clause 5.3. And, because para. 1 of the Ontario Indemnity defines the term "Pollution Claim" in near-identical terms, the motion judge did not err in placing weight on the absence of a similar exemption in the Ontario Indemnity as supporting the conclusion that regulatory orders — like the Director's Order — would fall within the scope of that indemnity.

de 1979, les parties devaient avoir compris que cette ordonnance réglementaire aurait autrement constitué une [TRADUCTION] « réclamation pour pollution » pour l'application de la clause 5.3. De plus, comme le par. 1 de l'Indemnité de l'Ontario définit l'expression « réclamation pour pollution » dans des termes quasi identiques, le juge des requêtes n'a commis aucune erreur en considérant que l'absence d'une exemption semblable dans l'Indemnité de l'Ontario étayait la conclusion que les ordonnances réglementaires — comme l'arrêté du directeur — étaient visées par cette indemnité.

[94] In his dissenting reasons, Laskin J.A. says that "similar carve out language was not needed" in the Ontario Indemnity, since by 1985, neither Reed nor Great Lakes had any obligations under the Control Order (para. 256). But, and with respect, the parties must have been aware that a new regulatory order could easily have been made subsequent to the execution of the Ontario Indemnity. Nothing prevented them from expressly providing — as did the parties to the 1979 Dryden Agreement — that such orders would not fall within the scope of the indemnity.

[94] Dans ses motifs dissidents, le juge Laskin affirme qu'un [TRADUCTION] « libellé d'exclusion semblable n'était pas nécessaire » dans l'Indemnité de l'Ontario puisqu'en 1985, ni Reed ni Great Lakes n'avait d'obligation en vertu de l'arrêté d'intervention (par. 256). Cependant, avec égards, les parties devaient savoir qu'une nouvelle ordonnance réglementaire pouvait facilement être rendue après la signature de l'Indemnité de l'Ontario. Rien ne les empêchait de prévoir expressément — comme l'avaient fait les parties à la convention de Dryden de 1979 — que de telles ordonnances ne seraient pas visées par l'indemnité.

(c) *The Settlement Agreement*

[95] Under paragraph 2.4(a) of the Settlement Agreement, the Province was to indemnify Reed and Great Lakes in respect of "the issues" — a term that was defined in the recitals to the Settlement Agreement as follows:

> The discharge by Reed and its predecessors of mercury and any other pollutants into the English and Wabigoon and related river systems, and the continuing presence of any such pollutants discharged by Reed and its predecessors, including the continuing but now diminishing presence of methylmercury in the related ecosystems since its initial identification in 1969, <u>and governmental actions taken in consequence thereof</u>, may have had and may continue to have effects and raise concerns in respect of the social and economic circumstances and the health of the present and future members of the Bands (the "issues"). [Emphasis added.]

(A.R., vol. IV, at p. 140)

c) *La Convention de règlement*

[95] Aux termes du par. 2.4(a) de la Convention de règlement, la province était tenue d'indemniser Reed et Great Lakes relativement aux [TRADUCTION] « points en litige », expression qui était définie comme suit dans les attendus de la convention :

> [TRADUCTION] Le rejet par Reed et ses prédécesseurs de mercure et de tout autre polluant dans le réseau hydrographique English-Wabigoon, ainsi que la présence continue de ces polluants, ce qui inclut la présence continue mais en voie de diminution de mercure méthylé dans les écosystèmes connexes depuis qu'on a constaté sa présence en 1969, <u>et les mesures gouvernementales prises à cet égard</u>, peuvent avoir eu et continuer d'avoir des incidences en ce qui concerne la conjoncture économique et sociale ainsi que la santé des membres actuels et futurs des bandes en question (les « points en litige »). [Nous soulignons.]

(d.a., vol. IV, p. 140)

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[96] The Province says the motion judge failed to appreciate the importance of these portions of the Settlement Agreement to the interpretation of para. 1 of the Ontario Indemnity. Preventative orders — like the Director's Order — do not fall within the scope of "the issues" that the Settlement Agreement was intended to address, the Province says, since the waste disposal site was not a source of the discharge. We note, however, that among those "issues" are "governmental actions taken in consequence" of the mercury contamination by Reed and its predecessors. The record provides ample indication that the Province was aware of Dryden Paper's construction of the waste disposal site for the purpose of containing mercury waste, and that it had been the subject of oversight by governmental agencies since 1977 (A.R., vol. IV, at pp. 35-36; A.R., vol. VI, at pp. 2-3). It follows that such oversight falls well within the scope of the "issues" which the Settlement Agreement was intended to address.

[97] In any event, the Ontario Indemnity expressly applies in respect of (among other things) the "presence of any pollutant . . . including mercury or any other substance . . . in the plant or plants or lands or premises forming part of the Dryden assets sold by Reed Ltd. to Great Lakes under the [1979] Dryden Agreement" (A.R., vol. IV, at p. 190). Irrespective, then, of how one understands the scope of the issues set out in the Settlement Agreement, that element of the factual matrix cannot "overwhelm" or be used to "deviate from" the text of the Ontario Indemnity (*Sattva*, at para. 57).

(d) *The Spills Bill*

[98] Paragraph 1 of the Ontario Indemnity closely tracks the language of the indemnity given by Great Lakes to Reed as part of the cost-sharing regime in clause 5.3 of the 1979 Dryden Agreement, with one important difference: while the scope of the former expressly covers claims, actions and proceedings, "whether statutory or otherwise", the latter does not. The Province explains this specific reference to statutory claims in the Ontario Indemnity as reflecting

[96] La province soutient que le juge des requêtes n'a pas bien compris l'importance de ces passages de la Convention de règlement pour l'interprétation du par. 1 de l'Indemnité de l'Ontario. Selon elle, les ordonnances préventives — comme l'arrêté du directeur — ne font pas partie des [TRADUCTION] « points en litige » que la Convention de règlement visait à régler puisque le lieu d'élimination des déchets n'était pas une source du rejet. Nous constatons toutefois que parmi ces « points en litige » se trouvent les « mesures gouvernementales prises à [l']égard » de la contamination par le mercure causée par Reed et ses prédécesseurs. Le dossier montre amplement que la province savait que Dryden Paper avait construit un lieu d'élimination des déchets qui était destiné à contenir les déchets mercuriels et qui était surveillé par des organismes gouvernementaux depuis 1977 (d.a., vol. IV, p. 35-36; d.a., vol. VI, p. 2-3). Il s'ensuit que cette surveillance fait entièrement partie des « points en litige » que la Convention de règlement visait à régler.

[97] Quoi qu'il en soit, l'Indemnité de l'Ontario s'applique expressément (entre autres) à la présence de « polluants, notamment le mercure ou toute autre substance, [. . .] [dans] [l]es usines, [l]es terrains ou [l]es lieux faisant partie des actifs de Dryden que Reed Ltd. a vendus à Great Lakes en vertu de la convention de Dryden [de 1979] » (d.a., vol. IV, p. 190). En conséquence, peu importe la compréhension que l'on peut avoir de la portée des points en litige énoncés dans la Convention de règlement, cet élément du fondement factuel ne saurait « supplanter » le texte de l'Indemnité de l'Ontario ou être utilisé pour « s'écarte[r] » de ce dernier (*Sattva*, par. 57).

d) *La loi sur les déversements*

[98] Le paragraphe 1 de l'Indemnité de l'Ontario suit de très près le libellé de l'indemnité que Great Lakes a accordée à Reed à la clause 5.3 de la convention de Dryden de 1979 dans le cadre du régime de partage des frais, mais il existe une différence importante entre ces deux indemnités : la première s'applique expressément aux réclamations, actions et procédures, [TRADUCTION] « qu'elle[s] soi[ent] prévue[s] par la loi ou autrement », mais

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the enactment of the Spills Bill, which created a new statutory right of action against polluters in favour of both the government and private parties, and which was proclaimed only two weeks before the parties executed the Settlement Agreement and the Ontario Indemnity. This language, it says, "addressed a significant new statutory cause of action created by the Spills Bill, along with other third party statutory claims which could have been brought at that time" (Ontario A.F., at para. 88). The Province's submission is therefore that the courts below erred by construing those terms as capturing the costs of compliance with (a) first party regulatory claims made under statutory powers, and (b) other kinds of claims arising from legislation enacted *after* the closing date in 1985 — like the Director's Order, which was made under provisions of the *Environmental Protection Act* that came into force in 1990.

pas la deuxième. La province explique que ce renvoi exprès aux réclamations prévues par la loi dans l'Indemnité de l'Ontario reflète l'adoption de la loi sur les déversements, qui a créé en faveur du gouvernement et des particuliers un nouveau droit d'action statutaire contre les pollueurs, et qui a été promulguée seulement deux semaines avant que les parties signent la Convention de règlement et l'Indemnité de l'Ontario. Ce libellé, affirme-t-elle, [TRADUCTION] « traitait d'une nouvelle cause d'action statutaire importante créée par la loi sur les déversements ainsi que des autres réclamations statutaires qui auraient pu être présentées par des tiers à ce moment-là » (m.a. Ontario, par. 88). La province soutient donc que les tribunaux d'instance inférieure ont commis une erreur en considérant que les termes en question englobaient les frais engagés pour donner suite a) aux réclamations réglementaires de première partie présentées en vertu de pouvoirs conférés par la loi et b) aux autres types de réclamations découlant d'une loi adoptée *après* la date de clôture en 1985 — comme l'arrêté du directeur, qui a été pris en vertu des dispositions de la *Loi sur la protection de l'environnement* entrées en vigueur en 1990.

[99] The motion judge did not consider the Spills Bill. (Neither, for that matter, do our colleagues in the majority.) He did, however, rely on the text of para. 1 of the Ontario Indemnity in concluding that it applies to "a statutory claim or proceeding brought by an agency of the Province such as the [Director's Order] issued by the [Ministry of the Environment]" (para. 47). The majority at the Court of Appeal saw no error in this: "it was not open to the motion judge to consider evidence of the parties' specific intentions or negotiations, including whether they discussed the Spills Bill during the negotiations that culminated in the execution of the Ontario Indemnity" (para. 112). This, the majority explained, was rooted in the principle that evidence of the parties' specific negotiations is inadmissible for the purpose of contractual interpretation. Justice Laskin, however, instead characterized the enactment of the Spills Bill as an objective fact that the parties would have or reasonably ought to have known about when entering into their agreement, and concluded that "[t]he timing of the Spills Bill relative to the [Ontario] Indemnity demonstrates that

[99] Le juge des requêtes n'a pas tenu compte de la loi sur les déversements. (Nos collègues de la majorité ne l'ont d'ailleurs pas fait non plus.) Il s'est toutefois fondé sur le libellé du par. 1 de l'Indemnité de l'Ontario pour conclure qu'elle s'applique [TRADUCTION] « aux réclamations ou procédures prévues par la loi présentées par un organisme de la province, comme [l'arrêté du directeur] pris par le [ministère de l'Environnement] » (par. 47). Les juges majoritaires de la Cour d'appel n'ont relevé aucune erreur à cet égard : [TRADUCTION] « il n'appartenait pas au juge des requêtes de prendre en considération la preuve relative aux intentions particulières des parties ou aux négociations particulières intervenues entre elles, et notamment de se demander si elles ont parlé de la loi sur les déversements pendant les négociations qui ont mené à la signature de l'Indemnité de l'Ontario » (par. 112). Comme ils l'ont expliqué, cette approche repose sur le principe selon lequel la preuve relative aux négociations particulières menées par les parties est inadmissible aux fins de l'interprétation contractuelle. Cependant, le juge Laskin a plutôt qualifié l'adoption de la loi

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the Spills Bil[l] was undoubtedly the reason why the [Ontario] Indemnity contained the added words relied on by the motion judge and the respondents" (para. 249).

sur les déversements de fait objectif que les parties connaissaient ou auraient raisonnablement dû connaître au moment de conclure leur entente, et il a conclu que [TRADUCTION] « [l]e moment où la loi sur les déversements a été adoptée par rapport à celui où l'Indemnité [de l'Ontario] a été conclue démontre que cette loi est sans aucun doute la raison pour laquelle l'Indemnité [de l'Ontario] contenait les termes supplémentaires sur lesquels se sont appuyés le juge des requêtes et les intimées » (par. 249).

[100] We note that the "general rule" that renders evidence of the parties' specific negotiations and subjective intentions inadmissible sits uneasily next to the rule that the circumstances surrounding the formation of the agreement inform contractual interpretation. As was noted in *Canadian Contract Law*:

[100] Soulignons que la « règle générale » qui rend inadmissible la preuve relative aux négociations particulières intervenues entre les parties et aux intentions subjectives particulières de ces dernières s'accorde mal avec la règle selon laquelle les circonstances entourant la conclusion d'un contrat en guident l'interprétation. Comme il a été souligné dans *Canadian Contract Law* :

> The difficulty in Canada in now giving content to or even acknowledging the continued existence of the rule stems from Rothstein J.'s statement in *Sattva Capital* that a court must look at the surrounding circumstances or "factual matrix". It seems very difficult to separate what happened during the negotiations from the "surrounding circumstances"; in fact and notwithstanding the decision of the House of Lords in *Chartbrook Ltd. v. Persimmon Homes Ltd.* [[2009] UKHL 38], it is hard to imagine where or how the line could be drawn. [Footnote omitted; p. 746.]

> [TRADUCTION] Au Canada, la difficulté à maintenant déterminer le contenu de la règle ou même à reconnaître le maintien de son existence découle de la déclaration du juge Rothstein dans l'arrêt *Sattva Capital* selon qui un tribunal doit tenir compte des circonstances ou du « fondement factuel ». Il semble très difficile de distinguer ce qui s'est passé lors des négociations des « circonstances »; en fait, et malgré l'arrêt de la Chambre des lords, *Chartbrook Ltd. c. Persimmon Homes Ltd.* [[2009] UKHL 38], il est difficile d'imaginer où ou encore comment tracer la ligne. [Note en bas de page omise; p. 746.]

The majority of the Court of Appeal may have been alluding to this difficulty when it suggested that the rule may be in need of change "as a matter of policy" (para. 112). Although we recognize the uncertainty surrounding this point of law, we would leave its resolution for another day, where it is both necessary to the disposition of the appeal and more directly addressed by the courts below and the parties in their submissions.

Les juges majoritaires de la Cour d'appel faisaient peut-être allusion à cette difficulté lorsqu'ils ont laissé entendre que la règle pourrait devoir être modifiée [TRADUCTION] « pour des raisons de politique générale » (par. 112). Bien que nous soyons conscients de l'incertitude qui entoure cette question de droit, nous sommes d'avis d'en reporter la résolution à une autre occasion, lorsqu'il sera nécessaire de le faire pour trancher le pourvoi, et lorsque les juridictions inférieures se seront prononcées plus directement sur celle-ci et que les parties en auront traité plus directement dans leur argumentation.

[101] Even accepting that the proclamation of the Spills Bill in November 1985 is objective and admissible evidence of what the parties did or ought to have had in contemplation when entering into the

[101] Même en acceptant que la promulgation de la loi sur les déversements en novembre 1985 soit une preuve objective et admissible de ce que les parties avaient envisagé ou auraient dû envisager au moment

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Ontario Indemnity, it is a far leap from that premise to the conclusion that they would have understood "statutory or otherwise" to refer solely to claims brought under the Spills Bill, or "other third party statutory claims which could have been brought at that time" (Ontario A.F., at para. 88). This element of the factual matrix does not support the position that the indemnity excludes claims, actions or proceedings brought under legislation enacted following the execution of the Ontario Indemnity — particularly given that it is expressly said to cover those "existing at December 17, 1979 or which may arise or be asserted thereafter" (A.R., vol. IV, at p. 189 (emphasis added)).

de conclure l'Indemnité de l'Ontario, il est difficile de conclure à partir de cette prémisse que les parties comprenaient que les mots [TRADUCTION] « prévue par la loi ou autrement » renvoyaient seulement aux réclamations présentées en vertu de la loi sur les déversements ou aux « autres réclamations statutaires qui auraient pu être présentées par des tiers à ce moment-là » (m.a. Ontario, par. 88). Cet élément du fondement factuel n'étaye pas la thèse selon laquelle l'indemnité exclut les réclamations, actions ou procédures présentées en vertu d'une loi adoptée après la signature de l'Indemnité de l'Ontario — surtout qu'il est expressément indiqué qu'elle vise les réclamations, actions ou procédures « qui existai[ent] au 17 décembre 1979 ou qui étai[ent] susceptible[s] de prendre naissance ou d'être présentée[s] par la suite » (d.a., vol. IV, p. 189 (nous soulignons)).

[102] Moreover, the proposition that the enactment of the Spills Bill as a surrounding circumstance supports reading the Ontario Indemnity narrowly — as excluding the costs of first party claims — cannot be reconciled with the Spills Bill's creation of a right of action for private persons *and for the Province of Ontario*. On this point, s. 68*i*(2) of the Spills Bill states:

[102] De plus, la thèse selon laquelle l'adoption de la loi sur les déversements, à titre de circonstance, appuie une interprétation restreinte de l'Indemnité de l'Ontario — interprétation selon laquelle cette indemnité exclut les frais liés aux réclamations de première partie — n'est pas conciliable avec le fait que la loi sur les déversements crée un droit d'action en faveur des particuliers *et de la province de l'Ontario*. À cet égard, le par. 68*i*(2) de la loi sur les déversements prévoit ce qui suit :

(2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,

(*a*) for loss or damage incurred as a direct result of,

(i) the spill of a pollutant that causes or is likely to cause adverse effects,

(ii) the exercise of any authority under subsection 1 of section 68*j* or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or

[TRADUCTION]

(2) Sa Majesté du chef de l'Ontario ou du chef du Canada ou toute autre personne a le droit d'obtenir une indemnisation du propriétaire du polluant et de la personne qui exerce un contrôle sur le polluant :

a) en ce qui concerne une perte ou un dommage subis directement à la suite :

(i) du déversement d'un polluant qui a ou aura vraisemblablement des conséquences préjudiciables,

(ii) de l'exercice de tout pouvoir en vertu du paragraphe 1 de l'article 68*j* ou de l'exécution d'une obligation imposée, de l'application d'un arrêté pris, ou d'une directive donnée dans le cadre de la présente partie, ou de la tentative qui est faite à cette fin,

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(iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;

(*b*) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,

from the owner of the pollutant and the person having control of the pollutant.

Indeed, if the parties had (or, at least, ought to have had) the Spills Bill in contemplation when executing the Ontario Indemnity, they would have known that it created first *and* third party liability.

[103] In a similar vein, the Province also advances the curious argument that first party claims should be excluded from the scope of the Ontario Indemnity because its reference to claims, actions and proceedings brought by any "province" does not include those brought by the Government of Ontario (Ontario A.F., at paras. 43 and 93). With respect, the notion that the parties would not have understood the reference to "any province" as including the province in which the Dryden Property is located, and which clearly has the constitutional authority to enact and pursue statutory claims in circumstances such as these, is simply absurd (see motion judge's reasons, at para. 48). Indeed, Ontario may be *the only "province"* to which this provision could apply since, in *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477, this Court held that Manitoba lacked the constitutional jurisdiction to enact and pursue a statutory claim against Dryden Chemicals in respect of the mercury contamination into the rivers.

[104] Finally, the suggestion that the scope of the indemnity excludes the costs of complying with first party regulatory orders is further undermined by its express application to claims, actions and proceedings

(iii) du défaut, notamment par négligence, d'exécuter une obligation imposée ou d'appliquer un arrêté pris ou une directive donnée dans le cadre de la présente partie;

b) en ce qui concerne les frais et les dépenses raisonnables engagés en vue de faire appliquer ou de tenter de faire appliquer un arrêté pris ou une directive donnée dans le cadre de la présente partie.

En fait, si les parties avaient (ou, du moins, devaient avoir) envisagé la loi sur les déversements lorsqu'elles ont signé l'Indemnité de l'Ontario, elles auraient su qu'elle créait une responsabilité à l'égard des premières parties *et* des tiers.

[103] Dans le même ordre d'idées, la province avance aussi l'argument pour le moins étrange selon lequel les réclamations de première partie devraient être exclues du champ d'application de l'Indemnité de l'Ontario parce que les réclamations, actions et procédures présentées par [TRADUCTION] « toute province » auxquelles elle fait référence n'englobent pas celles présentées par le gouvernement de l'Ontario (m.a. Ontario, par. 43 et 93). Avec égards, l'idée selon laquelle les parties n'auraient pas saisi que les termes « toute province » incluaient la province dans laquelle la propriété de Dryden est située et qui a clairement le pouvoir constitutionnel d'édicter et de faire valoir des réclamations statutaires en pareilles circonstances est simplement absurde (voir motifs du juge des requêtes, par. 48). En effet, l'Ontario est peut-être *la seule « province »* à laquelle pourrait s'appliquer cette disposition puisque dans l'arrêt *Interprovincial Co-operatives Ltd. c. La Reine*, [1976] 1 R.C.S. 477, notre Cour a conclu que le Manitoba n'avait pas le pouvoir constitutionnel d'édicter et de faire valoir une réclamation statutaire contre Dryden Chemicals relativement à la contamination par le mercure des rivières.

[104] Enfin, l'idée selon laquelle le champ d'application de l'indemnité exclut les frais engagés pour se conformer aux ordonnances réglementaires de première partie est affaiblie davantage par le fait

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brought by "any agency, body or authority created by statutory or other authority" (A.R., vol. IV, at p. 189). The role of such agencies, bodies or authorities is to act under the authority of Ontario statutes or regulations by, in this case, issuing regulatory orders such as that at issue in this appeal.

que l'indemnité s'applique expressément aux réclamations, actions et procédures intentées par [TRADUCTION] « tout organisme ou autorité créé en vertu d'un pouvoir statutaire ou d'un autre pouvoir » (d.a., vol. IV, p. 189). Le rôle de tels organismes ou autorités est d'agir en vertu des lois ou des règlements de l'Ontario en rendant des ordonnances réglementaires comme celle en cause en l'espèce.

[105] In light of the foregoing, we see no reversible error in the motion judge's consideration of the factual matrix, nor, therefore, in his interpretation of the Province's obligation under para. 1 of the Ontario Indemnity as extending to first party claims, including those brought under subsequently-enacted legislation.

[105] Compte tenu de ce qui précède, nous ne voyons aucune erreur révisable dans l'examen que le juge des requêtes a fait du fondement factuel et nous n'en voyons donc aucune dans son interprétation de l'obligation qu'a la province en vertu du par. 1 de l'Indemnité de l'Ontario, interprétation selon laquelle cette indemnité s'étend aux réclamations de première partie, y compris celles présentées en vertu d'une loi adoptée subséquemment.

(2) Did the Motion Judge Err in Failing to Read Paragraph 1 of the Ontario Indemnity in Light of the Agreement as a Whole?

(2) Le juge des requêtes a-t-il commis une erreur en ne lisant pas le par. 1 de l'Indemnité de l'Ontario à la lumière de l'entente dans son ensemble?

[106] In support of its second argument, the Province submits that paras. 2 and 3 of the Ontario Indemnity, which give Ontario the right to take carriage of a pollution claim and oblige the companies to cooperate with Ontario in relation to a pollution claim, are typical of third party indemnities, such that it should be clear that the Ontario Indemnity was not meant to address first party claims as well. Those two provisions read as follows:

[106] À l'appui de son deuxième argument, la province soutient que les par. 2 et 3 de l'Indemnité de l'Ontario, lesquels confèrent à l'Ontario le droit de prendre en charge une réclamation pour pollution et obligent les sociétés à collaborer avec cette province dans le contexte d'une réclamation pour pollution, sont typiques des indemnités de tiers, de sorte qu'il devrait être clair que l'Indemnité de l'Ontario n'était pas censée viser également les réclamations de première partie. Ces deux dispositions sont rédigées en ces termes :

[TRADUCTION]

2. Upon the receipt of notice of any Pollution Claim directed to Great Lakes or Reed or any predecessor in title of Reed, Great Lakes or Reed or failing Reed, International, as the case may be, shall promptly notify Ontario in writing of receipt of such notice giving reasonable particulars thereof, and Ontario shall have the right to elect to either take carriage of the defence or to participate in the defence and/or settlement of the Pollution Claim and any proceeding relating thereto as Ontario deems appropriate.

2. Sur réception d'un avis de toute réclamation pour pollution adressé à Great Lakes, à Reed ou à tout prédécesseur en titre de Reed, Great Lakes, Reed, ou à défaut de Reed, International, selon le cas, avise rapidement, par écrit, l'Ontario de la réception de cet avis et en donne des détails raisonnables; l'Ontario a le droit de choisir d'assumer la défense ou de participer à la défense et/ou au règlement de la réclamation pour pollution et de toute procédure y afférente, selon ce qu'il estime approprié.

. . .

. . .

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3. Where a Pollution Claim is brought against any of the companies referred to in paragraph 1 hereof, the said companies shall fully cooperate with Ontario in the investigation and defence and settlement of any such Pollution Claim and shall use their best efforts to obtain the cooperation of all personnel having any knowledge or information relevant to any such Pollution Claim and shall make available to Ontario all information . . . .

3. Lorsqu'une réclamation pour pollution est présentée contre l'une ou l'autre des sociétés dont il est question au paragraphe 1 des présentes, lesdites sociétés doivent pleinement collaborer avec l'Ontario à l'enquête, à la défense et au règlement de la réclamation. Elles doivent également mettre tout en œuvre pour obtenir la collaboration de tout le personnel ayant des connaissances ou des informations pertinentes relativement à la réclamation pour pollution et communiquer à l'Ontario tous les renseignements dont elles disposent . . .

[107] We agree with Laskin J.A. that these provisions "are meaningful only for third party claims" against the indemnified parties, and are "utterly meaningless" in the context of first party claims and orders, such as the Director's Order (para. 268). Nor did this escape the motion judge. Rather, he viewed the notification requirement in para. 2 as being "not inconsistent with the Province's obligation to indemnify Weyerhaeuser and Resolute for their costs of complying with the [Director's Order]" (para. 48). In other words, while para. 2 does not provide for first party indemnity, it did not exclude it either, and does not oust the language in para. 1 which clearly includes it. As Weyerhaeuser points out, "[t]he fact that some procedural provisions may be unnecessary or redundant in the case of certain types of claims does not mean that a [c]ourt should ignore clear language confirming that those claims are covered by the [Ontario] Indemnity" (Weyerhaeuser R.F. (Ontario Appeal), at para. 55). (This reasoning would also apply to para. 3, given its similarity to para. 2.) Again, we see no reversible error here.

[107] Nous convenons avec le juge Laskin que ces dispositions [TRADUCTION] « n'ont de sens qu'à l'égard des réclamations de tiers » présentées à l'encontre des parties indemnisées, et qu'elles sont « dénuées de tout sens » dans le contexte de réclamations et d'ordonnances de première partie, tel l'arrêté du directeur (par. 268). Cela n'a pas non plus échappé au juge des requêtes. Celui-ci a plutôt estimé que l'obligation d'aviser imposée par le par. 2 n'était [TRADUCTION] « pas incompatible avec l'obligation qui incombe à la province d'indemniser Weyerhaeuser et Résolu pour les frais engagés pour se conformer à l'[arrêté du directeur] » (par. 48). Autrement dit, s'il ne prévoit pas d'indemnisation de première partie, le par. 2 ne l'exclut pas non plus, et il n'écarte pas le libellé du par. 1 qui la prévoit clairement. Comme le souligne Weyerhaeuser, [TRADUCTION] « [c]e n'est pas parce que certaines dispositions procédurales peuvent être inutiles ou redondantes pour certains types de réclamations qu'un tribunal ne doit pas prendre en considération un texte clair qui confirme que ces réclamations sont visées par l'indemnité [de l'Ontario] » (m.i. Weyerhaeuser (pourvoi de l'Ontario), par. 55). (Ce raisonnement s'appliquerait aussi au par. 3, étant donné sa ressemblance avec le par. 2.) Là encore, nous ne voyons aucune erreur révisable.

(3) Did the Motion Judge Commit Palpable and Overriding Errors of Fact in His Findings of Fact?

(3) Le juge des requêtes a-t-il commis des erreurs manifestes et déterminantes dans ses conclusions de fait?

[108] The Province's third submission relies upon what it says were two palpable and overriding errors of fact by the motion judge. It points, first, to the motion judge's suggestion that Great Lakes "continued to spend significant amounts of money to modernize

[108] Le troisième argument de la province repose sur ce qu'elle affirme être deux erreurs de fait manifestes et déterminantes commises par le juge des requêtes. La province renvoie d'abord à la déclaration de ce dernier que Great Lakes a [TRADUCTION] « continué

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the pulp and paper operation in Dryden" as part of the Settlement Agreement (para. 48). This statement shows, the Province says, that he failed to appreciate that such modernization efforts were given in exchange for the 1979 Indemnity, and that they formed no part of the consideration given by Great Lakes for the Ontario Indemnity. The second putative error is said to be found in the motion judge's conclusion, unsupported by evidence, that the waste disposal site was the source of the mercury contamination into the English and Wabigoon rivers.

de dépenser beaucoup d'argent à la modernisation de l'exploitation de pâtes et papiers de Dryden », conformément à la Convention de règlement (par. 48). Selon elle, cette déclaration montre que le juge n'a pas compris que ces efforts de modernisation étaient consentis en contrepartie de l'Indemnité de 1979, et qu'ils ne faisaient pas partie de la contrepartie donnée par Great Lakes en échange de l'Indemnité de l'Ontario. La deuxième erreur soi-disant commise par le juge se trouverait dans sa conclusion, non étayée par la preuve, que le lieu d'élimination des déchets était la source de la contamination par le mercure des rivières English et Wabigoon.

[109] We begin by rejecting the proposition that the motion judge erred when he stated that the Ontario Indemnity "replaced the 1979 Indemnity and was part of the settlement of the lawsuit in which Great Lakes agreed to pay millions of dollars, and also continued to spend significant amounts of money to modernize the pulp and paper operation in Dryden" (para. 48). Specifically, and contrary to the position taken by our colleagues in the majority, the motion judge did not actually find that the modernization commitment was given to the Province *as part of the settlement in 1985*. Rather, he simply observed that Great Lakes continued to invest in the Dryden pulp and paper mill through to 1985, as it was required to do in exchange for the 1979 Indemnity (which, as the motion judge properly found, was subsequently replaced by the Ontario Indemnity). We agree with the Court of Appeal that there is ample evidence in the record supporting these findings, and that no basis for appellate intervention is disclosed.

[109] Nous commençons par rejeter la proposition selon laquelle le juge des requêtes a commis une erreur en disant que l'Indemnité de l'Ontario [TRADUCTION] « a remplacé l'Indemnité de 1979 et faisait partie du règlement de la poursuite dans le cadre duquel Great Lakes a consenti à verser des millions des dollars, en plus de continuer de dépenser beaucoup d'argent à la modernisation de l'exploitation de pâtes et papiers de Dryden » (par. 48). Plus précisément, et contrairement à la position adoptée par nos collègues de la majorité, le juge des requêtes n'a pas vraiment conclu que la promesse de modernisation avait été faite à la province *dans le cadre du règlement de 1985*. Il a plutôt simplement fait observer que Great Lakes avait continué à investir dans l'usine de pâtes et papiers située à Dryden jusqu'en 1985, comme elle était tenue de le faire en contrepartie de l'Indemnité de 1979 (qui, comme l'a conclu à juste titre le juge des requêtes, a par la suite été remplacée par l'Indemnité de l'Ontario). Nous convenons avec la Cour d'appel que la preuve au dossier étaye amplement ces conclusions et qu'il n'y a aucune raison d'intervenir en appel.

[110] In any event, and to the extent that either of these are "errors", or even "palpable" errors, we again agree with the majority at the Court of Appeal that they could not possibly have had an overriding effect on the conclusion reached by the motion judge. In our respectful view, neither the Province nor our colleagues remotely justify the exaggerated claim that such minor and collateral findings of fact somehow acquired an overriding significance so as to determine the outcome of the case (*Benhaim*

[110] Quoi qu'il en soit, et dans la mesure où il s'agit dans l'un ou l'autre cas d'« erreurs », ou même d'erreurs « manifestes », nous convenons aussi avec les juges majoritaires de la Cour d'appel que ces soi-disant erreurs ne sauraient avoir eu d'effet déterminant sur la conclusion du juge des requêtes. À notre humble avis, ni la province ni nos collègues n'ont un tant soit peu justifié la prétention exagérée voulant que des conclusions de fait mineures et accessoires de la sorte aient acquis une importance primordiale

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v. St-Germain, 2016 SCC 48, [2016] 2 S.C.R. 352, at para. 38, quoting *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46) — particularly where the motion judge's ultimate conclusion on the scope of the indemnity rested on *different* factual and contextual considerations. This ground of appeal must fail.

(4) Did the Motion Judge's Interpretation of the Ontario Indemnity Render the Agreement Unenforceable as an Impermissible Fetter on the Legislature's Law-Making Powers?

[111] The Province's argument here is that the motion judge's interpretation of the Ontario Indemnity — that it extends to the cost of compliance with first party statutory claims made under legislation enacted *after* the indemnity was given to Great Lakes and Reed in 1985 — has the impermissible effect of indirectly fettering the legislature's law-making power. *Ex hypothesi*, the expense that the Province would incur by indemnifying Great Lakes and Reed for compliance with such statutory claims would deter the legislature from enacting the enabling legislation in the first place. Based on the "presumption of law in favour of a legal, enforceable interpretation of a contract", the Province says that the motion judge's interpretation should be rejected and the Ontario Indemnity should instead be read as excluding the costs of complying with the Director's Order and other first party statutory claims based on legislation enacted post-1985 (Ontario A.F., at para. 132).

[112] This argument rests on two key premises. The first is that the motion judge "implied a term into [the Ontario Indemnity] under which [the Province] is required to compensate for costs incurred to comply with an order made under future legislation" (Ontario A.F., at para. 116 (emphasis added)). The second is that a contract that *implicitly* discourages legislative action is invalid and unenforceable. As to this second point, the Province says that an indirect fetter of legislative power — which occurs where a

au point de déterminer l'issue de l'affaire (*Benhaim c. St-Germain*, 2016 CSC 48, [2016] 2 R.C.S. 352, par. 38, citant *South Yukon Forest Corp. c. R.*, 2012 CAF 165, 4 B.L.R. (5th) 31, par. 46) — en particulier lorsque la conclusion finale du juge des requêtes sur le champ d'application de l'indemnité reposait sur des considérations factuelles et contextuelles *différentes*. Ce moyen d'appel doit être rejeté.

(4) L'interprétation donnée par le juge des requêtes à l'Indemnité de l'Ontario a-t-elle pour effet de rendre l'entente non exécutoire parce qu'elle constitue une entrave inacceptable aux pouvoirs de légiférer de la législature?

[111] L'argument ici avancé par la province est que l'interprétation que le juge des requêtes a faite de l'Indemnité de l'Ontario — interprétation selon laquelle elle s'étend aux frais engagés pour donner suite aux réclamations de première partie faites en vertu d'une loi adoptée *après* que l'indemnité ait été consentie à Great Lakes et à Reed en 1985 — a comme effet inacceptable d'entraver indirectement le pouvoir de légiférer de la législature. Suivant cette hypothèse, la dépense qu'engagerait la province pour indemniser Great Lakes et Reed afin qu'elles puissent donner suite à de telles réclamations aurait pour effet de dissuader la législature d'adopter la loi habilitante. Compte tenu de la [TRADUCTION] « présomption de droit favorisant une interprétation contractuelle qui soit légale et exécutoire », la province affirme que l'interprétation du juge des requêtes devrait être rejetée et que l'Indemnité de l'Ontario devrait plutôt être interprétée comme excluant les frais engagés pour se conformer à l'arrêté du directeur et pour donner suite à d'autres réclamations de première partie fondées sur une loi adoptée après 1985 (m.a. Ontario, par. 132).

[112] Cet argument repose sur deux prémisses clés. La première est que le juge des requêtes [TRADUCTION] « a introduit comme modalité implicite à [l'Indemnité de l'Ontario] que [la province] devait verser une indemnité pour les frais engagés pour se conformer à une ordonnance prise en vertu d'une loi future » (m.a. Ontario, par. 116 (nous soulignons)). La deuxième est qu'un contrat qui décourage *implicitement* une action législative est invalide et non exécutoire. À ce sujet, la province affirme qu'une entrave indirecte au pouvoir

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contract imposes an obligation on the government to compensate the other contracting party in the event of future legislative action or inaction — "should only be permitted where there is an express intention to allocate commercial risk" in this manner (Ontario A.F., at para. 115).

[113] We agree with the majority at the Court of Appeal. The Province's argument rests on a mischaracterization of the terms of the Ontario Indemnity, and a significant misunderstanding of the doctrine of fettering.

(a) *The Motion Judge Did Not Imply Any Terms Into the Ontario Indemnity Regarding the Effect of Orders Pursuant to Subsequently-Enacted Legislation*

[114] We begin by rejecting the Province's stated but unelaborated premise that the motion judge's conclusion rested on the implication of terms. Rather, his conclusion was drawn from a straightforward interpretation of the scope of the Province's obligation, expressly stated in para. 1 of the Ontario Indemnity as extending to "any obligation, liability, damage, loss, costs or expenses incurred . . . as a result of any claim, action or proceeding . . . existing at December 17, 1979 or which may arise or be asserted thereafter" (A.R., vol. IV, at p. 189 (emphasis added)). The motion judge's conclusion is fortified by para. 4, which provides that the indemnity is valid "without limitation as to time" (*ibid.*, at p. 191). These provisions contemplate that Reed and Great Lakes are to be indemnified in respect of *all* Pollution Claims, as defined, *whenever asserted*. Neither the text nor the surrounding circumstances support the restriction that the Province would seek to have recognized.

[115] The majority at the Court of Appeal was correct. There was no error — let alone a palpable and overriding error — in the motion judge's conclusion that the Ontario Indemnity requires the Province to indemnify the costs of compliance with an order

législatif — qui se produit lorsqu'un contrat impose au gouvernement l'obligation d'indemniser l'autre partie contractante en cas d'action ou d'inaction législative future — [TRADUCTION] « ne devrait être permise que s'il existe une intention expresse de répartir [ainsi] le risque commercial » (m.a. Ontario, par. 115).

[113] Nous partageons l'avis des juges majoritaires de la Cour d'appel. L'argument de la province repose sur une interprétation erronée des modalités de l'Indemnité de l'Ontario et sur une très mauvaise compréhension de la doctrine de l'entrave.

a) *Le juge des requêtes n'a introduit aucune modalité implicite à l'Indemnité de l'Ontario en ce qui a trait à l'effet des ordonnances prises en vertu d'une loi adoptée subséquemment*

[114] Nous commençons par rejeter la prémisse mise de l'avant sans plus d'explication par la province que la conclusion du juge des requêtes reposait sur l'introduction de modalités implicites. Sa conclusion reposait plutôt sur une interprétation simple de la portée de l'obligation de la province, explicitement énoncée au par. 1 de l'Indemnité de l'Ontario, selon laquelle celle-ci s'étendait à [TRADUCTION] « l'ensemble des obligations, responsabilités, dommages, pertes, frais ou dépenses qu'est susceptible d'entraîner [. . .] toute réclamation, action ou procédure [. . .] qui existait au 17 décembre 1979 ou qui était susceptible de prendre naissance ou d'être présentée par la suite » (d.a., vol. IV, p. 189 (nous soulignons)). La conclusion du juge des requêtes est renforcée par le par. 4, qui prévoit que l'indemnité n'est assujettie [TRADUCTION] « à aucune limite de temps » (*ibid.*, p. 191). Il ressort de ces dispositions que Reed et Great Lakes doivent être indemnisées à l'égard de *toute* réclamation pour pollution, tel que cette expression est définie, *peu importe le moment où elle est présentée*. Ni le libellé du texte ni les circonstances n'appuient la restriction que la province souhaiterait voir reconnue.

[115] Les juges majoritaires de la Cour d'appel ont raison. Il n'y a aucune erreur — et encore moins une erreur manifeste et déterminante — dans la conclusion du juge des requêtes selon laquelle l'Indemnité de l'Ontario oblige la province à verser une

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made under subsequently-enacted legislation. More to the point, the motion judge implied no term into the agreement.

(b) *The Fettering Doctrine Does Not Render Unenforceable Any Contract That Discourages Legislative Action or Inaction, Whether Implicitly or Explicitly*

[116] As a matter of constitutional law, the executive of the Canadian state cannot bind or restrict the legislature's sovereign law-making power, whether by contract or otherwise. As this Court affirmed in *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, "Ministers of State cannot . . . by means of contractual obligations entered into on behalf of the State fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations" (p. 560, quoting *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389, at p. 390). Similarly, this Court recently explained in *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, that "the executive is incapable of interfering with the legislature's power to enact, amend and repeal legislation", with the result being that "[a]n executive agreement that purports to bind the parties' respective legislatures cannot, therefore, have any such effect" (para. 53).

[117] It follows that a contract entered into by the executive that purports to require that a certain law be enacted, amended or repealed cannot be enforced by way of injunction or specific performance. The legislature's sovereign power to "make or unmake any law whatever" means that it can never be bound by such an order (P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 324). This is sometimes referred to as the rule against "direct fettering".

indemnité pour les frais engagés pour se conformer à une ordonnance prise en vertu d'une loi adoptée subséquemment. Plus précisément, le juge des requêtes n'a introduit aucune modalité implicite dans l'entente.

b) *La doctrine de l'entrave ne rend pas non exécutoire le contrat qui décourage, implicitement ou explicitement, une action ou une inaction législative*

[116] Sur le plan constitutionnel canadien, le pouvoir exécutif ne peut lier l'exercice souverain du pouvoir législatif ni restreindre celui-ci, que ce soit par contrat ou autrement. Comme la Cour l'a affirmé dans le *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525, [TRADUCTION] « [l]es ministres d'État ne sauraient [. . .] au moyen d'obligations contractées pour le compte de l'État, imposer des restrictions à leur propre liberté, à celle de leurs successeurs ou à celle d'autres députés, de proposer, d'étudier et, s'ils le jugent opportun, de voter des lois, fussent-elles incompatibles avec les obligations contractuelles » (p. 560, citant *West Lakes Ltd. c. South Australia* (1980), 25 S.A.S.R. 389, p. 390). De même, notre Cour a récemment expliqué dans le *Renvoi relatif à la réglementation pancanadienne des valeurs mobilières*, 2018 CSC 48, [2018] 3 R.C.S. 189, que « le pouvoir exécutif est incapable de restreindre le pouvoir de la législature d'adopter, de modifier et d'abroger des lois », de sorte qu'« [u]n accord conclu par différents exécutifs et censé lier les législatures respectives des parties ne peut donc avoir un tel effet » (par. 53).

[117] Il s'ensuit qu'un contrat conclu par le pouvoir exécutif qui vise à obliger à ce qu'une certaine loi soit adoptée, modifiée ou abrogée ne peut faire l'objet d'une exécution par injonction ou en nature. Le pouvoir souverain de la législature [TRADUCTION] « de faire ou d'abroger quelque loi que ce soit » signifie que l'exercice de ce pouvoir ne peut être lié par une telle prescription (P. W. Hogg, P. J. Monahan et W. K. Wright, *Liability of the Crown* (4e éd. 2011), p. 324). C'est ce qu'on appelle parfois la règle interdisant l'« entrave directe ».

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[118] At the same time — and this is the point that eludes the Province — there is an important difference between a contract that impermissibly *fetters* the legislature's power to enact, amend and repeal legislation, and a contract whose breach by the Crown exposes it to *liability*. Where the legislature exercises its law-making power in a manner inconsistent with the terms of a contract, the Crown may still face consequences in the form of liability in damages. While the possibility of such liability may deter the legislature from acting in a manner that runs contrary to the Crown's contractual promises — sometimes referred to as an "indirect fetter" — the legislature is not thereby truly *fettered*. Its freedom of action in these circumstances "is not diminished by holding that the enactment of a particular piece of legislation gives rise to an action for damages for breach of contract" (S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at p. 453; see also K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at p. 2-10). As is explained in *Liability of the Crown*:

> While a contract entered into by the Crown (or anyone else) cannot validly impose a *direct* fetter on legislative power, an exercise of legislative power in breach of contract will give rise to an obligation on the Crown to compensate the private contracting party for any loss suffered by the breach of contract. That obligation is an *indirect* fetter on legislative power, but it is not forbidden by the rule against fettering; on the contrary, it is required by the rule of law. [Emphasis in original; p. 325.]

[119] We say nothing new here: the same point emerges from *Wells v. Newfoundland*, [1999] 3 S.C.R. 199. There, the claimant Wells served as a commissioner on a statutory board, under a contract which entitled him to hold office during good behaviour until the age of 70. By legislation, the board was restructured and Wells' office was abolished. When he was not reappointed to the new board, he sued for breach of contract.

[118] Par ailleurs — et c'est le point qui échappe à la province —, il y a une différence importante entre un contrat qui *entrave* de façon inacceptable le pouvoir de la législature d'adopter, de modifier et d'abroger une loi, et un contrat dont une violation par la Couronne expose celle-ci à une *responsabilité*. Si la législature exerce son pouvoir de légiférer d'une manière incompatible avec les modalités d'un contrat, la Couronne peut quand même être exposée à des conséquences prenant la forme d'une responsabilité pour dommages. Bien que l'éventualité d'une telle responsabilité puisse dissuader la législature d'agir d'une manière qui va à l'encontre des promesses contractuelles de la Couronne, ce qu'on appelle parfois une « entrave indirecte », la législature n'est pas de ce fait véritablement *entravée*. Sa liberté d'action dans les circonstances [TRADUCTION] « n'est pas réduite du fait que l'on affirme que l'édiction d'une mesure législative en particulier donne ouverture à une action en dommages-intérêts pour violation de contrat » (S. M. Waddams, *The Law of Contracts* (7e éd. 2017), p. 453; voir aussi K. Horsman et G. Morley, dir., *Government Liability : Law and Practice* (feuilles mobiles), p. 2-10). Comme il est expliqué dans l'ouvrage *Liability of the Crown* :

> [TRADUCTION] Bien qu'un contrat conclu par la Couronne (ou par n'importe qui d'autre) ne puisse valablement imposer d'entrave *directe* au pouvoir législatif, l'exercice de ce pouvoir en violation dudit contrat donnera naissance à une obligation pour la Couronne d'indemniser la partie contractante privée pour toute perte subie en conséquence de cette violation. Cette obligation est une entrave *indirecte* au pouvoir législatif, mais elle n'est pas interdite par la règle interdisant l'entrave; au contraire, elle est requise par la primauté du droit. [En italique dans l'original; p. 325.]

[119] Il n'y a rien de nouveau dans ce que nous venons de dire : la même chose se dégage de l'arrêt *Wells c. Terre-Neuve*, [1999] 3 R.C.S. 199. Dans cette affaire, le demandeur, M. Wells, était commissaire au sein d'un organisme établi par la loi, en vertu d'un contrat qui lui permettait d'occuper son poste à titre inamovible jusqu'à l'âge de 70 ans. La commission a été restructurée et le poste de M. Wells aboli par voie législative. N'ayant pas été nommé à la nouvelle commission, il a intenté une poursuite pour violation de contrat.

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[120] While accepting that the legislature had throughout retained *unfettered* authority to restructure the Board and eliminate Wells' office, this Court nonetheless found for Wells by applying the "crucial distinction . . . between the Crown legislatively avoiding a contract, and altogether escaping the legal consequences of doing so" (para. 41). The Court went on to explain that:

> In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations — rights of the highest importance to the individual — those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens. [para. 46]

[121] *Wells* therefore affirms the distinction between *fettering* and *exposure to liability*. A legislature must be free — that is, *unfettered* — to exercise its law-making powers as it sees fit, within constitutional bounds. But where the legislature exercises its powers in such a way as to breach a government contract (that is, a contract between the executive and a counterparty), the Crown is, as a general rule, liable, unless the legislature also expressly and unambiguously extinguished the counterparty's rights of action or excluded Crown liability.

[122] *Even if*, therefore (to return to the facts of this appeal), the Ontario Indemnity has the effect of imposing liability upon the Province to indemnify against first party claims — or even of deterring or otherwise discouraging the legislature from exercising its law-making power in a certain way — *Wells* makes it clear that these effects do not render the agreement unenforceable at law. *Wells* also undermines the proposition, advanced by the Province, that indirect fettering "should only be permitted where there is an express intention to allocate commercial

[120] Bien qu'elle ait reconnu que la législature avait toujours conservé le pouvoir *libre de toute entrave* de restructurer la Commission et d'éliminer le poste occupé par M. Wells, notre Cour a néanmoins conclu en faveur de ce dernier en appliquant la « distinction fondamentale [qui existe] entre le fait pour la Couronne de se soustraire à l'exécution d'un contrat au moyen d'une loi, et le fait d'échapper entièrement aux conséquences juridiques d'une telle mesure » (par. 41). La Cour a ensuite expliqué :

> Dans un pays régi par la primauté du droit, nous présumons que le gouvernement respectera ses obligations, à moins qu'il n'exerce expressément son pouvoir de ne pas le faire. Faute d'une intention expresse et claire d'abroger des droits et des obligations — droits de la plus haute importance pour l'individu — ces droits demeurent en vigueur. Prétendre le contraire signifierait que le gouvernement n'est lié que par son caprice, non par sa parole. Au Canada, cela est inacceptable et ne concorde pas avec la façon dont on envisage la relation entre l'État et ses citoyens. [par. 46]

[121] L'arrêt *Wells* confirme donc la distinction entre l'*entrave* et le *fait de s'exposer à une responsabilité*. Une législature doit être libre — c'est-à-dire *n'être soumise à aucune entrave* — d'exercer ses pouvoirs de légiférer comme elle le juge indiqué, dans les limites fixées par la Constitution. Cependant, si elle exerce ses pouvoirs d'une façon telle qu'elle viole un contrat gouvernemental (c'est-à-dire un contrat entre le pouvoir exécutif et une partie cocontractante), la Couronne est, en règle générale, responsable, à moins que la législature ait aussi, expressément et sans équivoque, éteint les droits d'action de la partie cocontractante ou exclu la responsabilité de la Couronne.

[122] *Même si*, par conséquent (pour revenir aux faits du présent pourvoi), l'Indemnité de l'Ontario a pour effet d'imposer à la province une obligation de couvrir les réclamations de première partie — ou même de dissuader ou autrement décourager la législature d'exercer son pouvoir de légiférer d'une certaine façon —, l'arrêt *Wells* établit clairement que ces effets ne rendent pas l'entente non exécutoire en droit. L'arrêt *Wells* mine également la thèse, avancée par la province, selon laquelle l'entrave indirecte [TRADUCTION] « ne devrait être permise que s'il

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risk" (Ontario A.F., at para. 115), since there was no such express allocation in that case. Even though Wells' employment contract was silent on the point of compensation in the event of abolition of his office, this Court had no difficulty finding that "[t]he most plausible interpretation of the respondent's terms of employment is that while his position, and the authority flowing from it, could be eliminated, he could not be deprived of the benefits of the job except by virtue of age or bad behaviour" (para. 36).

existe une intention expresse de répartir le risque commercial » (m.a. Ontario, par. 115), puisqu'aucune répartition expresse de ce genre n'a été faite en l'espèce. Même si le contrat d'emploi de M. Wells était muet sur la question de l'indemnisation en cas d'abolition de son poste, notre Cour n'a eu aucune difficulté à conclure que « [l]'interprétation la plus vraisemblable des conditions d'emploi de l'intimé est que même si son poste et le pouvoir qui en découle pouvaient être abolis, il ne pouvait pas être privé des avantages de l'emploi sauf en raison de son âge ou d'une inconduite » (par. 36).

[123] For its part, the Province relies heavily on this Court's decision in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919 ("*Pacific National No. 1*"). At issue in that case was a contract between Pacific National Investments ("PNI") and the City of Victoria, which required PNI to redevelop a seaside neighbourhood and required the City to pass the necessary zoning and to grant subdivision. Bowing to public pressure, the City subsequently down-zoned to limit further development, thereby scuttling PNI's redevelopment. PNI sued, arguing that its contract implicitly prohibited the City from re-zoning the lands until the expiry of a reasonable amount of time, and that the City breached this implicit term when it re-zoned the land.

[123] Pour sa part, la province s'appuie fortement sur l'arrêt de notre Cour *Pacific National Investments Ltd. c. Victoria (Ville)*, 2000 CSC 64, [2000] 2 R.C.S. 919 (« *Pacific National n° 1* »). Cette affaire portait sur un contrat intervenu entre Pacific National Investments (« PNI ») et la Ville de Victoria, aux termes duquel PNI devait réaménager un quartier situé au bord de la mer alors que la Ville devait adopter le zonage nécessaire et approuver le lotissement. S'inclinant devant la pression publique, la Ville a par la suite modifié le zonage afin de limiter l'aménagement ultérieur, torpillant ainsi le plan de réaménagement de PNI. Cette dernière a engagé des poursuites, soutenant que son contrat interdisait implicitement à la Ville de modifier le zonage des terrains avant l'expiration d'un délai raisonnable et que la Ville avait contrevenu à cette clause implicite en modifiant le zonage des terrains.

[124] In finding for the City, this Court explained that, as a creature of statute, the City could only agree to the implied term posited by PNI if it had the statutory authority to do so. And even accepting that such a term might be read into the contract, such a term would nevertheless have been invalid as "an illegal fetter on [the City's] discretionary legislative powers" (para. 66). Indeed, the Court went as far as to reject the distinction between direct and indirect fettering, stating that "an agreement to compensate for a legislative decision . . . is no more acceptable than an outright restriction on the legislative power" (para. 63). Here, the Court was responding to an argument that a "duty to compensate . . . along these lines would necessarily make that legislative choice subject to considerations other than an objective

[124] En concluant en faveur de la Ville, notre Cour a expliqué qu'en tant que création statutaire, la Ville ne pouvait consentir à une clause implicite comme celle invoquée par PNI que si la loi lui conférait le pouvoir de le faire. Et, même en admettant qu'une telle clause puisse être considérée comme faisant partie du contrat, elle aurait été invalide puisqu'elle aurait constitué « une entrave illicite aux pouvoirs de réglementation discrétionnaires de la [Ville] » (par. 66). En fait, la Cour est même allée jusqu'à rejeter la distinction entre l'entrave directe et indirecte, affirmant qu'« une entente d'indemnisation pour une décision en matière de réglementation [. . .] n'est pas plus acceptable qu'une restriction catégorique du pouvoir de réglementation » (par. 63). La Cour répondait alors à l'argument voulant qu'une

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examination of what is best for the community of which [PNI] is undoubtedly also a part" (para. 64).

« obligation d'indemniser [. . .] de ce genre [. . .] assujettirait nécessairement cette décision [en matière de réglementation] à des considérations autres que l'examen objectif du meilleur intérêt de la collectivité [dont PNI fait indubitablement aussi partie] » (par. 64).

[125] The difficulty is that this reasoning is irreconcilable with the Court's decision only one year earlier in *Wells*. If the law commands that Wells be entitled to compensation for the breach of his employment contract that resulted from legislative action, we struggle to explain why the law would not operate similarly so as to entitle PNI to compensation for the breach of its development contract with the City when the City Council decided to "downzone" the seaside lands. We note that the reasoning in *Pacific National No. 1* has been the subject of heavy criticism on this very issue of fettering. The authors of *Liability of the Crown* take the view that "the decision is wrong, even if it is limited to the exercise of municipal legislative powers" (p. 328 (emphasis added); see also *Government Liability*, at p. 2-10; and *Andrews v. Canada (Attorney General)*, 2014 NLCA 32, 354 Nfld. & P.E.I.R. 42, at paras. 34-41). Likewise, Perell J. in *Rio Algom Ltd. v. Canada (Attorney General)*, 2012 ONSC 550, said there is "a very strong argument that *Pacific National No. 1* is wrong and inconsistent with other equally binding and authoritative Supreme Court of Canada's decisions" (para. 153 (CanLII) (emphasis added); see also *Ontario First Nations (2008) Limited Partnership v. Ontario (Minister of Aboriginal Affairs)*, 2013 ONSC 7141, 118 O.R. (3d) 356, at paras. 53-59).

[125] Le problème tient à ce que ce raisonnement est inconciliable avec l'arrêt *Wells* que notre Cour a rendu seulement un an plus tôt. Si le droit exige que M. Wells ait droit à une indemnité pour la violation de son contrat d'emploi résultant d'une action législative, il nous est difficile d'expliquer pourquoi le droit ne s'appliquerait pas de la même manière afin de permettre à PNI d'être indemnisée pour la violation de son contrat d'aménagement avec la Ville lorsque le conseil municipal a décidé de « modifier le zonage » des terrains situés au bord de la mer. Soulignons que le raisonnement suivi dans l'arrêt *Pacific National nº 1* a été fortement critiqué sur la question précise de l'entrave. Les auteurs de l'ouvrage *Liability of the Crown* estiment que [TRADUCTION] « la décision est erronée, même si elle se limite à l'exercice des pouvoirs de réglementation municipaux » (p. 328 (nous soulignons); voir aussi *Government Liability*, p. 2-10; et *Andrews c. Canada (Attorney General)*, 2014 NLCA 32, 354 Nfld. & P.E.I.R. 42, par. 34-41). De même, le juge Perell a dit, dans la décision *Rio Algom Ltd. c. Canada (Attorney General)*, 2012 ONSC 550, que [TRADUCTION] « des raisons solides permettent d'avancer que l'arrêt *Pacific National nº 1* est erroné et qu'il est incompatible avec d'autres arrêts de la Cour suprême du Canada dont la force obligatoire et la valeur de précédent sont équivalentes » (par. 153 (CanLII) (nous soulignons); voir aussi *Ontario First Nations (2008) Limited Partnership c. Ontario (Minister of Aboriginal Affairs)*, 2013 ONSC 7141, 118 O.R. (3d) 356, par. 53-59).

[126] Significantly, this Court in *Pacific National No. 1* did not purport to overrule *Wells*, and instead distinguished it on two bases. First, the majority observed that *Wells* "did not deal with a contract governing the exercise of municipal legislative powers" (para. 61). The logic appears to be that, unlike a province, a municipality cannot indirectly fetter its law-making powers in the absence of "legislation

[126] Fait important, dans *Pacific National nº 1*, notre Cour n'entendait pas écarter l'arrêt *Wells*, et elle a plutôt établi une distinction entre celui-ci et l'affaire dont elle était saisie pour deux raisons. Premièrement, les juges majoritaires ont fait observer que, dans l'affaire *Wells*, « [i]l n'était pas question [. . .] d'un contrat régissant l'exercice de pouvoirs de réglementation municipaux » (par. 61). Le raisonnement

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expressing a public policy permitting it to do so" (para. 65). With great respect, and while the failing may well be ours, this distinction eludes us. As Bastarache J. observed in dissent, public policy would tend to work the other way — there is no reason why the principle that the government should honour its commitments unless its legislature explicitly exercises the power not to (as was stated in *Wells*, at para. 46) should not apply with equal force in the context of municipalities (see *Pacific National No. 1*, at para. 112). In any event, this distinction would not assist the Province here, since it — and not a municipality — agreed to the Ontario Indemnity. Meaning, the circumstances of this appeal are analogous to *Wells*, and not to *Pacific National No. 1*.

semble être que, contrairement à une province, une municipalité ne peut indirectement entraver ses pouvoirs de réglementation à moins « qu'une mesure législative n'énonce une politique officielle l'autorisant à le faire » (par. 65). Avec égards, et bien que la faute puisse fort bien nous en incomber, cette distinction nous échappe. Comme l'a fait remarquer le juge Bastarache en dissidence, cette politique tend plutôt vers l'autre sens; il n'y a aucune raison pour laquelle le principe selon lequel le gouvernement devrait honorer ses engagements à moins que sa législature n'exerce expressément son pouvoir de ne pas le faire (ainsi qu'il a été déclaré dans *Wells*, au par. 46) ne devrait pas s'appliquer avec la même force dans le contexte municipal (voir *Pacific National n° 1*, par. 112). Quoi qu'il en soit, cette distinction ne serait pas utile à la province en l'espèce, puisque c'est elle — et non une municipalité — qui a consenti à l'Indemnité de l'Ontario. Ainsi, les circonstances du présent pourvoi sont analogues à celles de l'affaire *Wells*, et non à celles de l'affaire *Pacific National n° 1*.

[127] The second way that the majority in *Pacific National No. 1* distinguished *Wells* was to describe Wells' employment agreement as "a business contract in relation to the hiring of senior civil servants" (para. 61). In other words, a distinction was drawn between "business contracts" which *can* have the effect of indirectly fettering law-making powers, and other kinds of contracts which *cannot*. Again with great respect, we do not see the significance of this distinction — particularly since the contract in *Pacific National No. 1* for land redevelopment could hardly have been seen as less of a "business contract" than Wells' employment contract. In any event, if the principle that the government should honour its commitments unless its legislature explicitly exercises the power not to is to be cast aside, we see no reason for doing so in respect of one kind of contract and not another.

[127] Deuxièmement, les juges majoritaires dans *Pacific National n° 1* ont établi une distinction d'avec l'arrêt *Wells* en décrivant le contrat d'emploi de M. Wells comme un « contrat d'affaire[s] portant sur l'engagement de hauts fonctionnaires » (par. 61). Autrement dit, une distinction a été établie entre les « contrats d'affaires » qui *peuvent* avoir pour effet d'entraver indirectement les pouvoirs de légiférer et les autres types de contrats qui *ne le peuvent pas*. Là encore, et avec égards, nous ne voyons pas l'importance de cette distinction — d'autant plus que, dans l'affaire *Pacific National n° 1*, on pouvait difficilement considérer que le contrat de réaménagement des terrains était moins un « contrat d'affaires » que le contrat d'emploi de M. Wells. De toute façon, s'il faut écarter le principe selon lequel le gouvernement devrait honorer ses engagements à moins que la législature n'exerce expressément son pouvoir de ne pas le faire, nous ne voyons aucune raison de l'écarter à l'égard d'un type de contrat et non d'un autre.

[128] We also note that the statements in *Pacific National No. 1* regarding fettering were called into question only four years later when that dispute found its way back to this Court in *Pacific National*

[128] Soulignons également que les déclarations relatives à l'entrave faites par la Cour dans l'arrêt *Pacific National n° 1* ont été mises en doute seulement quatre ans plus tard alors que la Cour a de

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Investments Ltd. v. Victoria (City), 2004 SCC 75, [2004] 3 S.C.R. 575 ("*Pacific National No. 2*"). In its action against the City, PNI had also claimed in unjust enrichment for the $1.08 million that it had spent on improvements made in performing the failed development contract. In finding for PNI, a unanimous Court rejected the City's argument that the obligation to make restitution in those circumstances would constitute an indirect fetter on the City's, legislative power, explaining that "[t]he power to down-zone in the public interest does not immunize the City against claims for unjust enrichment" (para. 52). Commenting on this case, the authors of *Liability of the Crown* had the following to say:

> [In *Pacific National No. 2*], Binnie J. said: "Municipalities are subject to the law of unjust enrichment in the same way as other individuals or entities". We would add: what a shame that the same cannot be said of the law of contract! [Footnote omitted; p. 329.]

[129] Bearing all of this in mind, and to the extent that *Pacific National No. 1* can be taken as holding that the Crown will not be liable in damages for the breach of a governmental contract where that breach was caused by legislative action (or inaction), we are of the respectful view that it does not state the law as it relates to the fettering doctrine. On this point, we consider ourselves bound by *Wells*, and not *Pacific National No. 1*.

(c) *Conclusion on the Fettering Issue*

[130] It follows that we reject the Province's arguments that invoke the doctrine of fettering. Even if the Ontario Indemnity was to be interpreted as deterring the legislature from enacting new first party statutory claims, which would then be covered by the Province's obligation under para. 1 when asserted against Great Lakes and Reed, such an effect does not render the contract unenforceable or invalid such

nouveau été saisie du litige dans *Pacific National Investments Ltd. c. Victoria (Ville)*, 2004 CSC 75, [2004] 3 R.C.S. 575 (« *Pacific National n° 2* »). Dans son action contre la Ville, PNI avait également soulevé l'enrichissement sans cause pour le 1,08 million de dollars qu'elle avait dépensé pour les améliorations apportées dans l'exécution du contrat d'aménagement qui a échoué. Concluant en faveur de PNI, la Cour a unanimement rejeté l'argument de la Ville selon lequel l'obligation de restitution dans les circonstances constituerait une entrave indirecte au pouvoir de réglementation de la Ville, expliquant que « [l]e pouvoir de modifier le zonage dans l'intérêt public ne met pas la Ville à l'abri d'une action fondée sur l'enrichissement sans cause » (par. 52). Commentant cette affaire, les auteurs de l'ouvrage *Liability of the Crown* ont affirmé ce qui suit :

> [TRADUCTION] [Dans l'arrêt *Pacific National n° 2*], le juge Binnie a dit : « L'enrichissement sans cause s'applique à une municipalité comme à toute personne physique ou morale ». Nous tenons à ajouter ce qui suit : quel dommage que l'on ne puisse en dire autant du droit des contrats! [Note en bas de page omise; p. 329.]

[129] Compte tenu de tout ce qui précède, et dans la mesure où l'arrêt *Pacific National n° 1* peut être interprété comme établissant que la Couronne ne sera pas responsable des dommages causés par la violation d'un contrat gouvernemental si cette violation résulte d'une action (ou d'une inaction) législative, nous croyons respectueusement que cet arrêt n'énonce pas le droit applicable en ce qui concerne la doctrine de l'entrave. Sur ce point, nous considérons que nous sommes liés par l'arrêt *Wells*, et non par l'arrêt *Pacific National n° 1*.

c) *Conclusion sur la question de l'entrave*

[130] Nous rejetons donc les arguments avancés par la province au sujet de la doctrine de l'entrave. Même s'il fallait considérer que l'Indemnité de l'Ontario a pour effet de dissuader la législature d'édicter des mesures permettant de nouvelles réclamations de première partie, réclamations qui, après avoir été présentées contre Great Lakes et Reed, relèveraient ensuite de l'obligation imposée à la province par le

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that the legislature was fettered. This accords with the authority of this Court's judgment in *Wells*.

[131] It also follows that we do not view the motion judge's interpretation of the Ontario Indemnity — as requiring the Province to indemnify the cost of complying with orders made under subsequent legislation — as impermissibly fettering the Ontario Legislature's law-making power. While the enactment of new statutory claims might expose the Province to greater liability under the Ontario Indemnity (which might therefore discourage such enactments in the first place), the Ontario Indemnity, as interpreted by the motion judge, in no way prevents the legislature from exercising its sovereign authority to "make or unmake any law whatever" (A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at p. 40, cited in *Reference re Pan-Canadian Securities Regulation*, at para. 54).

C. *The Resolute and Weyerhaeuser Appeals*

[132] The appeals brought by Resolute and Weyerhaeuser ask whether either or both of them enjoy the benefit of the Ontario Indemnity by operation of the enurement clause (para. 6) of that agreement. That clause states that the indemnity "shall be binding upon and enure to the benefit of the respective successors and assigns of Ontario, Reed, International and Great Lakes" (A.R., vol. IV, at p. 191 (emphasis added)).

[133] The parties' submissions on this question are directed to three separate, but related, issues, which we will address below, in turn. The first is whether the benefit of the Ontario Indemnity extends to all of Great Lakes' successors and assigns, in perpetuity, irrespective of whether those successors and assigns had themselves assigned their benefits thereunder to third parties. Resolute and Weyerhaeuser say it does, while the Province (like the Court of Appeal) says that the assignor of a chose in action — such as

par. 1, un tel effet ne rend pas le contrat non exécutoire ou invalide de sorte qu'il y a eu entrave au pouvoir législatif. Cela est compatible avec l'arrêt de notre Cour dans l'affaire *Wells*.

[131] Il s'ensuit également que nous ne considérons pas que l'interprétation donnée à l'Indemnité de l'Ontario par le juge des requêtes — selon laquelle la province doit verser une indemnité pour les frais engagés pour se conformer aux ordonnances prises en vertu d'une loi subséquente — entrave de façon inacceptable le pouvoir de légiférer de la législature ontarienne. Bien qu'il soit possible que l'édiction de mesures permettant de nouvelles réclamations statutaires expose la province à une plus grande responsabilité en vertu de l'Indemnité de l'Ontario (ce qui pourrait en conséquence décourager de telles édictions), cette indemnité, telle qu'interprétée par le juge des requêtes, n'empêche nullement la législature d'exercer son droit souverain [TRADUCTION] « de faire ou d'abroger quelque loi que ce soit » (A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10e éd. 1959), p. 40, cité dans le *Renvoi relatif à la réglementation pancanadienne des valeurs mobilières*, par. 54).

C. *Les pourvois de Résolu et de Weyerhaeuser*

[132] Les pourvois formés par Résolu et Weyerhaeuser soulèvent la question de savoir si l'une ou l'autre, ou les deux, jouissent du bénéfice de l'Indemnité de l'Ontario par l'effet de la clause d'extension des bénéfices (par. 6) de cette entente. Cette clause stipule que l'indemnité [TRADUCTION] « lie les successeurs et ayants droit respectifs de l'Ontario, de Reed, d'International et de Great Lakes et bénéficie à ceux-ci » (d.a., vol. IV, p. 191 (nous soulignons)).

[133] Les arguments invoqués par les parties sur cette question portent sur trois questions distinctes, mais connexes, que nous examinerons tour à tour ci-après. La première vise à déterminer si le bénéfice de l'Indemnité de l'Ontario s'étend à tous les successeurs et ayants droit de Great Lakes, à perpétuité, que ces successeurs et ayants droit aient ou non eux-mêmes cédé à des tiers les bénéfices qu'elle leur confère. Résolu et Weyerhaeuser affirment que c'est le cas, alors que la province (à l'instar de la

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a right to indemnity — loses the benefit thereunder upon assignment (see C.A. reasons, at paras. 194 and 196-98).

[134] The second issue is whether Bowater actually assigned the benefit of the Ontario Indemnity to Weyerhaeuser under the 1998 Asset Purchase Agreement. Resolute says it did not, and that both the motion judge and the majority of the Court of Appeal erred in concluding otherwise. Weyerhaeuser and the Province both say no such error was made by the courts below.

[135] The final issue is whether Weyerhaeuser may benefit under the Ontario Indemnity as Great Lakes' successor-in-title to the Dryden Property, independently of whether it can also benefit as an assignee of the rights thereunder. Weyerhaeuser says the motion judge correctly interpreted the term "successors" in the enurement clause as extending to Great Lakes' corporate successors (like Resolute) *and* to successors-in-title to the Dryden Property.

(1) Can an Indemnified Party Continue to Enjoy the Benefit of the Ontario Indemnity After It Assigns Its Rights Thereunder Absolutely to a Third Party?

[136] Resolute and Weyerhaeuser say that all of Great Lakes' successors and assigns may continue to benefit in perpetuity from the Ontario Indemnity, even where they have assigned the benefit of the indemnity to third parties. In other words, they say that the enurement clause contemplates (1) Resolute's continued enjoyment of the benefit of the Ontario Indemnity as a corporate successor of Great Lakes, *even if* it had assigned its interest thereunder to Weyerhaeuser under to the 1998 Asset Purchase Agreement, and (2) Weyerhaeuser's continued enjoyment of the same as a successor-in-title to the Dryden Property and assignee of the Ontario Indemnity, *even*

Cour d'appel) affirme que le cédant d'une chose non possessoire — tel un droit à une indemnité — en perd le bénéfice en cas de cession (voir motifs de la C.A., par. 194 et 196-198).

[134] La deuxième question est de savoir si Bowater a en fait cédé le bénéfice de l'Indemnité de l'Ontario à Weyerhaeuser en vertu de la convention d'achat d'actifs de 1998. Résolu dit que Bowater ne l'a pas cédé et que le juge des requêtes et les juges majoritaires de la Cour d'appel ont commis une erreur en concluant autrement. Weyerhaeuser et la province affirment toutes les deux que les juridictions inférieures n'ont pas commis une telle erreur.

[135] La dernière question consiste à décider si Weyerhaeuser peut bénéficier de l'Indemnité de l'Ontario en tant que successeur en titre de Great Lakes quant à la propriété de Dryden, peu importe qu'elle puisse ou non également en bénéficier en tant que cessionnaire des droits conférés par cette indemnité. Weyerhaeuser affirme que le juge des requêtes a correctement interprété le terme [TRADUCTION] « successeurs » employé dans la clause d'extension des bénéfices en l'étendant aux successeurs corporatifs de Great Lakes (comme Résolu) *et* aux successeurs en titre quant à la propriété de Dryden.

(1) Une partie indemnisée peut-elle continuer à jouir du bénéfice de l'Indemnité de l'Ontario après avoir consenti à un tiers une cession absolue des droits qu'elle lui confère?

[136] Résolu et Weyerhaeuser affirment que tous les successeurs et ayants droit de Great Lakes peuvent continuer à bénéficier à perpétuité de l'Indemnité de l'Ontario, même s'ils ont cédé le bénéfice de cette indemnité à des tiers. En d'autres mots, elles affirment que la clause d'extension des bénéfices prévoit que (1) Résolu continue à jouir du bénéfice de l'Indemnité de l'Ontario en tant que successeur corporatif de Great Lakes, *même si* elle a, en vertu de la convention d'achat d'actifs de 1998, cédé l'intérêt que cette indemnité lui confère à Weyerhaeuser, et que (2) Weyerhaeuser continue à jouir du bénéfice de ladite indemnité en tant que successeur en titre quant à la propriété de

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if it had subsequently assigned its interest thereunder to a third party. According to Resolute:

> There is no legal principle that required the Court of Appeal to apply [a] "hot potato" theory, in which only the singular legal owner of an indemnity may rely on it. This Court relaxed the requirement of privity more than 25 years ago. Rather, the relevant question is what the parties to the Ontario Indemnity objectively intended. The only reasonable interpretation of the indemnity is that the parties intended to protect Great Lakes and its successors *and* assigns, in perpetuity. Any other interpretation is fundamentally inconsistent with the nature of the environmental liability that the Ontario Indemnity was given to protect against. [Emphasis in original.]

(Resolute A.F., at para. 64)

[137] We disagree. Our starting position is that of the majority of the Court of Appeal: the effect of an absolute assignment of contractual right is to extinguish the assignor's right to call upon the obligation for him or herself, and to place that right in the hands of the assignee:

> The party making the assignment was a promisee but became an assignor who assigned the contract right he had against a promisor. Unless the assignment is made to secure the payment of a debt, it extinguishes the contract right in the assignor (former promisee) and the right is recreated in the assignee to whom the party with the correlative duty (the promisor) made no promise. There is no longer any promisee since the former promisee has surrendered the right previously created by his promise by becoming an assignor.

(J. E. Murray, Jr., *Corbin on Contracts* (rev. ed. 2007), vol. 9, at p. 130)

See also C.A. reasons, at para. 194; G. Tolhurst, *The Assignment of Contractual Rights* (2nd ed. 2016), at § 3.10.

[138] The enurement clause alters none of this. By referring to "successors and assigns", it simply

Dryden et en tant que cessionnaire de l'Indemnité de l'Ontario, *même si* elle a par la suite cédé l'intérêt que cette indemnité lui confère à un tiers. Selon Résolu :

> [TRADUCTION] Aucun principe juridique n'obligeait la Cour d'appel à appliquer une théorie de la « question délicate », selon laquelle seul le particulier qui est propriétaire en droit d'une indemnité peut en bénéficier. Cette Cour a assoupli l'exigence de la connexité d'intérêts il y a plus de 25 ans. La question pertinente est plutôt celle de savoir quelle était l'intention objective des parties à l'Indemnité de l'Ontario. La seule interprétation raisonnable de l'indemnité consiste à considérer que les parties entendaient protéger Great Lakes ainsi que ses successeurs *et* ayants droit à perpétuité. Toute autre interprétation est fondamentalement incompatible avec la nature de la responsabilité environnementale contre laquelle l'Indemnité de l'Ontario est censée protéger. [En italique dans l'original.]

(m.a. Résolu, par. 64)

[137] Nous ne sommes pas d'accord. Notre position de départ est celle des juges majoritaires de la Cour d'appel : la cession absolue d'un droit contractuel a pour effet d'éteindre le droit du cédant d'exiger en sa faveur l'exécution de l'obligation en question, et de placer ce droit entre les mains du cessionnaire :

> [TRADUCTION] La partie qui consent la cession était un destinataire de promesse, mais elle est devenue un cédant qui a cédé le droit contractuel qu'elle avait à l'encontre du promettant. À moins que la cession soit faite pour garantir le paiement d'une dette, elle éteint le droit contractuel détenu par le cédant (l'ancien destinataire de promesse), lequel droit est recréé en faveur du cessionnaire à qui la partie à qui incombe l'obligation corrélative (le promettant) n'a fait aucune promesse. Il n'y a plus aucun destinataire de promesse puisque l'ancien destinataire de promesse a cédé le droit antérieurement créé par la promesse qui lui a été faite en devenant cédant.

(J. E. Murray, Jr., *Corbin on Contracts* (éd. rév. 2007), vol. 9, p. 130)

Voir aussi les motifs de la C.A., par. 194; G. Tolhurst, *The Assignment of Contractual Rights* (2e éd. 2016), § 3.10.

[138] La clause d'extension des bénéfices ne change rien à cela. En faisant référence aux [TRADUCTION]

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affirms that the rights and obligations thereunder continue to the benefit of successors and assigns. We see nothing in either the text of para. 6 or its surrounding circumstances, and Resolute and Weyerhaeuser direct our attention to nothing in this respect that would allow the indemnity to apply to those who have alienated their interest. We therefore find no error in the conclusion of the Court of Appeal on this point.

(2) Did Bowater Transfer the Benefit of the Ontario Indemnity to Weyerhaeuser Under the 1998 Asset Purchase Agreement?

[139] On this issue, Resolute says that a proper consideration of the context in which the 1998 Asset Purchase Agreement was made by the parties, in accordance with the modern approach to contractual interpretation rather than a purely textual reading of the relevant provisions, should have led the motion judge to conclude that Bowater did not absolutely assign the Ontario Indemnity to Weyerhaeuser under that agreement. We agree with Resolute. By failing to read the impugned contractual term in light of the factual matrix and in a commercially sensible way, the motion judge erred in holding that Bowater assigned the Ontario Indemnity to Weyerhaeuser under the 1998 Asset Purchase Agreement. We would therefore allow Resolute's appeal. Resolute is entitled to rely on the Ontario Indemnity to cover past and future costs incurred in complying with the Director's Order.

(a) *The Motion Judge Erred in Principle in His Approach to Interpreting the 1998 Asset Purchase Agreement*

[140] Generally, the interpretation of negotiated contracts involves questions of mixed fact and law, such that appellate review is confined to seeking out palpable and overriding error. Extricable questions of law, however, are reviewed for correctness (see *Sattva*, at para. 53). Such questions include "the application of an incorrect principle, the failure to consider a required element of a legal test, . . . the

« successeurs et ayants droit », elle ne fait que confirmer que les droits et obligations découlant de l'entente continuent de bénéficier à ceux-ci. Nous ne voyons rien dans le libellé du par. 6 ou dans les circonstances, et Résolu et Weyerhaeuser n'ont rien fait valoir à cet égard qui permettrait que l'indemnité s'applique à ceux qui ont aliéné leur intérêt. Nous ne décelons donc aucune erreur dans la conclusion que la Cour d'appel a tirée sur ce point.

(2) Bowater a-t-elle transféré le bénéfice de l'Indemnité de l'Ontario à Weyerhaeuser en vertu de la convention d'achat d'actifs de 1998?

[139] Sur cette question, Résolu affirme qu'un examen approprié du contexte dans lequel la convention d'achat d'actifs de 1998 a été conclue par les parties, examen fait selon la méthode moderne d'interprétation contractuelle — plutôt que selon une interprétation purement textuelle des dispositions pertinentes —, aurait dû amener le juge des requêtes à conclure que Bowater n'a pas cédé de façon absolue l'Indemnité de l'Ontario à Weyerhaeuser en vertu de cette convention. Nous sommes d'accord avec Résolu. Nous estimons qu'en ne lisant pas la clause contractuelle contestée à la lumière du fondement factuel et d'une manière qui a du sens sur le plan commercial, le juge des requêtes a commis une erreur lorsqu'il a conclu que Bowater a cédé l'Indemnité de l'Ontario à Weyerhaeuser en vertu de la convention d'achat d'actifs de 1998. Nous serions donc d'avis d'accueillir le pourvoi de Résolu. Résolu a le droit de bénéficier de l'Indemnité de l'Ontario pour couvrir les frais passés et futurs engagés pour se conformer à l'arrêté du directeur.

a) *Le juge des requêtes a commis une erreur de principe dans sa façon d'interpréter la convention d'achat d'actifs de 1998*

[140] De façon générale, l'interprétation de contrats négociés soulève des questions mixtes de fait et de droit, de sorte que le contrôle en appel se limite à la recherche d'une erreur manifeste et déterminante. Les questions de droit isolables sont toutefois contrôlées selon la norme de la décision correcte (voir *Sattva*, par. 53). Ces questions comprennent le fait [TRADUCTION] d'« appliquer le mauvais principe[, de] négliger

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failure to consider a relevant factor", or questions with respect to substantive legal rules of contract (*Sattva*, at para. 53, quoting *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 341 D.L.R. (4th) 520, at para. 21).

[141] We accept Resolute's submission that the motion judge erred *in law* by failing to properly apply the rules of contractual interpretation in determining whether Bowater assigned the Ontario Indemnity to Weyerhaeuser under the 1998 Asset Purchase Agreement. Indeed, the motion judge gave no reasons in support of his conclusion on this point, which was stated in a somewhat peremptory manner, and grounded solely on an analysis of the text of the relevant provisions of the 1998 Asset Purchase Agreement (motion judge reasons, at paras. 20 and 64). In our respectful view, he was required to consider both the context and circumstances surrounding the formation of the 1998 Asset Purchase Agreement, as well as the commercial reasonableness of any purported assignment. As he failed to apply the proper approach to contractual interpretation, his conclusion that the Ontario Indemnity was assigned from Bowater to Weyerhaeuser is entitled to no appellate deference.

(b) *Bowater Did Not Assign the Benefit of the Ontario Indemnity to Weyerhaeuser Under the 1998 Asset Purchase Agreement*

(i) Contracts Must Be Interpreted With a View to Commercial Reasonableness

[142] As we have already observed, commercial reasonableness is a crucial consideration in interpreting a contract (see *Canadian Contractual Interpretation Law*, at p. 55). This is simply a corollary of the object of discerning the parties' intentions: when interpreting commercial contracts, courts seek to reach a commercially sensible interpretation, since doing so is more likely than not to give effect to the intention of the parties (see *ibid.*, at p. 57; *Nickel Developments Ltd. v. Canada Safeway Ltd.*, 2001 MBCA 79, 156 Man. R. (2d) 170, at para. 34). Simply put, courts safely assume that those who enter

un élément essentiel d'un critère juridique[,] un facteur pertinent », ou encore les questions relatives aux règles de droit substantif en matière contractuelle (*Sattva*, par. 53, citant *King c. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 341 D.L.R. (4th) 520, par. 21).

[141] Nous acceptons l'argument de Résolu selon lequel le juge des requêtes a commis une erreur *de droit* en n'appliquant pas correctement les règles d'interprétation contractuelle au moment de déterminer si Bowater avait cédé l'Indemnité de l'Ontario à Weyerhaeuser en vertu de la convention d'achat d'actifs de 1998. Le juge n'a d'ailleurs pas motivé sa conclusion sur ce point, laquelle a été exposée de manière quelque peu péremptoire et reposait exclusivement sur une analyse du libellé des dispositions pertinentes de la convention en question (motifs du juge des requêtes, par. 20 et 64). À notre humble avis, il devait prendre en considération à la fois le contexte et les circonstances entourant la conclusion de la convention d'achat d'actifs de 1998, ainsi que la raisonnabilité commerciale d'une quelconque cession. Comme il n'a pas appliqué la bonne méthode d'interprétation contractuelle, sa conclusion suivant laquelle Bowater a cédé l'Indemnité de l'Ontario à Weyerhaeuser ne commande aucune déférence en appel.

b) *Bowater n'a pas cédé le bénéfice de l'Indemnité de l'Ontario à Weyerhaeuser en vertu de la convention d'achat d'actifs de 1998*

(i) Les contrats doivent être interprétés à la lumière de la raisonnabilité commerciale

[142] Comme nous l'avons déjà mentionné, la raisonnabilité commerciale est une considération cruciale dans l'interprétation d'un contrat (voir *Canadian Contractual Interpretation Law*, p. 55). Il s'agit simplement d'un corollaire de l'objectif visant à cerner les intentions des parties : dans l'interprétation de contrats commerciaux, les tribunaux cherchent à parvenir à une interprétation sensée sur le plan commercial, puisque ce faisant, il est plus probable qu'ils donnent effet à l'intention des parties (voir *ibid.*, p. 57; *Nickel Developments Ltd. c. Canada Safeway Ltd.*, 2001 MBCA 79, 156 Man. R. (2d) 170, par. 34). En

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into commercial contracts intend for their contracts to "work" (*Humphries v. Lufkin Industries Canada Ltd.*, 2011 ABCA 366, 68 Alta. L.R. (5th) 175, at para. 15).

[143] Discerning commercial reasonableness entails, like all contractual interpretation, an objective analysis (see *Canadian Contractual Interpretation Law*, at p. 57). Courts should therefore read commercial contracts in a "positive and purposive manner", seeking to understand the structure of the agreement reached by the parties, the purpose of the transaction and the business context in which the contract was intended to operate (*Humphries*, at para. 15). As Lord Wilberforce said in *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570, and as quoted with approval by this Court in *Sattva*, at para. 47:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

[144] Given, then, the choice between an interpretation that allows the contract to function in furtherance of its commercial purpose and one that does not, it is generally the former interpretation that should prevail (see *Humphries*, at para. 15). While a party cannot avoid its contractual obligations simply because the bargain that they entered into was undesirable or unusual, commercially absurd interpretations should be avoided (see *Canadian Contractual Interpretation Law*, at pp. 61-63). As this Court said in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 61, "[i]f a given construction of the contract would lead to an absurd result, the assumption is that this result could not have been intended by rational commercial actors in making their bargain, absent some explanation to the contrary". See also *City of Toronto v. W.H. Hotel Ltd.*, [1966] S.C.R. 434, at p. 440.

termes simples, les tribunaux assument que les parties qui concluent un contrat commercial veulent que leur contrat [TRADUCTION] « fonctionne » (*Humphries c. Lufkin Industries Canada Ltd.*, 2011 ABCA 366, 68 Alta. L.R. (5th) 175, par. 15).

[143] La détermination de la raisonnabilité commerciale nécessite, comme toute interprétation contractuelle, une analyse objective (voir *Canadian Contractual Interpretation Law*, p. 57). Les tribunaux devraient donc interpréter les contrats commerciaux de [TRADUCTION] « manière positive et téléologique », et chercher à comprendre la structure de l'entente conclue par les parties, l'objet de l'opération et le contexte commercial dans lequel le contrat doit être exécuté (*Humphries*, par. 15). Comme lord Wilberforce l'a dit dans l'arrêt *Reardon Smith Line Ltd. c. Hansen-Tangen*, [1976] 3 All E.R. 570, cité avec approbation par notre Cour au par. 47 de l'arrêt *Sattva* :

> [TRADUCTION] Aucun contrat n'est conclu dans l'abstrait : les contrats s'inscrivent toujours dans un contexte. [. . .] Lorsqu'un contrat commercial est en cause, le tribunal devrait certes connaître son objet sur le plan commercial, ce qui présuppose d'autre part une connaissance de l'origine de l'opération, de l'historique, du contexte, du marché dans lequel les parties exercent leurs activités.

[144] Étant donné, donc, le choix entre une interprétation qui permet au contrat de servir son objectif commercial et une qui n'a pas cet effet, c'est généralement la première interprétation qui devrait l'emporter (voir *Humphries*, par. 15). Bien qu'une partie ne puisse échapper à ses obligations contractuelles simplement parce que la transaction qu'elle a conclue est non souhaitable ou inhabituelle, il convient d'éviter les interprétations absurdes sur le plan commercial (voir *Canadian Contractual Interpretation Law*, p. 61-63). Comme notre Cour l'a affirmé dans l'arrêt *Guarantee Co. of North America c. Gordon Capital Corp.*, [1999] 3 R.C.S. 423, par. 61, « [s]i une interprétation donnée du contrat menait à un résultat absurde, on supposerait qu'en l'absence d'explication contraire des acteurs commerciaux rationnels ne peuvent pas avoir voulu un tel résultat en concluant leur contrat ». Voir également *City of Toronto c. W.H. Hotel Ltd.*, [1966] R.C.S. 434, p. 440.

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(ii) It Was Not Commercially Reasonable for Bowater to Transfer the Ontario Indemnity to Weyerhaeuser

[145] In light of the foregoing — and, in particular, based on an interpretation of the 1998 Asset Purchase Agreement that properly reflects the factual matrix and which is consistent with the principle of commercial reasonableness — we find ourselves in respectful disagreement with the conclusions reached by the courts below. We would instead hold that the Ontario Indemnity was *not* assigned by Bowater to Weyerhaeuser as part of the 1998 Asset Purchase Agreement. The manner in which the parties structured the transfer of the Dryden Property from Bowater to Weyerhaeuser reveals an intention that Bowater would both continue to bear the risk associated with the waste disposal site and indemnify Weyerhaeuser in respect of any environmental liabilities that the latter may incur in relation to the Reed-era mercury contamination.

[146] Section 3.1(vii) and (xiv) of the 1998 Asset Purchase Agreement recorded Bowater's agreement to sell certain intangible assets forming part of the Dryden Property to Weyerhaeuser. As already noted, the motion judge relied on both provisions in concluding that the benefit of the Ontario Indemnity was assigned to Bowater as part of the asset sale. The majority at the Court of Appeal agreed, citing the "plain and unambiguous language of s. 3.1(xiv)", and the commercial reasonableness of Weyerhaeuser's seeking to "maximize its protection against environmental liabilities associated with the [waste disposal site]" (paras. 156 and 159).

[147] But s. 3.1(xiv) of the 1998 Asset Purchase Agreement cannot be read in isolation. Instead, as we have stressed throughout these reasons, contractual text must be interpreted in light of the surrounding circumstances and with a view to commercial reasonableness, taking into account the commercial purpose and the structure of the agreement.

(ii) Il n'était pas commercialement raisonnable pour Bowater de transférer l'Indemnité de l'Ontario à Weyerhaeuser

[145] À la lumière de ce qui précède — et nous fondant, en particulier, sur une interprétation de la convention d'achat d'actifs de 1998 qui reflète adéquatement le fondement factuel et qui s'accorde avec le principe de la raisonnabilité commerciale —, nous ne partageons pas les conclusions tirées par les juridictions inférieures. Nous estimons plutôt que l'Indemnité de l'Ontario *n'a pas* été cédée par Bowater à Weyerhaeuser dans le cadre de la convention d'achat d'actifs de 1998. La façon dont les parties ont structuré le transfert de la propriété de Dryden de Bowater à Weyerhaeuser révèle l'intention que Bowater continue d'assumer le risque posé par le lieu d'élimination des déchets et indemnise Weyerhaeuser à l'égard de toute responsabilité environnementale qui pourrait incomber à cette dernière en ce qui a trait à la contamination par le mercure remontant à l'époque de Reed.

[146] Les articles 3.1(vii) et (xiv) de la convention d'achat d'actifs de 1998 constatent le fait que Bowater a consenti à vendre à Weyerhaeuser certains actifs incorporels faisant partie de la propriété de Dryden. Comme nous l'avons déjà souligné, le juge des requêtes s'est fondé sur ces deux dispositions pour conclure que le bénéfice de l'Indemnité de l'Ontario avait été cédé à Bowater dans le cadre de la vente d'actifs. Les juges majoritaires de la Cour d'appel ont souscrit à cette conclusion, invoquant les [TRADUCTION] « termes clairs et non équivoques de l'art. 3.1(xiv) », et la raisonnabilité commerciale de la volonté de Weyerhaeuser de « maximiser sa protection contre les responsabilités environnementales liées au [lieu d'élimination des déchets] » (par. 156 et 159).

[147] Cependant, l'art. 3.1(xiv) de la convention d'achat d'actifs de 1998 ne saurait être interprété isolément. Comme nous l'avons souligné tout au long des présents motifs, un libellé contractuel doit plutôt être interprété à la lumière des circonstances et de la raisonnabilité commerciale, eu égard à l'objectif commercial et à la structure de l'entente.

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[148] Further, commercial reasonableness must be assessed *from the perspective of both parties*. After all, a commercial arrangement that makes sense for one party but no sense for another makes no sense as a commercial arrangement at all. As the Court of Appeal for Ontario explained in *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 114 O.A.C. 357, at para. 27:

> Where . . . the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity. Rather, the document should be construed in accordance with sound commercial principles and good business sense. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other. [Emphasis added; citations omitted.]

[149] This point looms large in considering the text of s. 3.1(xiv), which, at first glance, appears to transfer to Weyerhaeuser the full benefit of *all* of the intangible rights that Bowater enjoys under the representations, warranties, guarantees, indemnities, undertakings, certificates, covenants, agreements and security that it has received upon the acquisition of the Dryden Property or "otherwise". Read literally, "otherwise" suggests that Bowater would be stripped of all of its contractual benefits by operation of s. 3.1(xiv) *even if* those benefits were unconnected to the Dryden Property. This simply could not have been the intention of the parties: Weyerhaeuser could not reasonably have expected to enjoy rights unrelated to the assets it was purchasing. Such an arrangement would be commercially absurd.

[150] The meaning of the term "otherwise" in s. 3.1(xiv) — and, specifically, whether it captures the benefit of the Ontario Indemnity — becomes evident, however, once the structure of the agreement between Bowater and Weyerhaeuser, and how they chose to allocate risk as between them is understood. The latter is a key consideration, since the allocation of contractual risk is an attempt by one party to shape

[148] En outre, la raisonnabilité commerciale doit être évaluée *du point de vue des deux parties*. Après tout, une entente commerciale qui est sensée pour une partie, mais qui ne l'est pas pour une autre, n'est en aucun cas une entente sensée sur le plan commercial. Comme l'a expliqué la Cour d'appel de l'Ontario dans l'arrêt *Kentucky Fried Chicken Canada c. Scott's Food Services Inc.* (1998), 114 O.A.C. 357, par. 27 :

> [TRADUCTION] Lorsque [. . .] le document à interpréter est un document commercial négocié, le tribunal devrait éviter toute interprétation qui mènerait à une absurdité sur le plan commercial. Il convient plutôt d'interpréter le document conformément aux principes commerciaux reconnus et au bon sens en matière commerciale. Il faut prendre soin, cependant, de le faire objectivement plutôt que du point de vue d'une partie contractante ou de l'autre, puisque ce qui peut être sensé sur le plan commercial pour l'une ne l'est pas nécessairement pour l'autre. [Nous soulignons; références omises.]

[149] Ce point revêt une grande importance dans l'examen du libellé de l'art. 3.1(xiv), qui, à première vue, semble transférer à Weyerhaeuser le plein bénéfice de *l'ensemble* des droits incorporels dont jouit Bowater à l'égard des déclarations, garanties, indemnités, engagements, certificats, conventions, ententes et sûretés qu'elle a reçus lors de l'acquisition de la propriété de Dryden [TRADUCTION] ou « autrement ». Interprété littéralement, le mot « autrement » donne à penser que Bowater aurait été dépouillée de tous ses bénéfices contractuels par application de l'art. 3.1(xiv) *même si* ces bénéfices n'étaient pas liés à la propriété de Dryden. Cela ne peut tout simplement pas avoir été l'intention des parties : Weyerhaeuser ne peut raisonnablement s'être attendue à jouir de droits qui n'ont aucun rapport avec les actifs qu'elle achetait. Un tel arrangement serait absurde sur le plan commercial.

[150] Le sens du terme « autrement » à l'art. 3.1(xiv) — et, plus précisément, la question de savoir s'il englobe le bénéfice de l'Indemnité de l'Ontario — devient évident, cependant, lorsqu'on comprend la structure de l'entente intervenue entre Bowater et Weyerhaeuser, et la façon dont ces sociétés ont choisi de répartir le risque entre elles. Cette deuxième considération joue un rôle clé, car la répartition du risque contractuel

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the other's expectations in light of what they are prepared to do (see *Canadian Contract Law*, at p. 731).

[151] Here, the parties structured the 1998 Asset Purchase Agreement in a way that imposed *all risk* in relation to environmental liabilities — especially in relation to the waste disposal site — *on Bowater*, and not on Weyerhaeuser. First and foremost, as part of the deal, Bowater provided to Great Lakes a broad environmental indemnity in respect of the entire Dryden Property, in the following terms:

10.7 Environmental Indemnity

The Vendor shall indemnify the Purchaser from and against any Claim wherein the Claimant alleges that any Loss, or any damages of any nature whatsoever, was suffered or incurred as a result of a release or discharge of any Hazardous Substance that occurred prior to the Time of Closing, which Hazardous Substance leaves or left the Purchased Assets prior to the Time of Closing and which originated from the Purchased Assets (the "Claim"). For purposes of this paragraph, Claimant shall not include the Purchaser. The carriage and defence of the Claim shall be conducted in accordance with Section 18.4. There shall be no limitation period and no maximum amount for the Indemnity under this Section 10.7.

(A.R., vol. V, at p. 70)

[152] Further, by s. 9.01 of the 1998 Lease Agreement, Bowater also provided to Weyerhaeuser a separate indemnity for *all claims* relating to the presence or release of mercury in relation to the waste disposal site:

9.01 **Tenant's Indemnity**

[Bowater] covenants to indemnify and save harmless [Weyerhaeuser] from all claims, actions, costs and losses of every nature arising during the Term or thereafter relating to or arising in any way from this lease of the Lands

est une tentative par une partie d'orienter les attentes de l'autre partie en fonction de ce qu'elle est disposée à faire (voir *Canadian Contract Law*, p. 731).

[151] En l'espèce, les parties ont structuré la convention d'achat d'actifs de 1998 de façon à ce que *tous les risques* en matière de responsabilités environnementales — en particulier ceux ayant trait au lieu d'élimination des déchets — *incombent à Bowater*, et non à Weyerhaeuser. D'abord et avant tout, Bowater a consenti à Great Lakes, dans le cadre de l'entente qu'elles ont conclue, une indemnité environnementale considérable en ce qui concerne l'ensemble de la propriété de Dryden :

[TRADUCTION]

10.7 Indemnité environnementale

Le vendeur s'engage à indemniser l'acheteur quant à toute réclamation dans laquelle le réclamant allègue avoir subi une perte ou des dommages de quelque nature qu'ils soient par suite du rejet d'une substance dangereuse antérieur à l'heure de clôture, laquelle substance dangereuse doit être évacuée ou avoir été évacuée des actifs visés par l'achat avant l'heure de clôture et doit provenir des actifs visés par l'achat (la « réclamation »). Pour l'application du présent paragraphe, le terme « réclamant » n'englobe pas l'acheteur. La conduite et la défense de la réclamation se feront conformément à l'article 18.4. Aucun délai de prescription ni aucun montant maximal ne s'appliqueront à l'indemnité prévue au présent article 10.7.

(d.a., vol. V, p. 70)

[152] Par ailleurs, aux termes de l'art. 9.01 de la Convention de bail de 1998, Bowater a également consenti à Weyerhaeuser une indemnité distincte à l'égard de *l'ensemble des réclamations* portant sur la présence ou le rejet de mercure en ce qui concerne le lieu d'élimination des déchets :

[TRADUCTION]

9.01 **Indemnité du locataire**

[Bowater] s'engage à indemniser [Weyerhaeuser] et à la tenir à couvert de l'ensemble des réclamations, actions, frais et pertes de quelconque nature ayant pris naissance pendant la durée du présent bail ou après l'expiration de

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and the Access Area except to the extent caused by the Landlord's negligence or wilful misconduct. The foregoing indemnity extends without limitation to all claims, actions, costs or losses arising out of or relating to:

(1) the presence or release of mercury and any other contaminant, substance or waste on or in the Lands;

. . .

The obligations of the Tenant to indemnify the Landlord under the provisions of this section are to survive the termination or expiry of this lease.

(A.R., vol. V, at pp. 126-27)

[153] These two broadly-worded indemnities reveal with absolute clarity the risk allocation structure that Bowater and Weyerhaeuser intended to achieve. Once the indemnity in the 1998 Lease Agreement was provided, Weyerhaeuser was protected from any and all environmental liability resulting from its temporary ownership of the waste disposal site, in addition to the protection that it enjoyed in relation to the rest of the Dryden Property. The parties clearly intended that any claim against Weyerhaeuser in respect of the presence or release of the mercury waste would be covered by either the indemnity in s. 10.7 of the 1998 Asset Purchase Agreement or in s. 9.01 of the Lease Agreement (assuming, of course, that any such claim falls within the scope of either provision).

[154] This risk-allocation structure makes commercial sense, however, if *and only if* Bowater's interests remained protected by the Ontario Indemnity. The Province acknowledged as much during the hearing in this Court and in its factum in the Superior Court of Justice (see hearing transcript, at p. 121; A.R., vol. VIII, at p. 24). As Resolute says, such an interpretation of the 1998 Asset Purchase Agreement makes sense because "Weyerhaeuser would have

celui-ci, et qui ont trait ou sont consécutives de quelque manière que ce soit au présent bail sur les terres et la zone d'accès sauf dans la mesure où il est question de négligence ou d'inconduite délibérée de la part du locateur. L'indemnité susmentionnée s'étend notamment à l'ensemble des réclamations, actions, frais ou pertes consécutives ou ayant trait à ce qui suit :

(1) la présence ou le rejet de mercure et de tout autre contaminant, substance ou déchet sur ou dans les terres;

. . .

Les obligations d'indemnisation du locateur qui incombent au locataire en vertu des dispositions du présent article continuent de s'appliquer après la résiliation ou l'expiration du présent bail.

(d.a., vol. V, p. 126-127)

[153] Ces deux indemnités, rédigées en termes larges, révèlent avec une clarté absolue la structure de répartition du risque que Bowater et Weyerhaeuser entendaient établir. Une fois l'indemnité de la Convention de bail de 1998 accordée, Weyerhaeuser était protégée contre toute responsabilité environnementale découlant de son droit de propriété temporaire sur le lieu d'élimination des déchets, en plus de bénéficier d'une protection à l'égard du reste de la propriété de Dryden. Les parties ont clairement voulu que toute réclamation visant Weyerhaeuser en ce qui a trait à la présence ou au rejet de déchets mercuriels soit visée soit par l'indemnité prévue à l'art. 10.7 de la convention d'achat d'actifs de 1998 ou par celle prévue à l'art. 9.01 de la Convention de bail (en supposant, bien sûr, qu'une telle réclamation entre dans le champ d'application de l'une ou l'autre de ces dispositions).

[154] Toutefois, cette structure de répartition du risque n'a de sens sur le plan commercial que si, *et seulement si*, l'Indemnité de l'Ontario continuait à protéger les intérêts de Bowater. La province l'a reconnu à l'audience devant notre Cour ainsi que dans le mémoire qu'elle a déposé devant la Cour supérieure de justice (voir transcription de l'audience, p. 121; d.a., vol. VIII, p. 24). Comme le dit Résolu, cette façon d'interpréter la convention d'achat d'actifs de 1998

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recourse against Bowater, and Bowater would have recourse against [the Province]", the result being that "[e]veryone would be protected" (Resolute A.F., at para. 101).

[155] Weyerhaeuser also conceded that "it would have been commercially absurd for Bowater to assign the indemnity if, by doing so, Bowater (and its successor, Resolute) would lose the benefit of the Indemnity" (Weyerhaeuser R.F. (Resolute Appeal), at para. 28). It argues, however — and the majority at the Court of Appeal accepted — that it was "perfectly reasonable" for Weyerhaeuser to seek both an assignment of the Ontario Indemnity *and* a separate indemnity from Bowater under the Lease Agreement (*ibid.*, at para. 27; see also C.A. reasons, at para. 159). While this is undoubtedly so, this submission views the commercial reasonableness of the transaction exclusively from the standpoint of Weyerhaeuser. But, again, commercial reasonableness has to be assessed from the standpoint of *each party*, and not just one of them. And, as Weyerhaeuser concedes, from the standpoint of *Bowater*, this arrangement would be ridiculous, leaving Bowater (and its successors) responsible for *two* contractual indemnities vis-à-vis Weyerhaeuser, and completely exposed to all environmental liabilities in respect of both the Dryden Property and the waste disposal site.

[156] It follows that, in our view, for the purpose of applying s. 3.1(xiv) of the 1998 Asset Purchase Agreement, the contractual rights and indemnities "otherwise" received by Bowater and its corporate predecessors must not be read so as to confer on Weyerhaeuser *all* the rights and indemnities enjoyed by Bowater. Both the factual matrix (which includes the indemnities in the 1998 Asset Purchase Agreement and in the Lease Agreement) and the principle of commercial reasonableness indicate that this provision did not effect a transfer of Bowater's rights under the Ontario Indemnity to Weyerhaeuser. The parties could not reasonably have intended that Bowater would be obliged to indemnify Weyerhaeuser for all environmental liabilities in relation to the Dryden Property and the

est sensée parce que [TRADUCTION] « Weyerhaeuser pourrait poursuivre Bowater, et cette dernière pourrait poursuivre [la province] », de sorte que « [t]out le monde serait protégé » (m.a. Résolu, par. 101).

[155] Weyerhaeuser a également concédé qu'il [TRADUCTION] « aurait été absurde sur le plan commercial que Bowater cède l'indemnité si, ce faisant, Bowater (et son successeur, Résolu) en avait perdu le bénéfice » (m.i. Weyerhaeuser (pourvoi de Résolu), par. 28). Elle soutient cependant — et les juges majoritaires de la Cour d'appel en conviennent — qu'il était [TRADUCTION] « parfaitement raisonnable » pour elle de vouloir à la fois une cession de l'Indemnité de l'Ontario *et* l'octroi par Bowater d'une indemnité distincte en vertu de la Convention de bail (*ibid.*, par. 27; voir aussi motifs de la C.A., par. 159). Bien que ce soit indubitablement le cas, cet argument envisage la raisonnabilité commerciale de l'opération uniquement du point de vue de Weyerhaeuser. Cependant, nous le répétons, la raisonnabilité commerciale doit être appréciée du point de vue de *chacune des parties*, et non seulement de l'une d'elles. De plus, comme le concède Weyerhaeuser, du point de vue de *Bowater*, cet arrangement serait ridicule en ce que Bowater (et ses successeurs) assumerait la responsabilité de *deux* indemnités contractuelles à l'égard de Weyerhaeuser, et qu'elle serait complètement exposée à toute responsabilité environnementale afférente à la propriété de Dryden et au lieu d'élimination des déchets.

[156] C'est pourquoi nous estimons que, pour l'application de l'art. 3.1(xiv) de la convention d'achat d'actifs de 1998, les droits et indemnités contractuels « autrement » reçus par Bowater et les sociétés qui l'ont précédée ne doivent pas être interprétés de façon à conférer à Weyerhaeuser *tous* les droits et indemnités dont bénéficiait Bowater. Tant le fondement factuel (qui comprend les indemnités prévues dans la convention d'achat d'actifs de 1998 et la Convention de bail) que le principe de la raisonnabilité commerciale indiquent que cette disposition n'a pas eu pour effet de transférer à Weyerhaeuser les droits de Bowater en vertu de l'Indemnité de l'Ontario. Les parties ne pouvaient raisonnablement vouloir que Bowater soit tenue d'indemniser Weyerhaeuser pour toute responsabilité environnementale

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waste disposal site, while relinquishing its own protection.

[157] We would therefore allow Resolute's appeal.

(3) Is Weyerhaeuser a "Successor" of Great Lakes for the Purpose of the Enurement Clause at Paragraph 6 of the Ontario Indemnity?

[158] While Weyerhaeuser is not an assignee of the benefit of the Ontario Indemnity, it also says that it may still benefit thereunder as a successor owner of the Dryden Property. In its submission, the term "successor" in para. 6 of the Ontario Indemnity includes both corporate successors of Great Lakes *and* successors-in-title to the Dryden Property. Relying on *Brown v. Belleville (City)*, 2013 ONCA 148, 114 O.R. (3d) 561, Weyerhaeuser argues that the enurement clause extends the benefit of the Ontario Indemnity to a *class* of beneficiaries, all of whom may simultaneously benefit from the agreement.

[159] Like the majority at the Court of Appeal, we are of the respectful view that the motion judge made a palpable and overriding error in concluding that the enurement clause extended the benefit of the Ontario Indemnity to successor owners of the Dryden Property (i.e., successors-*in-title*). In our view, the term "successors" clearly refers only to *corporate* successors. It is worth noting that this clause is a standard contractual term — that is, "boilerplate" — that solicitors use in order to protect their clients' interests and expectations (see *Canadian Contract Law*, at pp. 741-42). Certainty in commercial transactions is best protected where courts give effect to the common understanding and inclusion of such terms in contracts, absent any indication that the parties intended them to have a different effect.

afférente à la propriété de Dryden et au lieu d'élimination des déchets tout en renonçant à sa propre protection.

[157] Nous accueillerions donc le pourvoi de Résolu.

(3) Weyerhaeuser est-elle un « successeur » de Great Lakes pour les besoins de la clause d'extension des bénéfices contenue au par. 6 de l'Indemnité de l'Ontario?

[158] Bien que Weyerhaeuser ne soit pas cessionnaire du bénéfice de l'Indemnité de l'Ontario, elle affirme par ailleurs qu'elle peut quand même en bénéficier en tant que propriétaire successeur de la propriété de Dryden. Elle soutient que le terme [TRADUCTION] « successeurs » au par. 6 de l'Indemnité de l'Ontario vise à la fois les successeurs corporatifs de Great Lakes *et* les successeurs en titre quant à la propriété de Dryden. Invoquant l'arrêt *Brown c. Belleville (City)*, 2013 ONCA 148, 114 O.R. (3d) 561, Weyerhaeuser fait valoir que la clause d'extension des bénéfices étend le bénéfice de l'Indemnité de l'Ontario à une *classe* de bénéficiaires, tous susceptibles de bénéficier simultanément de l'entente.

[159] À l'instar des juges majoritaires de la Cour d'appel, nous sommes d'avis que le juge des requêtes a commis une erreur manifeste et déterminante en concluant que la clause d'extension des bénéfices étendait le bénéfice de l'Indemnité de l'Ontario aux propriétaires successeurs de la propriété de Dryden (c.-à-d. aux successeurs *en titre*). Selon nous, le terme [TRADUCTION] « successeurs » ne renvoie clairement qu'aux successeurs *corporatifs*. Il convient de souligner que cette clause est une clause contractuelle type, c.-à-d. [TRADUCTION] « standard », que les avocats utilisent pour protéger les intérêts et les attentes de leurs clients (voir *Canadian Contract Law*, p. 741-742). La certitude en matière d'opérations commerciales est mieux protégée lorsque les tribunaux donnent effet au sens courant et à l'inclusion de telles clauses figurant dans les contrats, en l'absence d'indication que les parties ont voulu que celles-ci aient un effet différent.

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[160] In *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410, this Court observed that, "[w]hen used in reference to corporations, a 'successor' generally denotes another corporation which, through merger, amalgamation or some other type of legal succession, assumes the burdens and becomes vested with the rights of the first corporation" (p. 423). Indeed, this common understanding of the term "successor" has been recognized in considering enurement clauses like the one at issue here (see C. L. Elderkin and J. S. Shin Doi, *Behind and Beyond Boilerplate: Drafting Commercial Agreements* (1998), at pp. 250-51; M. H. Ogilvie, "Re-defining Privity of Contract: *Brown v. Belleville (City)*" (2015), 52 *Alta. L. Rev.* 731, at p. 736). Again, bearing in mind that the object of contractual interpretation is to discern the parties' objective *intentions*, the commonly accepted meaning of that term provides a helpful starting point to considering what the parties understood the words in the enurement clause to mean.

[161] We agree with the majority at the Court of Appeal that, in these particular circumstances, "nothing in the language of the Ontario Indemnity or in the circumstances surrounding the formation of the contract" supports Weyerhaeuser's interpretation of the enurement clause (para. 184). To the contrary, in reading the enurement clause together with the rest of the Ontario Indemnity, it becomes clear that the parties intended to restrict the term "successors" to *corporate* successors. Paragraph 2 of the Ontario Indemnity refers to Reed's "predecessor[s] in title", while para. 6 uses the term "successors" without any such qualification. As this Court remarked in *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at para. 47, "[m]eaning must be given to the choice to use one term in one clause and a different term in a different clause of the same agreement". Had the parties to the Ontario Indemnity intended the enurement clause to apply to all successors-in-title over the Dryden Property, they could have made those intentions clear.

[160] Dans l'arrêt *National Trust Co. c. Mead*, [1990] 2 R.C.S. 410, notre Cour a fait observer qu'« [e]mployé à l'égard de sociétés, le terme "successeur" désigne généralement une autre société qui, par fusion ou une autre forme de succession juridique, assume les obligations et acquiert les droits de la première société » (p. 423). En fait, ce sens courant du terme « successeur » a été reconnu à l'occasion de l'examen de clauses d'extension des bénéfices comme celle en cause en l'espèce (voir C. L. Elderkin et J. S. Shin Doi, *Behind and Beyond Boilerplate : Drafting Commercial Agreements* (1998), p. 250-251; M. H. Ogilvie, « Re-defining Privity of Contract : *Brown v. Belleville (City)* » (2015), 52 *Alta. L. Rev.* 731, p. 736). Encore là, étant donné que l'interprétation contractuelle a pour objectif de cerner les *intentions* objectives des parties, le sens communément reconnu de ce terme constitue un point de départ utile pour déterminer comment les parties ont interprété les mots employés dans la clause d'extension des bénéfices.

[161] Nous sommes d'accord avec les juges majoritaires de la Cour d'appel pour dire que, dans les circonstances particulières de l'espèce, [TRADUCTION] « rien dans le libellé de l'Indemnité de l'Ontario ou dans les circonstances entourant la conclusion du contrat » n'appuie l'interprétation donnée par Weyerhaeuser à la clause d'extension des bénéfices (par. 184). Au contraire, lorsqu'on lit cette clause conjointement avec le reste de l'Indemnité de l'Ontario, il apparaît clairement que les parties ont voulu restreindre le sens du terme [TRADUCTION] « successeurs » aux successeurs *corporatifs*. Le paragraphe 2 de l'Indemnité de l'Ontario renvoie aux « prédécesseur[s] en titre » de Reed, alors que le par. 6 emploie le terme « successeurs » sans aucun qualificatif de la sorte. Comme la Cour l'a fait remarquer dans l'arrêt *Heritage Capital Corp. c. Équitable, Cie de fiducie*, 2016 CSC 19, [2016] 1 R.C.S. 306, par. 47, « [i]l faut donner un sens à la décision d'employer un terme donné dans une clause et un terme différent dans une autre clause figurant dans le même contrat ». Si les parties à l'Indemnité de l'Ontario voulaient que la clause d'extension des bénéfices s'applique à tous les successeurs en titre quant à la propriété de Dryden, elles auraient pu l'exprimer clairement.

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[162] This is not to say that our conclusion with respect to the word "successors" in this specific enurement clause sets out a universal definition of that term. It may be possible, in other circumstances, for the term "successors" to refer to successors-in-title (e.g. *Belleville*).

[163] For these reasons, Weyerhaeuser is neither an assignee of the benefit of the Ontario Indemnity nor a corporate successor of either Great Lakes or Reed. Notwithstanding its rights under the 1998 Asset Purchase Agreement and the Lease Agreement, it has no entitlement to benefit under the Ontario Indemnity, and we would dismiss its appeal.

[164] Given this conclusion, it is unnecessary for us to decide whether the enurement clause operates to the benefit of a class of beneficiaries (being Great Lakes' successors *and* assigns).

VI. Conclusion

[165] We would dismiss the appeals of the Province and of Weyerhaeuser. We would allow Resolute's appeal and declare that Weyerhaeuser enjoys no benefit under the Ontario Indemnity. Resolute is entitled to its costs in this Court and throughout, including costs before the motion judge on the terms he ordered (*Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONSC 1814).

Appeal of Resolute FP Canada Inc. dismissed, CÔTÉ, BROWN *and* ROWE JJ. *dissenting.*

Appeal of Her Majesty The Queen as represented by the Ministry of the Attorney General allowed with costs throughout, CÔTÉ, BROWN *and* ROWE JJ. *dissenting.*

Appeal of Weyerhaeuser Company Limited dismissed.

Solicitors for the appellant/respondent Resolute FP Canada Inc.: Torys, Toronto.

[162] Cela ne signifie pas que notre conclusion sur le mot [TRADUCTION] « successeurs » figurant dans cette clause particulière d'extension des bénéfices donne à ce terme une définition universelle. Il se peut que dans d'autres circonstances, le terme « successeurs » renvoie aux successeurs en titre (p. ex. *Belleville*).

[163] Pour ces motifs, Weyerhaeuser n'est ni cessionnaire du bénéfice de l'Indemnité de l'Ontario ni un successeur corporatif de Great Lakes ou de Reed. Malgré les droits que lui confèrent la convention d'achat d'actifs de 1998 et la Convention de bail, elle n'a pas droit au bénéfice de l'Indemnité de l'Ontario et nous rejetterions son pourvoi.

[164] Étant donné cette conclusion, il n'est pas nécessaire que nous décidions si la clause d'extension des bénéfices s'applique au profit d'une classe de bénéficiaires (qui sont les successeurs *et* ayants droit de Great Lakes).

VI. Conclusion

[165] Nous rejetterions les pourvois de la province et de Weyerhaeuser. Nous accueillerions le pourvoi de Résolu et déclarerions que Weyerhaeuser ne jouit pas du bénéfice de l'Indemnité de l'Ontario. Résolu a droit à ses dépens devant toutes les cours, y compris les dépens aux conditions ordonnées par le juge des requêtes (*Weyerhaeuser Company Limited c. Ontario (Attorney General)*, 2017 ONSC 1814).

Pourvoi de Produits forestiers Résolu rejeté, les juges CÔTÉ, BROWN *et* ROWE *sont dissidents.*

Pourvoi de Sa Majesté la Reine représentée par le ministère du procureur général accueilli avec dépens dans toutes les cours, les juges CÔTÉ, BROWN *et* ROWE *sont dissidents.*

Pourvoi de Compagnie Weyerhaeuser Limitée rejeté.

Procureurs de l'appelante/intimée Produits forestiers Résolu : Torys, Toronto.

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Solicitor for the appellant/respondent Her Majesty The Queen as represented by the Ministry of the Attorney General: Ministry of the Attorney General, Toronto.

Solicitors for the appellant/respondent Weyerhaeuser Company Limited: Borden Ladner Gervais, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Procureur de l'appelante/intimée Sa Majesté la Reine représentée par le ministère du procureur général : Ministère du procureur général, Toronto.

Procureurs de l'appelante/intimée Compagnie Weyerhaeuser Limitée : Borden Ladner Gervais, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

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TAB 6

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Blackmore Management Inc. v. Carmanah Management Corporation,* 2022 BCCA 117

Date: 20220330
Docket: CA47679

Between:

Blackmore Management Inc. and Justin Taverna

Appellant
(Petitioners)

And

Carmanah Management Corporation, Amphitrite Management Inc., First Light Technologies Ltd.

Respondents
(Respondents)

Before: The Honourable Madam Justice MacKenzie
The Honourable Madam Justice Stromberg-Stein
The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated July 13, 2021 (*Blackmore Management Inc. v. Carmanah Management Corporation*, 2021 BCSC 1379, Victoria Docket S201171).

Counsel for the Appellant: R.W. Sieg

Counsel for the Respondent: A. Porter
A.J. Young

Place and Date of Hearing: Vancouver, British Columbia
March 8, 2022

Place and Date of Judgment: Vancouver, British Columbia
March 30, 2022

Written Reasons by:
The Honourable Madam Justice MacKenzie

Concurred in by:
The Honourable Madam Justice Stromberg-Stein
The Honourable Madam Justice Fenlon

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Summary:

The appellants appeal from the dismissal of their petition for various forms of relief. The relief sought included an injunction extending the time to respond to a compulsory buyout offer made pursuant to a shareholders' agreement. The appellants also sought an order that the offer was not revocable. As a matter of contractual interpretation, the judge determined the respondents' "shotgun offer" was revocable within the contractual election period. By a separate agreement, the parties agreed to toll the election period until the related injunction application was disposed of. As a result of COVID-19-related court closures, the hearing of the injunction application was postponed. The respondents purported to revoke the shotgun offer before the hearing of the injunction application and petition, and later argued that the tolling agreement had been frustrated. Held: Appeal allowed. The judge made a palpable and overriding error in interpreting the shareholders' agreement as permitting the unilateral revocation of the shotgun offer during the election period. Further, the agreement to toll the election period was not frustrated.

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[1] This appeal raises the question of whether a "shotgun offer" made pursuant to the compulsory buy-sell provision of a shareholders' agreement is revocable within the contractual election period.

[2] Blackmore Management Inc. ("Blackmore") and Justin Taverna appeal from an order dismissing their petition for reasons indexed as *Blackmore Management Inc. v. Carmanah Management Corporation*, 2021 BCSC 1379. They sought, among other things, a declaration that a shotgun offer was not revocable during the election period.

Background

[3] Blackmore, Carmanah Management Corporation ("Carmanah"), and Amphitrite Management Inc. ("Amphitrite") each own one-third of First Light Technologies Inc. ("FLT").

[4] Justin Taverna is the principal of Blackmore; Sean Bourquin is the principal of Amphitrite; David Green is the principal of Carmanah. Messrs. Traverna, Bourquin, and Green are the only three directors of FLT.

[5] FLT did not participate in the proceedings below or in this appeal. I refer to Carmanah and Amphitrite as "the respondents".

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The Shareholders' Agreement

[6] Messrs. Taverna, Bourquin, and Carmanah are parties to a shareholders' agreement dated May 28, 2012. Under this agreement, Blackmore is the assignee of Mr. Taverna and Amphitrite is the assignee of Mr. Bourquin.

[7] The agreement acknowledges that it is a contract entered into for valuable consideration. Article 5 contains a shotgun clause, described in more detail below.

The Offers to Acquire Blackmore's Shares

[8] On October 31, 2019, Messrs. Bourquin and Green initiated negotiations for the respondents to purchase Blackmore's shares in FLT. These negotiations lasted approximately 60 days and were terminated by Mr. Taverna.

[9] On January 27, 2020, the respondents invoked the shotgun clause by delivering a notice to Blackmore and Mr. Taverna in which they offered to acquire Blackmore's interest for $1,500,001 or to sell their interests on the same valuation (for a total of $3,000,002) (the "shotgun offer"). The price included a buyout of the seller(s)'s outstanding shareholder loan(s).

[10] The election period was set to end on March 27, 2020. The notice described the 60-day election period:

> In accordance with Section 5.2 of the Shareholders Agreement, you have sixty (60) days from the date of delivery of this letter to respond. You may accept the Compulsory Offer at any time within the sixty (60) day period. If you do not respond within sixty (60) days, you will be deemed to have accepted the offer in accordance with Section 5.5 of the Shareholders Agreement.

[11] Mr. Taverna and Blackmore requested production of financial documents to assess the offer and to potentially obtain financing to purchase the respondents' shares. There was some dispute as to which documents they were entitled to receive.

[12] On February 21, 2020, Mr. Taverna advised Messrs. Bourquin and Green that he intended to secure financing for Blackmore to purchase the respondents' shares.

[13] On March 12, 2020, Mr. Taverna and Blackmore filed a petition for an interim order or injunction freezing the time for Blackmore to make its election and for an order that FLT deliver accounting records to assist Mr. Taverna and Blackmore in evaluating the shotgun offer.

The March Agreement

[14] On March 13, 2020, the parties agreed to suspend the time for Blackmore to make an election until the proceeding regarding the injunction was heard. The parties agreed to a March 25, 2020 hearing date. The parties further agreed that if the injunction to extend or freeze the time for Blackmore's election were not disposed of on March 25, 2020, the election period would be tolled from March 26, 2020, until its disposition. Counsel for the appellants recorded the agreement in a letter. The relevant parts of the March Agreement are as follows:

> …
>
> 2. the hearing of the Injunction will be set for 25 March 2020, or such later time as directed by the Court or agreed to by counsel if court time is not available on those dates;
>
> 3. I will take all reasonable steps to make myself available for later hearing dates if they are required;
>
> 4. [counsel for the respondents] and [the respondents] agree that if the Injunction is not disposed of on 25 March 2020 the running of time caused by the delivery of the compulsory buy-out offer by [Carmanah] and [Amphitrite] on 27 January 2020 ("Offer") stops on 25 March 2020 and the dates of 26 March 2020 to the date on which a ruling is made disposing of the Injunction shall not be included in the calculation of the running of time for determining when Blackmore must accept or reverse the Offer;
>
> …

[15] On March 19, 2020, the courts suspended in-person operations due to the COVID-19 pandemic and as a result, the application for the injunction was not heard on March 25, 2020.

The Purported Revocation

[16] On June 22, 2020, the respondents' counsel advised that he was available for a hearing the week of August 17, 2020. The appellants' counsel advised the court of this availability on June 23, 2020.

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[17] By June 2020, the parties became aware that FLT had increased in value "by an amount that was not insignificant".

[18] On June 29, 2020, one week after agreeing to the August hearing date, the respondents wrote to Blackmore purporting to revoke the shotgun offer on the basis that world events and Blackmore's commencement of legal proceedings had fundamentally changed the circumstances relating to the shotgun offer. The entire communication reads as follows:

> On January 27, 2020, we delivered notice to [Blackmore] on behalf of our clients [Carmanah] and Amphitrite of a Compulsory Offer to acquire all of Blackmore's share interest in First Light Technologies Ltd. The Compulsory Offer was a contractual offer to purchase, open for a period of sixty (60) days, and subject to the terms and condition of the Amended Shareholders Agreement if it was not accepted by your client. To date, Blackmore has adopted the position that it has neither accepted nor rejected the offer.
>
> Since the Compulsory Offer was delivered to your client both world events and your client's election to litigate this matter have fundamentally changed the circumstances relating to the Compulsory Offer. In connection with the litigation, Blackmore is seeking relief which would in effect defer its obligation to accept or reject the Compulsory Offer for an indefinite period of time until the claims under the Petition are determined. As a result the Compulsory Offer which was intended by initial agreement of the parties to only be open for 60 days, has now been open for over 5 months. This period may be extended indefinitely until the Petition is heard, which is patently unreasonable.
>
> In light of the above, our clients [Carmanah] and Amphitrite, have instructed us to notify Blackmore that they have elected to revoke the Compulsory Offer that was issued on January 27, 2020. This letter will constitute notice to your client of the revocation of that offer. We make no comment at this time as to whether the initial Offer would be considered frustrated in any event as a matter of law due to the fundamental change in circumstance.
>
> Any future communication concerning litigation existing between the respective clients should be directed to the attention of Mr. Young. We ask you advise him as to whether your client will be continuing to pursue the claims for relief that are presently extant.

[19] On July 23, 2020, Blackmore delivered a notice to the respondents, electing to purchase the respondents' shares at the valuation stipulated in the shotgun offer.

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[20] On August 14, 2020, Blackmore and Mr. Taverna amended their petition seeking a declaration that the shotgun offer was not revocable, and as a result, Blackmore's election to purchase the respondents' shares was enforceable.

Chambers Judgment

[21] The petition was heard in September and December, 2020. The judge reserved his decision until July 13, 2021.

[22] The judge addressed three issues: (1) whether the petition should be converted to an action; (2) whether the shotgun offer was revocable; and (3) if the shotgun offer was revocable, whether the respondents' conduct was oppressive or unfairly prejudicial, contrary to s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57. Only the conclusion on the second issue is appealed.

[23] The judge identified the second issue as a question of contractual interpretation. He concluded that a shotgun offer made pursuant to Article 5 of the shareholders' agreement was revocable. He relied on the general principle that an offer to contract can be revoked prior to acceptance unless the parties have specifically agreed otherwise, and on the fact the shareholders' agreement contains no language that suggests a compulsory buyout offer is irrevocable. The judge reasoned that finding a shotgun offer was irrevocable would require reading in a significant term to which the parties had not agreed. He said:

> [60] In my opinion, interpreting the ASA in the manner advocated by the petitioners would entail reading into the agreement a significant term that I am not convinced the parties considered or, more importantly, agreed to. More to the point, the fact that the ASA contains no language that suggests a compulsory buy-out offer made under Article 5 of the agreement is irrevocable means, in my view, that the general principles of contractual interpretation apply and that such an offer can be revoked, unless the parties have otherwise agreed.
>
> …
>
> [63] … The parties to the ASA did not include any reference to a compulsory buy-out offer being irrevocable. Consequently, I find the petitioners' position on this issue would result in the Court reading into the ASA a significant and material term that the parties did not see fit to include.

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[24] The judge was not persuaded the March Agreement "froze" the shotgun offer or led the appellants to believe it was frozen: at para. 64.

[25] Given his conclusion, the judge found it unnecessary to address the respondents' argument that the shotgun offer was frustrated by litigation or the COVID-19 pandemic: at para. 65.

Issues

[26] The judge's conclusion that the shotgun offer was revocable raises two questions:

a) Was the shotgun offer an independent offer subject to the settled test for contract formation?

b) Was the shotgun offer revocable in light of the ordinary and grammatical meaning of the shareholders' agreement, having regard to the surrounding circumstances, sound commercial principles, and good business sense?

Standard of Review

[27] Contractual interpretation is a question of mixed fact and law, generally subject to review only where there has been a palpable and overriding error. However, where the judge has made an extricable error of law, the standard of review is correctness: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 51–54 [*Sattva*]; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at paras. 44–45 [*Teal Cedar*].

[28] As Justice Groberman explained in *Canaccord Genuity Corp. v. Reservoir Minerals Inc.*, 2019 BCCA 278:

> [21] The interpretation of a contract (apart from contracts that use widely-employed standard language clauses) is a question of mixed fact and law, on which a trial judge is entitled to deference (*Sattva* at para. 50). Nonetheless, when a trial judge interprets a contract in a manner that cannot be supported on its plain language, the error will be corrected on appeal.

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[29] The first issue is an extricable question of law. Whether a shotgun offer is an independent offer to contract or the exercise of a term of an existing contract determines which legal test must be applied—the test for the formation of a contract or the test for the interpretation of a contract. Identification of the correct legal test is a question of law: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8–9; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35.

[30] In my view, the second issue does not raise an extricable legal question; the interpretation of this contract is a question of mixed fact and law, reviewable on the standard of palpable and overriding error: *Teal Cedar* at paras. 45, 47.

Discussion

Characterization of the Shotgun Clause

[31] I am not persuaded that the invocation of a shotgun clause is either an exercise of a contractual option or an offer to form a new contract. Rather, to invoke a shotgun clause is to rely on a term of an existing contract by which the parties have agreed to a compulsory buyout procedure. As a result, whether the respondents were entitled to revoke the shotgun offer depends on the proper interpretation of the shareholders' agreement as a whole.

Interpretation of the Shotgun Clause

[32] Contractual interpretation is a practical, common-sense exercise to determine the objective intentions of the parties: *Sattva* at para. 47. Intentions are determined by reading the contract as a whole, giving words their ordinary and grammatical reading in light of the surrounding circumstances at the time of contracting: *Sattva* at para. 47. Surrounding circumstances can assist in ascertaining the meaning of the contract but cannot overwhelm the words: *Sattva* at para. 57.

[33] In my view, given the plain meaning of the agreement in light of the surrounding circumstances, the shareholders intended the shotgun offer to be irrevocable during the 60-day election period. The judge made a palpable and

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overriding error in interpreting the shareholders' agreement to permit the unilateral revocation of the shotgun offer.

Ordinary and Grammatical Meaning

[34] The shotgun clause entitles each shareholder to force a share sale at a price and on the terms stipulated in its offer; the recipient of the offer decides whether to buy or sell, as reflected by these terms:

> **5.1** Any Shareholder (the "Instigator") will have the right to deliver to the other Shareholders (the "Recipient") a notice in writing (the "Compulsory Offer") stating that the Instigator has determined to avail itself of the provisions of this Article and:
>
> > (a) the Instigator offers to sell to the Recipient (on a pro rata basis) all but not less than all of the Instigator's Investment, stipulating:
> >
> > > i. the number, kind and class of Shares owned by it and the price per Share (expressed in lawful money of Canada);
> > >
> > > ii. that the Recipient must also purchase the Instigator's Loans on a dollar for dollar basis; and
> > >
> > > iii. the terms and conditions of sale; or
> >
> > (b) to buy from the Recipient the Recipient's Investment stipulating that:
> >
> > > i. the price per Share will be the price set by the Instigator pursuant to Subsection 5.1(a)(i);
> > >
> > > ii. the Instigator will purchase the Recipient's Loans on a dollar for dollar basis; and
> > >
> > > iii. the sale of the Recipient's Investment is to be made on the same terms and conditions as set forth in Subsection 5.1(a)(ii)
>
> **5.2** Election by Recipient. The Recipient will be entitled, at its option within 60 days from the date of the receipt of the Compulsory Offer, by notice in writing to the Instigator either:
>
> > (a) to buy the Instigator's Investment at the price and upon the terms and conditions of purchase and sale contained in the Compulsory Offer; or
> >
> > (b) to sell to Instigator the Recipient's Investment at the price and upon the terms and conditions of purchase and sale contained in the Compulsory Offer.

[35] If the recipient shareholder does not make an election within 60 days, it is deemed to have accepted the offer to sell:

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> **5.5** Failure to Notify of Election. If the Recipient does not notify the Instigator in writing within the 60 day notice then the Recipient will be deemed to have accepted the offer to sell to the Instigator the Recipient's Investment at the price stipulated and upon the terms and conditions of purchase and sale specified in the Compulsory Offer…

[36] The ordinary meaning of these provisions is that once the clause is invoked, the process cannot be stopped—the shareholder relationship will be severed.

[37] Article 5.1 defines a shotgun offer as a "Compulsory Offer", which suggests the recipient must choose either to buy or sell. The respondents put great weight on the word "Offer", as support for their submission that a shotgun offer is an offer to form a new contract (and can therefore be revoked, pursuant to the general rules of contract formation). This submission ignores the word "Compulsory". This parsing of language does not lead to a coherent, principled interpretation of the agreement as a whole. Further, if a notice under article 5.1 is nothing more than an offer to form a new contract, it would be open to the recipient to simply refuse it and put an end to the process. This outcome would be inconsistent with the mandatory language of the clause.

[38] The conclusion that the shotgun process must continue once it is initiated is consistent with Article 5.5, which provides that the recipient cannot resist a shotgun sale by refusing to make an election—if no election is made, the recipient is deemed to have elected to sell its shares.

[39] Article 5.2 says the recipient of a shotgun offer will be "entitled" to buy or sell, at the price and on the terms stipulated in the offer. This means the recipient of a shotgun offer has an absolute right to elect, within the 60-day election period, to be the buyer or seller. Thus, the conclusion that an offer is irrevocable during the election period is necessary to give effect to the clause.

[40] The respondents say it is clear the parties intended shotgun offers to be revocable because Article 5.2 says the recipient is entitled to make an election "within 60 days" (as opposed to "for 60 days"). This argument is not persuasive.

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Surrounding Circumstances: Commercial Principles

[41] The surrounding circumstances and commercial context support the conclusion that the shotgun offer is irrevocable during the election period.

[42] Commercial reasonableness is a central consideration when interpreting commercial contracts. Courts prefer commercially reasonable interpretations because they are more likely to reflect the parties' objective intentions: *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 at paras. 142–144 at para. 142 (Côté and Brown JJ., dissenting but not on this point) [*Resolute*]. As Justices Côté and Brown explained in *Resolute*:

> [144] Given, then, the choice between an interpretation that allows the contract to function in furtherance of its commercial purpose and one that does not, it is generally the former interpretation that should prevail. While a party cannot avoid its contractual obligations simply because the bargain that they entered into was undesirable or unusual, commercially absurd interpretations should be avoided. As this Court said in *Guarantee Co. of North America v. Gordon Capital Corp*., "[i]f a given construction of the contract would lead to an absurd result, the assumption is that this result could not have been intended by rational commercial actors in making their bargain, absent some explanation to the contrary".
>
> [Citations omitted.]

See also the reasons the majority: *Resolute* at paras. 79–80.

[43] The commercial purpose of a shotgun clause is to provide a mechanism for shareholders to terminate the shareholder relationship by forcing a sale of one shareholder's interest in the company: *Powell v. Sedebe Holdings Co.* (1990), 19 A.C.W.S. (3d) 679; *Gray v. Gray*, 2004 MBQB 171 at para. 4. An interpretation that would allow the shotgun process to be unilaterally stopped once triggered is inconsistent with this objective.

[44] An important feature of a shotgun mechanism is that each party has an incentive to make their offer as close to market value as possible because the instigator does not know whether it will be required to buy or sell: *Kinzie v. The Dell Holdings Ltd.*, 2010 BCSC 1360 at para. 25. To conclude that shotgun offers are revocable absent an agreement to that effect would weaken the incentive for

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shareholders to make a fair offer. Based on the respondents' interpretation, the instigator could attempt to obtain shares at a below-market rate and revoke the offer if it became apparent that the recipient shareholder intended to elect to buy. The fairness of a shotgun mechanism depends, in part, on the possibility that the instigator may be forced to sell its shares. The respondents' interpretation would not motivate offers at fair market value.

[45] Shotgun provisions are not intended to allow shareholders to "test out" valuations of a company, but rather to end the shareholder relationship on mutually fair terms: *Powell* at para. 9. I note the respondents point to no cases where a shotgun clause has been interpreted to be revocable.

[46] The respondent points to practical reasons an instigator may wish to revoke a shotgun offer during the election period. For example, the instigator may want to revoke where there has been a change in financial circumstances such that the instigator can no longer afford to purchase the other shareholder's interest at the rate stipulated in the offer. In my view, this self-interested motive is not a reason to conclude the offer should be revocable.

[47] The instigator decides the valuation as well as whether and when to invoke the shotgun clause. As the judge noted, the parties are "experienced business people who, with the assistance of competent legal counsel, must be taken to understand the consequences of triggering the shotgun clause": Reasons at para. 59. An instigator must be assumed to have considered these risks before making a shotgun offer. Had the respondents wished to bargain for revocability to mitigate this risk, they ought to have included an express provision to that effect in the shareholders' agreement. To conclude the shotgun mechanism could be unilaterally stopped after having been triggered would be to "rescue a party who later regrets contractual arrangements that were carefully designed and accepted": see *Western Larch Ltd. v. Di Poce Management Ltd.*, 2013 ONCA 722 at para. 46.

[48] There is always a risk of market fluctuations during the election period. Parties can mitigate this risk by bargaining for a shorter election period. In this case,

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the respondents agreed to a 60-day election period and further agreed to toll the election period. Sophisticated commercial parties must be taken to understand the market's risks and uncertainties when entering into contracts: *Sattva* at paras. 117–118.

[49] For many businesses and individuals, circumstances changed as a result of the COVID-19 pandemic and the exact details of those circumstances may well have been unforeseen. However, the shotgun offer was only open for longer than contemplated in the shareholders' agreement because, with the March Agreement, all parties agreed to toll the election period. In my view, the respondents cannot complain about litigation delay and uncertainty when they consented to tolling the election period. The March Agreement is discussed in more detail below.

[50] Finally, each word and clause of a contract is assumed to have a purpose; courts do not prefer interpretations that render contractual terms ineffective or meaningless: *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489 at para. 20, citing *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410. In *Albanese v. Albanese* (1999), 1 B.L.R (3d) 131, Justice Lofchik concluded that the inclusion of an election period in the shotgun clause made the offer irrevocable during that period: at para. 9. The judge in the present case distinguished *Albanese*, partly on the basis that the shareholders' agreement in *Albanese* was made under seal. In my view, that is not relevant to the legal issue and is not a valid basis on which to distinguish *Albanese*. On appeal, the respondents argue this Court cannot rely on *Albanese* because it does not set out the language of the shareholders' agreement, which may have stated the offer was "irrevocable". I do not agree. The judge in *Albanese* was specifically considering the issue of revocability. Had revocability been explicitly addressed in the shareholders' agreement, the judge would have said so.

[51] I also note the respondents' shotgun offer states that Blackmore can respond to the offer at any time within the election period. It reads:

> In accordance with Section 5.2 of the Shareholders Agreement, you have sixty (60) days from the date of delivery of this letter to respond. <u>You may accept the Compulsory Offer at any time within the sixty (60) day period</u>. If

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> you do not respond within sixty (60) days, you will be deemed to have accepted the offer in accordance with Section 5.5 of the Shareholders Agreement.

Although this letter was written after the parties entered into the shareholders' agreement, it is consistent with the interpretation that the parties intended the shotgun offer be irrevocable.

Conclusion

[52] For these reasons, I conclude the judge made a palpable and overriding error in his interpretation of the shareholders' agreement.

[53] The judge's conclusion that the parties intended the shotgun offer to be revocable is irreconcilable with the ordinary and grammatical meaning of the words of the contract in light of the surrounding circumstances at the time of contracting. Again, the judge's conclusion is inconsistent with the respondents' confirmation by email that the shotgun offer could be accepted "at any time within the sixty (60) day period".

[54] In my view, the parties intended shotgun offers to be irrevocable for the duration of the election period. Accordingly, the purported revocation was invalid, and Blackmore was entitled to accept or "reverse" the offer at any time during the election period. I must therefore consider the effect of the March Agreement.

Effect of the March Agreement

[55] On March 13, 2020, the parties agreed that if the appellants' injunction application were not resolved on March 25, 2020, the election period for the shotgun offer would stop running on March 26, 2020, until the disposition of the injunction application. The hearing did not occur as scheduled on March 25.

[56] The March Agreement suspended the election period, and thus extended the period during which the shotgun offer could not be revoked.

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[57] The respondents submit that the COVID-19 pandemic was an unforeseen, intervening event that frustrated performance of the shareholders' agreement as modified by the March Agreement. They say the agreement was, objectively, an agreement to extend the time for a matter of days, and the extraordinary delay that resulted rendered performance of the March Agreement a radically different thing than was contemplated, particularly in light of the increase in FLT's value in the intervening time.

[58] I do not agree for a number of reasons. First, the circumstances do not amount to frustration. Second, the respondents acquiesced in the delay that they now allege was a frustrating event. Finally, there was no purported termination of the March Agreement.

[59] There is a two-part test to establish frustration at law. There must be (1) a qualifying supervening event that was outside the parties' contemplation at the time of contracting and not the fault of either party, which (2) renders performance of the contract "a thing radically different from that which was undertaken by the contract": *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 at para. 53; *Wilkie v. Jeong*, 2017 BCSC 2131 at para.18. It is common ground that the first step is met in this case.

[60] As to the second step, a frustrating event must change the <u>nature</u> of a party's obligations; it is well-established that increased expense, hardship, onerousness, inconvenience, or material loss do not amount to frustration: *KBK No. 138 Ventures Ltd. v. Canada Safety Limited*, 2000 BCCA 295 at paras. 12–13 [*KBK*]; *Wilkie* at para. 34. The alleged frustration must go to the root of the agreement and be entirely beyond what was contemplated by the parties: *KBK* at para. 21. In their factum, the respondents submit financial disadvantage is a basis for frustration.

[61] Where a party's objectives and expectations are specified in the contract, a significant change that prevents a party from achieving those objectives may amount to frustration: see e.g., *KBK* at para. 28. The respondents contend on appeal that they only sought to toll the election period for "a matter of days". However, there is

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nothing in the March Agreement to reflect this intention. The parties could easily have made this intention clear. For example, they could have stated this intention explicitly, included a specific end-date for the tolling period, or fixed a date on which to re-evaluate. They chose not to do so, and I decline to infer this intention.

[62] It is clear the respondents were aware there might be some delay in disposing of the injunction application when they entered into the March Agreement, which did not contain a fixed end-date for the extension of the election period. The March Agreement itself reflects uncertainty as to whether the matter would be heard as scheduled—the parties agreed to toll the election period if the petition were not resolved as scheduled. In fact, there would have been no need for the agreement if delay were not contemplated because the injunction would have been determined on March 25 (within the 60-day election period). At the hearing of the appeal, the respondents conceded that some delay in court proceedings is to be expected.

[63] In my view, it is clear on its face that the purpose of the March Agreement was to toll the election period until the injunction application was resolved. The character or essential purpose of the March Agreement was to extend time. An intervening event that causes delay in disposing of an injunction does not destroy the functional purpose of an agreement to toll the limitation period until the injunction is disposed of: see e.g., *Wilkie* at paras. 28–31, 40.

[64] In any event, the suspension of court operations resulting from the pandemic was temporary and did not cause the loss of the subject matter of the contract: see e.g., *Verigen v. Ensemble Travel Ltd.*, 2021 BCSC 1934. It did not amount to frustration of the March Agreement. The respondents were content with the March Agreement and appeared to remain so until they became aware of the company's increased value.

[65] Counsel referred to other cases alleging frustration on the basis of the COVID-19 pandemic. It is unnecessary to address them. Each case turns on its unique facts.

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[66] Furthermore, on March 19, 2020, just six days after making the March Agreement, the parties became aware of the suspension of court operations as a result of the COVID-19 pandemic. Even if the prolonged extension of time were a frustrating event (and I have concluded it is not), the parties became aware of it relatively soon after entering into the March Agreement. But they did not attempt to revisit the Agreement or to amend it. In my view, the respondents acquiesced in the alleged frustration by choosing to do nothing: see e.g., *Verigen* at para. 60.

[67] In addition to making no effort to amend the March Agreement, the respondents' conduct actively reinforced to the appellants that they were content to let the March Agreement stand. By agreeing to the hearing date in August, the respondents indicated they were content to wait at least another two months to have the injunction application resolved. Had the respondents ever communicated a concern about the extended election period, the appellants may have made an election sooner. The respondents gave the appellants no such indication. Therefore, it was reasonable for the appellants to rely on the continued tolling of the election period. Based on the timing of the purported revocation, it appears the respondents were content with the March Agreement until they obtained an updated financial valuation of FLT. At that point, they realized their shotgun offer had stipulated a low price in light of the increase in the company's value in the intervening three months.

[68] Finally, it is notable that even if the frustration argument had merit, the respondents never purported to terminate the March Agreement. They rely on the "revocation" of the shotgun offer, saying this also indicated they were unilaterally terminating the March Agreement. However, their letter of purported revocation does not mention the March Agreement. In fact, the letter says the respondents are reserving the right to argue frustration <u>in the future</u>. I take this to mean the respondents were not alleging frustration at that time. Accordingly, they cannot seek to rely on that letter as a purported unilateral termination of the March Agreement on the basis of frustration.

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[69] The respondents ask this Court to rescue them from a bargain they now regret. For the reasons provided, it is inappropriate to do so. There is no merit to the frustration argument.

[70] The respondents also suggest this Court could imply a term in the March Agreement permitting unilateral termination on reasonable notice. This argument is inconsistent with the respondents' position on frustration and in any event, no such reasonable notice was provided for the alleged termination. I need not address this argument further.

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Disposition

[71] In summary, the judge incorrectly framed the shotgun offer as an offer to form a new contract and made a palpable and overriding error in his interpretation of the shotgun clause.

[72] On the terms of Article 5 of this shareholders' agreement, a shotgun offer is not revocable unless the parties have agreed otherwise. Once the respondents invoked the shotgun clause, they were bound by the consequences.

[73] In the result, I would allow the appeal and:

a) set aside paragraph 1 of the order below to the extent that it dismissed the relief sought in Part 1, paragraph 7 of the second amended petition (the injunction application);

b) declare that the respondents are not entitled to revoke the compulsory buyout offer made pursuant to Article 5 of the amended shareholders' agreement; and

c) declare that Blackmore Management Inc. is entitled to purchase the respondents' shares in First Light Technologies Ltd. in accordance with

Blackmore Management Inc.'s reversal notice of the compulsory buyout offer.

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"

I AGREE:

"The Honourable Madam Justice Fenlon"

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Court File No. CV-21-00673084-00CL

ROYAL BANK OF CANADA -and- **PEACE BRIDGE DUTY FREE INC.**
Applicant Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

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