File No. CI 20-01-26627

THE QUEEN'S BENCH
Winnipeg Centre

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., C., B-3 AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., C. C280, AS AMENDED**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC

Applicant,

-and-

NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC., 4093887 CANADA LTD., 4093879 CANADA LTD., NYGARD INTERNATIONAL PARTNERSHIP, NYGARD PROPERTIES LTD., AND NYGARD ENTERPRISES LTD.

Respondents.

BRIEF OF THE RESPONDENTS
HEARING DATE: APRIL 29TH, 2020 at 10:00 AM

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INDEX

Page No.

PART I: ISSUES TO BE ADDRESSED

1. Document Disclosure Order

2. Amendments to Appointment Order

    i. Limitations regarding Nygard Properties Inc. and Nygard Enterprises Inc.

    ii. Deletion of Paragraph 13 – Stay of Class Action

3. Access to the Gardena Properties and Other Tenanted Properties

4. Directors and Officer Liability Insurance

5. Initial Response to Relief Sought by the Receiver and Receiver's First Report

PART II: AUTHORITIES TO BE RELIED UPON

	TAB
Bank of Montreal v. 0740103 B.C. Ltd, 2012 BCSC 806	1
Romspen Investment v. 6711162 Canada, 2014 ONSC 2781	2
Manulife Bank of Canada v. Conlin, 1996 CarswellOnt 3941	3
Alarez Pharmaceuticals Inc. CV-18-603054-00CL	4
7451190 Manitoba Ltd v CWB Maxium Financial Inc et al, 2019 MBCA 95	5
CED Bankruptcy and Insolvency VII.2.(b), 405	6

PART III: POINTS TO BE ARGUED

INTRODUCTION

1. Some of the Receiver's conduct does not make sense in the context of it being a court officer. One example is in the Receiver's report, there are allegations of improper conduct (up to and including the equivalent of fraud). The parties responded. Their response was rejected because of the lack of proper documentation. Why does the Receiver not advise the Court that these parties have no access to their work documents which are in the control of the Receiver? Why would they publicly name some parties and not others? Why would they not give these individuals access to their documents to respond or wait until they had access to their documents so they could respond fully?

2. There has been much discussion on the issues at hand but not as much progress as hoped. A question for the court. Are the secured creditors too involved in directing the receiver? Does it appear like the receiver is too often an advocate for the secured creditors? The receiver must be fair and reasonable to all parties. As each issue is addressed one needs to examine why the receiver takes the position it does. It is understood that the applicants and the respondents do not trust each other however, the Receiver cannot let this effect all its decisions.

1. Document Disclosure Order

3. The Receiver has provided a form of Order. The Respondents have been deferential

to the Receiver's wording as it relates to the debtor documents, which are under the Receiver's control, and the Respondents would like to access some of them. The Respondent is less deferential to the Receiver's wording as it relates to the non-debtor documents because they should not be in control of these documents. They should be returned immediately without condition. It may be there are some documents where there is an issue as to if they are documents of a debtor corporation or not. There are many documents where there is no issue that they belong to the non debtor. One example would be the plans for a building owned by a non debtor.

4. The Respondents' position regarding said Order can be set out as follows:

Debtor Documents paragraph:

2(e): This creates an exclusive list of non-debtors. It should not. There are many more non-debtors. We do not yet even know the list.

3: This paragraph suggests that the Receiver can review that which it chooses, including privileged and confidential information; it is the Respondents' position that the Receiver cannot review privileged and confidential documents of the non-debtors. The Court should have the authority to decide what is and is not read by the Receiver.

8: It is the Respondents' position that a "requester" as defined should include a non-debtor request or alternatively, a similar paragraph should be included in the non-debtor section of the order.

9(a): This paragraph seems to give the Receiver discretion to not provide the

documents even it is agreed that they are needed.

Non Debtor Documents

14: The limitation of request to documents in one of two places may not be appropriate, especially if and when the Receiver chooses to relocate the records to third party sites (i.e. if a building is sold)

5. It is the Respondents' position that the Receiver is currently in possession of non-debtor documents that are in no way related to its mandate. These documents must be returned to their true owners immediately. If the Receiver is unable to locate documents, the Respondents can attend at the premises to locate the documents. Further, there will be other non-debtors who will require the return of their items and this should be done expeditiously, without any hesitation by the Receiver.

6. Some of the Debtor Facilities are shared with certain parties who are not Debtors (the "Non-Debtors") including Edsons Investments Inc. ("Edsons") and Brause Investments Inc. ("Brause"). The Receiver has taken possession of the Debtor Facilities and excluded the Non-Debtors from accessing their assets, property and undertaking, including various corporate records.

7. Edson's and Brause are real estate investment companies and were not involved in the Debtors' business or operations (save for being certain Debtors' landlord at some of the Debtors Premises). As a result of its exclusion from the premises, Edson's and Brause have been unable to conduct routine functions such as pay

bills, file tax returns, do ongoing maintenance, and review its own leases. This is causing significant, and possibly irreversible, damage to Edson's and Brause, not to mention certain other Non-Debtors.

8. By way of example Edsons and Brause had requested access to their property this week and access was negotiated but they were refused access to the plans and maintenance document. There was no good reason to refuse these documents.

9. There are certain records that are required by Directors of the Debtor entities so that they may review them in the event that the NOI Proceeding can be recommenced.

10. There are a number of statements included in the First Report of the Receiver that support the Respondents' request for document disclosure. These statements are as follows:

    a. At Page 8, Paragraph 29, the Receiver sets out what it believes to be potential claims. It is therefore important that the Directors and Officers obtain full disclosure of documents as they may be put in a position to defend themselves.
    b. Beginning at Page 23, Paragraph 89 – 98, the Receiver alleges misconduct regarding Corporate Credit Card Activity and Sale of Corporate Vehicles. There is an information imbalance. The Receiver repeatedly states that the companies have not complied with certain requests, however, the Receiver

fails to acknowledge that it is in control of all documents required by the companies to comply with said requests.

11. Based on the statements of the Receiver, as set out above, the Receiver is alleging that the Identified Employees committed the equivalent of fraud. These are serious allegations and these allegations change the circumstances surrounding the need for document disclosure. The document disclosure issue is now a question of disclosure within a litigation context. It is now all the more important that the Receiver provides full and complete disclosure, and not be afforded the discretion to choose which documents to provide.

12. Further, these allegations on the part of the Receiver should cause the Court to wonder why seven employees were listed as having potential personal expenditures and only five names were protected. Two had their names associated with possible corporate misconduct and were not afforded the same protections the Receiver bestowed upon others (even though two of the protected names appear to have larger "potential personal expenditures".) Why would the Receiver do this?

13. It is submitted that the appropriate order for disclosure of documents of Non Debtor entities is as follows:

NON-DEBTOR RECORDS

1. **THIS COURT ORDERS** that, for the purposes of this Order, "**Non-Debtor Business Records**" means books, documents, securities, contracts, orders, corporate and accounting records and any other papers, records, and information in the nature of:

(a) Minute Books and related corporate records;
(b) shareholder ledgers;
(c) tax returns and tax notices;
(d) real property lease agreements;
(e) contracts with third parties;
(f) employment agreements;
(g) mortgage and financing agreements; and
h) financial statements, general ledgers, trial balances and Adjusting Entries;

2. **THIS COURT ORDERS** that, for the purposes of this Order the debtor locations in the possession and control of the Receiver are (collectively, the **"Debtor Locations"**) the following:

14702 South Maple Avenue, Gardena, California
14421 S. San Pedro Street, Gardena, California,
14401 S. SN Pedro Street, Gardena, California
332 E. Rosencrans Avenue, Gardena, California
312 E. Rosencrans Avenue, Gardena, California,
(collectively, the "**California Offices**"),

1 Niagara Street, Toronto, Ontario
239 Chrislea Road, Vaughan, Ontario
701 Broadway, Winnipeg, Manitoba
1771 Inkster Blvd. Winnipeg, Manitoba
1300, 1302 and 1340 Notre Dame Avenue Winnipeg, Manitoba,
(collectively, the "**Canadian Offices**"),

Non-Debtor Business Record Request

3. **THIS COURT ORDERS** that any party that is not a Debtor (a "**Non-Debtor**") and believes the Receiver is in possession of any Non-Debtor Business Records may submit a request (the "**Request**") by no later than _____ requesting the Receiver locate and make available any Non-Debtor Business Records belonging to that party.

4. **THIS COURT ORDERS** that the Request shall include the name of the Non-Debtor, the Non-Debtor Business Records it requires (the "**Requested Documents**"), and the Non-Debtor's best recollection of the location(s) within the Debtor Locations where the Non-Debtor Business Records are located (the "**Document Locations**").

5. **THIS COURT ORDERS** that the Receiver shall make best efforts to search the Debtor Locations, and any other premises that are within the Receiver's control (including, but not limited to, the Document Locations), for the Requested Documents and shall provide a response to the Request within ____ days disclosing what

Requested Documents have been located and where the Non-Debtor requesting party can retrieve same.

Additional Requests

6. **THIS COURT ORDERS** that Non-Debtors may submit further requests (the "**Additional Requests**") for its property, assets and undertaking, including additional Non-Debtor Business Records (the "**Additional Property**") which it believes are in the Receiver's possession by no later than _____ (the "**Additional Request Deadline**").

7. **THIS COURT ORDERS** that the Receiver shall make best efforts to search the Debtor Locations, and any other premises that are within the Receiver's control for the Additional Property and shall advise the Non-Debtor within ____ days of when it will be in a position to respond to the Additional Requests.

8. **THIS COURT ORDERS** that when the Receiver responds to the Additional Requests, it shall advise as to what Additional Property has been located and where the Non-Debtor can retrieve same.

MISCELLANEOUS

9. **THIS COURT ORDERS** that, the Receiver shall provide Non-Debtors with supervised access to computers, servers and e-mail accounts for the purpose of locating documents subject to a Request or Additional Requests. Once located, the Receiver shall determine whether the electronic document(s) are properly subject to the Request or Additional Request and, if so, permit the Non-Debtor to either copy said documents onto a USB drive or take photocopies or printouts of said documents (all photocopies and printouts to be charged to the Non-Debtor at 25 cents per page).

10. **THIS COURT ORDERS** that if, in the course of its duties, the Receiver discovers any property, assets, and undertaking of a Non-Debtor (the "**Non-Debtor Property**") and the Receiver has contact information for said Non-Debtor, the Receiver shall contact the Non-Debtor, advise of its discovery of the Non-Debtor Property and provide the relevant Non-Debtor ___ days to claim said property, failing which the Receiver is at liberty to destroy, or otherwise dispose of the Non-Debtor Property in question.

11. **THIS COURT ORDERS** that all disputes relating to the interpretation of this Order (including, but not limited to, any decision by the Receiver not to deliver assets, property and undertaking that the Non-Debtor states are Non-Debtor Business Records and/or Additional Property) shall be referred to this Honourable Court by way of motion to be scheduled on not less than four (4) days' notice.

12. **THIS COURT ORDERS** that each of the Non-Debtor(s) and the Receiver shall bare their own costs (including disbursements) with respect to addressing a Request, or an Additional Request.

13. **THIS COURT ORDERS** that any Non-Debtor who makes a request for property, assets and undertaking after the Additional Request Deadline shall be responsible for all reasonable fees and disbursements incurred by the Receiver in accommodating such a request.

2. Amendments to Appointment Order

i. Limitations regarding Nygard Properties Inc. and Nygard Enterprises Inc.

14. This process began with the Notice of Application of the secured creditor, White Oak. No other creditor asked for the court's assistance. The Appointment Order was made on behalf of a secured creditor who had the ability to appoint a receiver pursuant to their security interest over a group that included debtors and guarantors. The responsibility of the debtors and guarantors were different. It is explicit in the security documentation. We submit it should be made explicit in the order.

15. There is a difference between a Receiver appointed when they have security and the ability to appoint a receiver pursuant to that security and when they do not. First the test to obtain the receivership is different. It is a much more difficult test to overcome. Some courts have suggested it is as restrictive as the test to obtain a Mareva injunction. One of the factors the court considered, in appointing the receiver was the applicant's ability to appoint a receiver pursuant to its security. In this case, the security is limited as it relates to NEL and NPL because they are guarantors, and not primary debtors, and the security documents list what is covered. It would be just for the court to give the receiver a mandate pursuant to the security. A Court should make clear its order covers only those assets described in the security.

16. The White Oak Facility defines Limited Recourse Guarantor as being NEL and NPL. Article 11.09 of the White Oak Facility states that:

> Notwithstanding anything to the contrary contained in this Article X1, Agent's recourse with respect to the Limited Recourse Guarantors shall be limited to the assets encumbered by the Mortgages and assets pledged by each Limited Recourse Guarantor pursuant to the Securities Pledge, ***and neither Agent nor Lenders shall enforce such liability against any other asset or property of the Limited Recourse Guarantor*** [emphasis added]

17. The relevant Securities Pledge and Mortgages can be found at Exhibit "F", Exhibit "H" and Exhibit "I" of the Dean Affidavit. As set out in the Affidavit of Greg Fenske, affirmed April 8, 2020, the Mortgages refers to mortgages granted by NPL to the Lenders on the Office Premises and that the Securities Pledge relates to shares owned by NEL in 4093879 Canada Ltd. (one of the Debtors) and shares owned by both NPL in 4093887 Canada Ltd. (another of the Debtors).

18. As set out in the Affidavit of Greg Fenske, affirmed April 8, 2020, Counsel to NEL and NPL wrote to Receiver's counsel and raised the issue of the Receiver's mandate as it pertains to both NEL and NPL (a copy of the letter from NEL and NPL's counsel to Receiver's counsel dated April 5, 2020 (the "April 5 Letter") is attached to said Affidavit as Exhibit "C".)

19. As set out in the Affidavit of Greg Fenske, affirmed April 8, 2020, on April 6, 2020 Receiver's counsel responded to the April 5 Letter by stating that it was White Oaks' understanding that the real property subject to the Mortgages and the shares subject to the Securities Pledge encapsulated all of NEL and NPL's property, assets and undertaking and thus the Appointment Order, as issued, is appropriate.

20. White Oaks' assertions as articulated in the April 6 E-Mail do not correspond with the written language contained in Article 11.09 of the Credit Agreement or the concept of limited recourse guarantees generally.

21. In the case of *Bank of Montreal v. 0740103 B.C. Ltd.*, a receivership order was amended to exclude an asset that was specifically excluded in the wording of a general security agreement. It was found that the receivership order ought to have excluded the asset when it was initially granted.

22. The Respondents submit that as set out in *Romspen Investment v. 6711162 Canada*, that the appointment of a receiver is an equitable remedy. The appointment must be fair and reasonable. It is not fair or reasonable to permit a misunderstanding to allow for an overly broad order.

23. The Receiver has included a Corporate Structure Chart at Appendix D to its First Report. The line connecting Nygard International Ltd (Shanghai) to Nygard Properties Ltd. is inaccurate; there is no such connection.

24. There following are two examples of assets that are not covered by the White Oak Facility:

    a. Leasehold interest on a property in Falcon Lake: the lease is held by Nygard Property Ltd however, it was not pledged as security to White Oak.

    b. Property in Shanghai: The Company that owns the Shanghai property is not owned by any of the debtor companies. Even if it were, and the line in the chart was accurate, it should still not be subject to the Receiver's mandate as it was not pledged as security to White Oak.

25. It is the Respondents' position that as the White Oak Facility does not cover all of the Debtors' properties, the Order ought to set out exactly what it does cover.

26. The scope of the Receivership Order is important as the Receiver only needs to be appointed over the assets subject to the White Oak Facility. Upon the Receivership's completion of its mandate, there is NOI that can be reactivated.

27. It is the Respondents' position that if there is a dispute as to the wording in the Credit Agreement, as it was drafted by the Creditor White Oak, the doctrine of *contra proferentem* applies and it should be interpreted to the benefit of the Respondents. In *Manulife Bank of Canada v. Conlin* (1996), 1996 CarswellOnt 3941, the Supreme Court of Canada was asked to interpret a guarantee. The Court confirmed that where a contractual provision is sufficiently ambiguous that it is reasonably capable

of more than one construction, it will be construed against the party responsible for drafting and tendering the contract (rather than the person in whose favour the stipulation was made.)

28. In accordance to the foregoing the Respondents seek an Order amending the Appointment Order by including the following as paragraph 2A

> 2A **THIS COURT ORDERS** that, notwithstanding paragraph 2 of this Order, or any other paragraph related thereto, the Receiver is only appointed over the following, property, assets and undertaking of Nygard Properties Ltd. and Nygard Enterprises Ltd.
>
> (a) real property municipally known as 1 Niagara Street, Toronto, Ontario;
>
> (b) real property municipally known as 1771 Inkster Blvd, Winnipeg, Manitoba;
>
> (c) real property municipally known as 1300, 1302, and 1340 Notre Dame Avenue, Winnipeg, Manitoba;
>
> (d) real property municipally known as 702/708 Broadway, Winnipeg, Manitoba
>
> (e) 200 common shares of 4093879 Canada Ltd., owned by Nygard Enterprises Ltd.; and
>
> (f) 200 common shares of 4093887 Canada Ltd. owned by Nygard Properties Ltd.

ii. Deletion of Paragraph 13 – Stay of Class Action

29. It is the Respondents' position that paragraph 13 of the Appointment Order, which reads as follows, should be removed:

13. THIS COURT ORDERS that notwithstanding paragraph 12 of this Order, nothing contained in this Order shall prevent or stay the continuation of the proceeding of *Jane Does Nos. 1-10 v. Nygard et al.*, No. 20-cv-01288 (ER) against certain Debtors in the United States District Court for the Southern District of New York (the "Jane Doe Proceeding") through and including the entry of final judgment therein, provided that this Order shall prevent and stay in all respects the enforcements of any judgment therein against any of the Debtors. For the avoidance of doubt, (i) the Receiver shall be under no obligation whatsoever to take any actions or steps with respect to the Jane Doe Proceeding, including but not limited to defending against such proceeding, and (ii) the Receiver shall have no liability whatsoever in respect of the Jane Doe Proceeding.

30. The Respondents acknowledge that the inclusion of paragraph 13 in the Receivership Order was previously addressed by this Honorable Court. However, as set out in the First Report of the Receiver, at Page 14, Paragraph 57, there has been a change of circumstances:

The Receiver also noted that at the time the Lenders filed the Receiver Application, all of the Debtors retail stores were open and operating. As noted previously in this First Report, just prior to the Receiver's appointment, the Debtors closed all of their retail stores and, as the COVID-19 pandemic has unfolded, it has become clear that what was once viewed as a short term interruption, may actually last for an extended period. The Debtors have records located across multiple offices in Canada and the United States and, as such, discovery and production requests related to the Class Action are likely to result in a significant challenge and expense for the estate. The Receiver must look to conserve resources where it can to preserve its ability to liquidate assets and maximize realizations from the Property for the benefit of stakeholders. Given the foregoing circumstances, and despite the Receiver's general desire not to impede the Class Action, the Receiver determined that it was in

the best interests of the estate that the Class Action (solely with respect to the Debtors) be stayed, at least on a temporary basis.

31. It is the Respondents' position that there ought to be consistency between the jurisdictions in the treatment of the Class Action, especially given that the Class Action is based in the United States.

32. It is to be noted that in a prior piece of litigation, *Alarez Pharmaceuticals Inc. CV-18-603054-00CL*, the Receiver agreed to a Cross Border Protocol that set out as follows. Why not implement this now, particularly given paragraph 57 of its First Report, as set out above.

> H. Recognition of Stay of Proceedings
>
> The Canadian Court hereby recognizes the validity of the stay of proceedings and actions against or respecting the U.S. Debtors under their property under section 362 of the Bankruptcy Code (the U.S. Stay). [...]

3. Access to the Gardena Properties and Other Tenanted Properties

33. This issue is of great urgency to Edson and Brause. The receiver mischaracterized the Landlords comments, as intimidating, when the Landlords were legally exercising their rights to access their building (including giving 24 hours' notice) and the Receiver instructed its agent to withhold keys and access to the property. By not permitting the Landlords access to conduct safety inspections, it could expose the Landlord to actions should there be property or personal damage resulting from a lack of safety checks and compliance with regulatory requirements.

34. Further, in paragraph 119 the receiver left the impression Abe Rubinfeld changed his position on three topics. He was not changing his position but rather talking about three separate issues. This is another instance of the receiver being an advocate for the secured creditor.

35. The Receiver has put forward the conditions upon which Edsons' and Brause would be permitted access to the properties they own, being the five leased premises in Gardena, California, all of which are now under the Receiver's control.

36. As set out in the Affidavit of Greg Fenske, affirmed April 8, 2020, on March 28, 2020, counsel for Edsons and Brause requested access to the properties. On April 20, 2020, a formal request was once again made to enter all buildings in California for a maintenance check.

37. It is the Respondents' position that the following conditions for entry, as set out by the Receiver, are not acceptable:

    a. "In advance of attending, Edsons would provide to the Receiver reasonable evidence to confirm and support the purpose of the access." As has been advised by Edsons to the Receiver, the leases do not require Edsons to state its reasons for wanting access to the premises. Further, Edsons is not a debtor and its business and affairs are not the concern of the Receiver. In the

circumstances, this condition is not reasonable.

b. "The Receiver's costs associated with the attendance are to be borne by Edsons." It is Edsons and Brause's position that there is no provision of the lease that requires the landlord to reimburse the tenant for costs associated with attending the properties. Further, this condition is particularly concerning in an instance where the Receiver is actively restraining the landlord from attending the properties and is requiring additional measures for a visit that would not normally be required when a landlord visits a tenanted premise. In the circumstances, this condition is not reasonable.

38. It is to be noted that Section 146 of the *Bankruptcy and Insolvency Act* provides that the rights of a landlord (lessor) are to be determined according to the law of the province in which the leased premises are situated.

39. It is to be further noted that the lease waivers that have been provided by the Receiver speak to the Receiver having a rent-free period; however, this is in the context of the Receiver being a "representative of the Agent". It is the Respondents' position that this language in the lease waivers is referring to a private receiver and not a court appointed receiver. While a private receiver is the representative for only the Creditor, a court appointed receiver acts in a fiduciary capacity with respect to all interested parties (CED Bankruptcy and Insolvency VII.2.(b), 405). This distinction is briefly addressed in *7451190 Manitoba Ltd v CWB Maxium Financial Inc et al,* 2019

MBCA 95 (CanLII) at paragraph 27.

40. It is based on the foregoing, that the Respondents are seeking the following Order:

> an Order requiring the Receiver to provide Edsons Investments Limited ("Edson's") and Brause Investments Limited ("Brause") with access to their owned premises with 24 hours advanced notice providing that said access does not offend any province or state's "shelter in place" directions in place with respect to the COVID-19 pandemic

4. Directors and Officer Liability Insurance

41. The Directors and Officers of the companies in receivership have asked the Receiver about the status of the Directors and Officers insurance policies purchased by some, or all, of the Debtor Companies. The Directors and Officers' understanding is that it is a claims made policy that expires in June or July of this year. The Directors and Officers understand that there is an ability to purchase tailing coverage of either three years or six years.

42. The Directors and Officers would like the Receiver to purchase the tailing coverage option for them, or, failing that, instruct the Debtor Companies' insurance broker (who is believed to be HUB Insurance) to purchase the tailing coverage providing that the Directors and Officers personally pay for said coverage. Accordingly, the following has been asked of the Receiver:

a. Purchase and pay for the tailing coverage for the Directors and Officers so that they maintain coverage for claims that occurred during the policy period but that may not be made until after the policy expires; or in the alternative

b. Advise HUB Insurance that it will purchase the tailing coverage providing that the Directors and Officers pay the premiums for said tailing coverage.

5. Initial Response to Relief Sought by the Receiver / Receiver's First Report

i. Key Employee Retention Plan

43. It is the Respondents' position that it is opposed to the Key Employee Retention Plan if it is to include employees Mr. Hudda and Mr. Carkner. It is the Respondents' position that these two individuals are upper level employees who may be attempting to buy the companies. There are in possession of information that others do not have. It is the Respondents' position that it should be provided with the KERP Plan, and it will undertake not to distribute it to others.

44. The receiver's report wrongly states $500,000 dollars was diverted to Edsons. The money was transferred from Edsons and then back to Edsons. Nygard International Partnership's position was White Oak was in breach of their agreement when it refused to provide further funding, on three days' notice, forcing the Nygard group to arrange alternate funding to meet payroll. Further it is Nygard International Partnership's position that White Oak always had an obligation to allow Nygard International Partnership access to the White Oak credit facility pursuant to the formula to pay suppliers, generate sales, and be responsible to meet the payroll of March 12, 2020.

45. For the reasons described above and herein, the Respondents and the Non-

Debtors respectfully request:

a. Approval of a document disclosure order substantially in the form as set out above as it relates to the debtor entities and as we have set out herein with respect to the non-debtor corporation.

b. An Order amending the Appointment Order to:

   i. limit the Receiver's appointment over NPL to the Security, as more particularly described in paragraph 4 of the Debenture granted by NPL to the Applicant dated December 25, 2019 and NPL's owned shares in 4093887 Canada Ltd.; and

   ii. Limit the Receiver's appointment over NEL to NEL's owned shares in 4093879 Canada Ltd.

c. An Order directing the Receiver to advise both HUB Insurance and AIG Insurance Company of Canada that it approves the purchase of tailing coverage for the Debtors' Directors and Officers as provided for in the Insurance Policy purchased by Nygard Enterprises Ltd. (the "**Policy**"), on the understanding that the Directors and Officers shall pay the Addition Premium Amount (as that term is defined in the Policy) and provide copies of any other insurance to which the Directors and officers would benefit.

46. An urgent Order granting the Non-Debtors access to the Gardena Premises on 24 hours advanced notice as per the leases between Nygard Inc. and the relevant Non-Debtor Landlords.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of April, 2020

LEVENE TADMAN GOLUB LAW CORPORATION

Per:

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TAB "1"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bank of Montreal v. 0740103 B.C. Ltd.,*
2012 BCSC 806

Date: 20120531
Docket: S106152
Registry: Vancouver

Between:

Bank of Montreal

Plaintiff

And

0740103 B.C. Ltd.
0740115 B.C. Ltd.
Lang Vineyards Ltd.
Holman Holdings Ltd.
Holman Lang Wineries Ltd.
Keith Douglas Holman and Dorothy Lynn Holman, in their own capacities, and doing business as Holman Farms
Pepinieres Guillaume SA

Defendants

Before: The Honourable Madam Justice Kloegman

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	H. Ferris
Counsel for the Holman Defendants:	R. Burke
Counsel for the Receiver Manager, Wolridge Mahon Limited	S.D. Dvorak
Place and Date of Trial/Hearing:	Vancouver, B.C. January 4 and 6, 2012
Place and Date of Judgment:	Vancouver, B.C. May 31, 2012

[1] This has been a long and arduous insolvency action, at least in its latter stages. It started in 2007 when the Holmans executed personal guarantees, general security agreements and mortgages over property owned by them personally in favour of the plaintiff bank and as security for ongoing loans from the plaintiff to the corporate defendants.

[2] As a result of defaults in repayment of the loans and the expiry of a number of Forbearance Agreements, the plaintiff applied in this action for the appointment of a receiver manager and also started separate foreclosure proceedings . A receivership order was granted by Walker J. to the plaintiff on September 17, 2010.

[3] In June 2011, with the assistance of new counsel, the Holmans were successful in applying before me to amend the receivership order to exclude their principal residence on Midland Road. At this hearing, the plaintiff argued that the Midland Road property was already the subject of an order *nisi* and order for sale granted in the foreclosure action which the plaintiff had started in the Penticton registry. This foreclosure action was not before me, and had no bearing on the fact that the plaintiff was not entitled to a receivership order over the Midland property pursuant to the general security agreements. I found that the wording of the general security agreements specifically excluded the non-business assets held by the Holmans personally, and therefore, their principal residence on Midland Road should have been excluded from the receivership order.

[4] At the June hearing, counsel for the Holmans also made submissions about an alleged oral agreement between the plaintiff and the Holmans to exclude their home from the entire realization proceedings. There was some affidavit evidence in this regard, and so I granted leave to the Holmans to file a counterclaim on this issue. Since then, I understand that the following events have occurred; not necessarily in this order:

1. The Midland Road home has been sold in the foreclosure proceedings.

2. The receiver manager has sold most, if not all, the assets of the winery, including the secured real property, pursuant to Court approved sales.

3. There is about a $3 million shortfall to the plaintiff.

4. The Holmans have filed a greatly enlarged counterclaim for damages since the hearing in June 2011. They allege, *inter alia*, negligent misrepresentation, breach of agreement not to sell the Midland Road property, negligent listing of properties below market value, improper purpose for the appointment of the receiver manager, imprudent liquidation of the defendants' properties, and compromising of the receiver manager's impartiality and independence.

5. The parties have settled the outstanding issue of the priority of mortgage security registered against the Holmans' property by counsel for the Holmans' law firm.

[5] The only issue I am being asked now to decide is whether the Holmans are entitled to funding from the receiver manager for opposing the receivership claim over their home, and for prosecuting their counterclaim in the future.

[6] The Holmans argue that they are entitled to such funding on three grounds:

1. The Holmans, as directors of the corporate defendants, had the authority to incur the legal costs they did and such costs were reasonable;

2. They are statutorily entitled to such costs under ss. 159, 162(1) and 164 of the *Business Corporations Act*; S.B.C. 2002, c. 57; and

3. They are impecunious and will be deprived of the opportunity to pursue their remedy if the order is not granted.

[7] I find that the submissions to support the grounds above are fatally flawed on the facts in this case. The Holmans never contested the appointment of the receiver manager. They have never contested the underlying debt or the validity of the

security held by the plaintiff. The receivership has for all intents and purposes, been concluded, with a $3 million shortfall. The plaintiff never claimed *in personam* relief against the Holmans in the receivership action because it had already obtained judgment against them in the foreclosure action. All that remains is the adjudication of the Holmans' counterclaim, which is not a defence, but an affirmative claim for damages to themselves, personally.

[8] From my review of the case law, legal costs will only be funded by the receiver manager from the corporate assets where the underlying right of the plaintiff creditor to enforce its security against those assets in the manner proposed is brought into question. In other words, it is only the defence of the original action brought by the plaintiff to enforce its security that can attract an order that costs be paid from the corporate assets. [See: *Royal Bank of Canada v. Tower Aircraft Hardware Inc.* (1991), 118 A.R. 86 (QB); *Royal Bank of Canada v. West-Can Resource Finance Corp. Ltd.* (1990), 77 Alta. L.R. (2d) 43 [*West-Can*]; King *Petroleum Ltd. (Re)*, [1973] O.J. No. 1324 (HCJ); *Toronto Dominion Bank v. Fortin et al* (1978), D.L.R. (3d) 111 (BCSC)]

[9] It is true that the general security agreements did not cover non-business assets, and in that sense, the Holmans brought into question the right of the plaintiff to enforce its security against their home. However, the home was not a corporate asset; it was a personal asset of the Holmans. The proceeds of sale from the corporate assets are not available to fund the Holmans personally. It must be remembered also that the proceeds of sale from the Midland Road property were not obtained through the receivership action, but rather the separate foreclosure, so they are not available for funding in this action, either.

[10] I further find that the statutory entitlement under the *Business Corporations Act* that the defendants rely upon is not available to them as individuals pursuing their personal claim for damages incurred by them. The cases cited by the Holmans have no bearing on this post-receivership, personal claim for damages.

[11] Similarly, the cases cited by the Holmans to support their third ground of argument all deal with funding of defences raised by the corporate entity, not a personal claim of the individual director of a corporation for personal damages. In the case of *West-Can*, relied upon by the Holmans, the counterclaim was inextricably linked to the defence of the receivership action in that it arose from a dispute over terms of interest of the original debt.

[12] Accordingly, I can find no merit in the Holmans' application brought at this stage of the proceedings. Their application for funding is dismissed.

"Kloegman J."

Tab "2"

CITATION: Romspen Investment Corporation v. 6711162 Canada Inc., 2014 ONSC 2781
COURT FILES NOS.: CV-14-10470-00CL and CV-14-10529-00CL
DATE: 20140505

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

COURT FILE NO. CV-14-10470-00CL

RE: Romspen Investment Corporation, Applicant

AND:

6711162 Canada Inc., 1794247 Ontario Inc., 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts Ltd., Altaf Soorty and Zoran Cocov, Respondents

AND:

COURT FILE NO. CV-14-10529-00CL

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF 6711162 CANADA INC., AND THOSE OTHER COMPANIES LISTED IN SCHEDULE "A" HERETO

BEFORE: D. M. Brown J.

COUNSEL: S. Jackson, for the Romspen Investment Corporation

D. Magisano and S. Puddister, for 6711162 Canada Inc., 1794247 Ontario Inc., 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts Ltd. and Casino R.V. Resorts Inc., respondents/CCAA Applicants

A. Bouchelev, for Altaf Soorty and Zoran Cocov

E. Tingley, for Pezzack Financial Services Inc.

HEARD: May 2, 2014

REASONS FOR DECISION

I. Competing applications for the appointment of a receiver and the making of an initial order under the *Companies' Creditors Arrangement Act*

[1] Romspen Investment Corporation ("Romspen") lent money to 6711162 Canada Inc. ("671") and certain related companies. That loan has matured and has not been repaid. Romspen applies for the appointment of a receiver under section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, together with the appointment of a construction lien trustee pursuant to section 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30.

[2] 6711162 Canada Inc. and certain related companies opposed the appointment of a receiver and, instead, they have applied for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. Romspen opposed the making of a *CCAA* initial order.

[3] The key business issue at stake in these competing applications is who gets to control the development and/or realization of a partially-completed residential condominium project in Midland, Ontario – a court-appointed receiver or the current owners and management of one of the CCAA Applicants, Hugel Lofts Limited?

[4] For the reasons set out below, I grant the application for the appointment of a receiver and construction lien trustee, and I dismiss the application for an initial order under the *CCAA*.

II. Evidence about the debt and secured assets

[5] Romspen is a commercial mortgage lender. The respondents, Altaf Soorty and Zoran Cocov, are the principals of a group of property holding and development companies which own parcels of land in Midland, Cambridge and Ramara, Ontario and to which Romspen lent money.

A. The Loan and the demands

[6] By Commitment Letter dated July 18, 2011, Romspen agreed to provide 671162 Canada Inc. ("671") and 1794247 Ontario Inc. ("179") with a $16 million loan facility for a two year term expiring August 1, 2013. The Commitment Letter stated:

> The Loan shall be funded by way of advances, the amount(s) and timing of such advances(s) to be in the absolute discretion of Lender.

[7] The funds were to be used "for general corporate purposes…to retire existing mortgage indebtedness [on two properties]…to pay fees and transaction costs, to set up an interest reserve, and up to $10,000,000 for the acquisition of additional real property, to be secured by mortgage(s) and other security satisfactory to Lender in its sole discretion."

[8] The Loan was secured by first mortgages on three properties in Ramara, as well as by a second mortgage on a fourth. Three of the properties were owned by 671 and 179; the fourth was owned by Soorty and Cocov. The Commitment Letter stated that the Borrower had represented that the cumulative value of the four properties was $28.1 million. The Loan was also secured by general security agreements.

[9] A year later, on June 12, 2012, the parties amended the Commitment Letter in several respects (the "First Supplement"). First, another company controlled by Soorty and Cocov, Casino R.V. Resorts Inc., was added as a "Borrower". Second, an additional advance of $470,000 was made, secured by two other properties. The parties agreed that this advance was transitional in nature and ultimately was taken out by replacement financing.

[10] However, the principals of the CCAA Applicants made some very serious allegations about the validity of the First Supplement. Soorty, in his April 17, 2014 affidavit, deposed:

> I did not sign the said document and verily believe that it is a forgery. Unlike all other documents signed between Romspen Investment Corporation and myself, the pages of the First Supplement are not initialed and the signatures not witnessed, even though space for witnessess' signatures is provided.

Soorty so deposed evidently to support his contention that he had never agreed to make Casino R.V. a "Borrower" under the Loan, which on its face was one of the effects of the First Supplement. In his April 17 affidavit Cocov also alleged that his signature on the First Supplement was a forgery.

[11] Romspen adduced evidence which showed that slightly over 15 other documents were signed as part of the additional $470,000 loan put in place by the First Supplement. Soorty signed many of those on behalf of Casino R.V. One of the documents was an opinion by corporate counsel for Casino R.V. dated June 14, 2012 which stated that the "Loan and Security Documents have been duly and validly executed and delivered by the Company and create valid and legally binding obligations of the Company enforceable against the Company in accordance with the term thereof".

[12] After Romspen filed that evidence Soorty swore a further affidavit (April 23) in which he backpedalled from his forgery allegation, now contending that:

> I have no recollection of ever signing [the First Supplement]. If I ever did sign it, it was without understanding and appreciation of the nature and legal consequences of the document that was put in front of me.

Then, in his affidavit in support of the *CCAA* application, Soorty deposed that "even a cursory review of the First Amendment shows that it was put together in a rather hap-hazard fashion". Finally, in his second affidavit in support of the *CCAA* application, Soorty simply stated that the First Supplement "was placed in front of me with little time to obtain meaningful legal advice".

[13] Yet, as will be discussed in detail shortly, on June 7, 2013, one year after the First Supplement, both Soorty and Cocov signed a forbearance letter with Romspen, including Soorty signing the letter on behalf of Casino R.V. Resorts Inc. Why, one might ask, if the First Supplement which added Casino R.V. as a Borrower was a "forgery" or was based on a lack of "understanding and appreciation", would Soorty proceed to sign, one year later, the forbearance letter on behalf of Casino? In my view the answer is clear – there is absolutely no basis to support the allegations of Soorty and Cocov that the First Supplement was a forgery or that they

did not understand it. Their allegations of forgery can only be described as falsehoods, and such falsehoods severely undermine the credibility of the *CCAA* application given that Soorty and Cocov are the principals of the CCAA Applicants.

[14] To continue with the technical narrative, a further amendment was made to the Commitment Letter on August 15, 2012 (the "Second Supplement"). Four entities were added as "Borrowers": Hugel Lofts Limited, 20333387 Ontario Inc., 1564168 Ontario Inc., and 1387267 Ontario Inc. The use of the loaned funds provision was amended so that the next advances under the Loan could be used by the Borrowers to refinance a condominium project in Midland and "to provide funds to assist in completion of construction on [the Midland Condo Project] on a cost to complete basis in accordance with a project budget to be approved by Lender (including contingency allowance satisfactory to Lender)(approximately $7,000,000) and to pay further fee and transaction costs."

[15] Also, the Second Supplement increased the security provided by the Borrowers to include three Midland properties, including the lands upon which the Midland Condo Project was being built, as well as three properties in Cambridge. Romspen took first and second mortgages on the Midland lands, a first mortgage on one Cambridge property, and second mortgages on two other Cambridge properties which were behind mortgages held by Pezzack Financial Services Inc.

[16] The mortgage security taken by Romspen contained a standard provision enabling it to appoint a receiver upon an event of default, and the chargor also agreed to consent to a court order appointing a receiver.

[17] The Second Supplement also amended the Commitment Letter by adding, as a schedule, Romspen's Standard Construction Conditions. Section 4 of those Conditions stated:

> **4. Cost to Complete**
>
> The Lender shall not be required to make any advance unless prior to making such advance, the Lender is satisfied that the unadvanced portion of the Loan will be sufficient to pay the cost to complete the Project. Where insufficient unadvanced funds remain, the Borrower shall be required to pay such additional funds to the Lender so as to make the unadvanced portion of the Loan equal to the cost to complete.

[18] According to Wesley Roitman, a Managing General Partner of Romspen, in the months following the execution of the Second Supplement Romspen became concerned that the costs to complete the Midland Condo Project would exceed the budgeted $7 million and that a funding gap of about $3.1 million would arise. On June 7, 2013, the parties entered into a forbearance agreement. After reciting the language of the Commitment Letter's Section 4 "Cost to Complete", the forbearance letter went on to state:

> At this time, the amount required to be invested by you to comply with Section 4 above, is $3,180,994.00. You have advised that you have been and are currently unable to fund this amount. *Your failure to fund this amount constitutes an act of default under the loan and the security granted in connection therewith*. (emphasis added)

[19] Notwithstanding putting the Borrowers on notice that they had committed an act of default, in the forbearance letter Romspen stated that it agreed to forbear from exercising its available rights and remedies with respect to the act of default and would make the current advance requested by the Borrowers under the Loan "to fund continuing construction with respect to the condominium development at 151 Marina Park Avenue, Midland, Ontario".

[20] The Borrowers did not invest the $3,180,994.00 stipulated in the forbearance agreement. The record showed that at most they invested a further $270,000 on June 20, 2013 and paid a supplier's $89,383 invoice on June 14, 2013.

[21] Rompsen stopped making any further advances under the Loan in October, 2013.

[22] In December, 2013, suppliers to the Midland Condo Project registered liens totaling about $2.248 million.

[23] On January 3, 2014, Romspen sent to all of the Borrowers, except Casino, a demand letter and *BIA* s. 244(1) Notice of Intention to Enforce Security. The demand stated that as of January 3, 2014, the sum of $11.996 million was owed under the Loan. Payment was demanded by January 17, 2014. None was made.

[24] On March 28, 2014, Romspen sent to Casino R.V. Resorts a demand letter and *BIA* s. 244(1) Notice of Intention to Enforce Security which stated that as of March 28, 2014 the amount due under the Loan was $12.284 million.

[25] On March 4, 2014 Romspen commenced its application to appoint a receiver, subsequently amending its notice of application on April 3. A schedule for the hearing of Romspen's receivership application was set by the Court on April 11, 2014.

[26] Then, on April 28, 2014, 671, 179, 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc. and Hugel Lofts Ltd. (the "CCAA Applicants"), issued their notice of application seeking an initial order under the *CCAA*.

B. The businesses of the *CCAA* Applicants

[27] Five of the CCAA Applicants own vacant land: 671 and 179 own the properties in Ramara, and 138, 156 and 203 own the Cambridge properties. At the present point of time, those CCAA Applicants operate simply as land holding companies; they have no employees.

[28] The other CCAA Applicant, Hugel Lofts, owns the land on which the Midland Condo Project is located, together with two undeveloped parcels of land in Midland.

C. The Midland Condo Project and other Midland properties

[29] The Midland Condo Project involves a partially constructed 4-storey residential building with 53 units. Construction is either about 50% or two-thirds completed, depending on which evidence one consults. The project has had a difficult development history, with Hugel Lofts

acquiring the already-started project in power of sale proceedings in June, 2012 for $4 million, with a mortgage back for $3.1 million.

[30] Between December 11 and December 20, 2013, trades registered six construction liens against the Midland Condo Project, with certificates of action registered this past January and February. In early April Hugel Lofts filed notices of intent to defend those lien actions. Construction has ceased on the Project.

[31] There was a dispute in the evidence about the fair market value of the three properties in Midland. The CCAA Applicants pointed to an October 3, 2013 "short narrative appraisal" prepared by Real Estate Appraisers and Consulting Limited which appraised the properties at $18 million (the "RE Appraisal"). That appraisal consisted of an "as is" appraisal of the one parcel on which the Midland Condo Project is located (151 Marina Park Ave.), which the appraiser arrived at by deducting the costs to complete from an appraised "as if complete" sellout value for the 53 condo units. The RE Appraisal also contained "as if" appraisals of the other two Midland parcels assuming "all approvals for the proposed development are in place and the subdivisions registered" (Vindon and Victoria Streets).

[32] The RE Appraisal recounted the following history of the Midland Condo Project as obtained from the current property owner – i.e. Hugel Lofts:

> Based on the information available, the structure was erected a few years ago by the previous owner. Due to finance and other difficulties, the construction work was (sic) for several years. This property in conjunction with the remaining undeveloped lands was sold under power of sale in 2012. Our client (the new owner) reported that the construction work was resumed in summer 2013.
>
> …
>
> The building as of the date of appraisal is described as about 50% completed.
>
> It is also reported that all units were completely presold by the previous owner for about $275 per sq ft. These sales were however void after liquidation of the previous owner.
>
> Per our client, that marketing of the new project will be launched in Spring 2014 and the new price range will be between $300 and $325 per sq ft. *Our client reported that many of the previous buyers show strong interest of coming back.* (emphasis added)

Photographs of the Midland Condo Project taken by the appraiser in October, 2013 showed significant completion of the exterior work on the building, but the need for extensive interior work.

[33] The RE Appraisal used a "cost to complete" for the Midland Condo Project of $6.591 million based upon a payment schedule dated September 15, 2013 provided by the general contractor, Sierra Construction. Sierra's schedule recorded a total value for its construction contract of $7.452 million, with the value of work done to that date of $1.145 million.

[34] Hugel Lofts proposes to build on the two undeveloped parcels (Vindon and Victoria Streets) 68 condo apartment units, 39 senior apartment units, 66 bungalows, 62 townhouse units and 80,000 sq. ft. of commercial space. The RE Appraisal assigned an "as is" value to 151 Marina Park of $10.6 million, and a "hypothetical" "as if" value of $7.4 million to the other two parcels.

[35] Romspen's internal valuations placed the worth of the Midland properties at far less than $18 million.

D. The Ramara properties

[36] The CCAA Applicants contended that the four Ramara Properties – 5781 Rama Road, 5819 Rama Road, 4243 Hopkins Bay Road and 4285 Hopkins Bay Road – were worth about $27 million on a built-out basis. An August 11, 2010 narrative appraisal of the vacant, unserviced development land prepared by Schaufler Realty Advisors for 671 provided a "hypothetical value of the subject site as fully serviced sites approved for the contemplated commercial and residential development" as of October 6, 2012 of $27.1 million.

[37] The Schaufler Appraisal noted that the four properties had been acquired for $4.4 million.

[38] A November 21, 2013 "draft" appraisal prepared by Schaufler also used a $27.1 million hypothetical value.

[39] Romspen's internal valuations placed the "as is" worth of the Ramara properties at far, far less than $27.1 million.

E. The Cambridge Properties

[40] 138, 156 and 203 own six parcels of vacant land in Cambridge, some of which are "brown-field" lands which will require remediation for environmental reasons. Romspen holds first mortgages over the Cambridge properties owned by 138, and second mortgages over those owned by 156 and 203, with Pezzack Financial Services and TD Canada Trust holding $300,000 in first mortgages on those properties.

III. Evidence about the owners' approach should the Court grant a *CCAA* initial order

[41] Soorty deposed that the CCAA Applicants intend to complete the Midland Condo Project without any further financial support from Romspen and he believed that the proceeds from condo units sales would be "sufficient to repay Romspen, resolve any lien claims and make a proposal to creditors using the remaining properties as the basis for that proposal":

> The Applicants simply want to complete the Condo Project with funds that will likely be supplied by Zoran and I (from our own resources) and repay Romspen the funds they did advance once the Condo Project is complete.

Soorty deposed elsewhere:

> … I believe that Zoran and I should have the opportunity to restructure the Applicants' affairs, repay Romspen on its loan, pay remaining creditors and keep control of our real estate development projects. As shown above, there is more than enough value in the Applicants' assets to repay Romspen in full.

A. Proposed sources of funds

A.1 Principals of CCAA Applicants mortgage other assets under their control

Harbour Mortgage

[42] As to the sources of those funds, Soorty deposed that a related company, 1026517 Ontario Limited, owned lands in Mississauga which secured a collateral mortgage in favour of Harbour Mortgage Corp. in the amount of $8 million. He deposed that Harbour Mortgage had "agreed to increase the loan amount to $11,250,000, thereby providing 1026517 Ontario Limited with an additional $3,250,000. I intend to use these funds to finish the construction at the Midland Property".

[43] The April 2, 2014 term sheet signed by Harbour Mortgage had not been signed and accepted by Soorty on behalf of 1026517 Ontario. The "loan amount" of $11.25 million was "not to exceed 65% of the appraised value and/or value as determined by the Lender" of the Mississauga properties. No evidence of their value was placed in evidence. The term sheet offered a loan with a 12-month term, and described the "use of funds" as follows:

> The proceeds of the Loan shall be used to refinance existing debt and to repatriate Borrower equity for planned future development.

The term sheet made no reference to a permitted use of funds for the Midland Condo Project.

National Bank

[44] Cocov deposed that he was the President of Harmony Homes Oshawa Ltd., a recently completed townhome condominium project in Oshawa, and that the National Bank had agreed to provide Harmony Homes with a mortgage for $4.8 million: "I intend to use these funds to complete construction at 151 Marina Park Avenue, Midland, Ontario."

[45] Cocov attached to his affidavit an April 11, 2014 "Discussion Paper" from National Bank which stated: "This Discussion Paper is an outline of proposed terms for purpose of considering your application only and is not: (i) a commitment letter; nor (ii) an agreement to provide financing". The Discussion Paper only referenced the Oshawa property, and it described the "purpose of proposed loan" as "refinancing", with the "type of facility" as "first rank conventional mortgage financing". The Discussion Paper made no reference to the Midland Condo Project, and I infer from its terms that the bank simply envisaged that its loan would replace the existing financing for the Oshawa property.

[46] Harmony Home signed the Discussion Paper on April 17, 2014. This motion was heard on May 2. No detailed evidence was provided concerning what discussions, if any, had ensued between Harmony Home and National Bank between April 17 and May 2.

[47] The Projected Statement of Cash Flows for the period May 2 through to June 6, 2014 filed by the CCAA Applicants did not make any reference to cash receipts from financings from either Harbour Mortgage or National Bank.

A.2 Proposed DIP Financing

[48] Soorty deposed that the CCAA Applicants would require $250,000 to complete four model suites, together with $50,000 in soft costs to begin pre-sales. Soorty and Cocov would finance those costs using their personal funds to make available up to $300,000 in "drip" financing, provided their financing was given a DIP Priority Charge.

[49] The filed CCAA Cash Flow statement contemplated using $150,000 of the DIP financing during the initial 30-day period.

A.3 HST Refund

[50] Soorty deposed that in early April, 2014, Cocov had contacted the CRA which had advised that it had approved an HST refund to Hugel Lofts of about $254,000. The filed CCAA Cash Flow statement contemplated receipt of the HST Tax refund during the week of May 23, 2014. The CCAA Applicants did not adduce any written communications from CRA which confirmed the entitlement to the HST Refund or the expected date of refund issuance.

B. Costs to complete the Midland Condo Project

[51] As to the costs to complete the Midland Condo Project, Soorty initially deposed that the Project's general contractor, Sierra Construction (Woodstock) Limited:

> [I]s prepared to complete the Condo Project for $5.5 million plus H.S.T. (the "Project Completion Costs"). In fact, they have guaranteed to complete the Condo Project for no more than then Project Completion Costs.

The April 23, 2014 Sierra Construction letter which Soorty filed in support of that evidence did not support Soorty's assertion. Sierra Construction did write that "the all in number to complete should be $5,500,000.00 (HST is not included)". However, it continued:

> Sierra, the project trades and their respective suppliers have suffer and continue to suffer damages as a result of non-funding. Collectively and in the interest of the Lien holders, we request the project/developer not be placed in receivership and the courts allow the project to be completed. Our summary would indicate the costs spent to date and the costs to complete weighted against the projected revenues, support the request for the project to continue to completion. We look forward in assisting you in completing this project.

Sierra's letter contained no "guarantee" that it would complete construction for $5.5 million.

[52] In a subsequent affidavit Soorty attached a further, April 28, 2014 letter from Sierra which stated, in part:

> The outstanding Construction Liens cumulative balance is $1,378,605.02 per our understanding you intend to vacate the liens. Some contractor Liens are in dispute, the true Lien value is $957,949.00. The remaining cost to complete the construction portion of the project plus consulting fees, Tarion Warranty inspections, Models suite upgrades, the all in number to complete should be $5,500,000.00 (HST is not included). Based on earlier submission/correspondence Sierra is prepared to enter into a fix price contract for the remainder of the project work.
>
> Collectively and in the interest of the Lien holders, we request the project/developer not be placed in receivership and the courts allow the project to be completed. We look forward in assisting you in completing this project.

[53] The CCAA Applicants did not file a detailed statement from Sierra which identified the work needed to complete the Midland Condo Project, similar to the one attached as Appendix "E" to the October, 2013 RE Appraisers report, nor did they file any explanation about why Sierra, which in that October, 2013 statement valued the work remaining to be done at $6.3 million, would be prepared to commit to complete the work for the significantly lesser amount of $5.5 million.

[54] Also, Sierra's April 28 letter suggested that it would not be prepared to resume work unless its lien was vacated. The CCAA Applicants did not address where the funds would come from to either pay off or bond off Sierra's lien, let alone those of other lien claimants, apart from their evidence about dealings with Harbour Mortgage and National Bank.

[55] Romspen filed its own internal calculations which placed all of the costs to complete – both "hard" and "soft" – several million dollars higher than the $5.5 million referred to by Sierra.

C. Summary

[56] In sum, the evidence filed by the CCAA Applicants disclosed that, if granted CCAA protection, they would look to the future sale of the units from the Midland Condo Project to "repay the Romspen Indebtedness in full and provide funds for resolving lien claims". The evidence of projected unit sales revenue of $17.579 million filed by the CCAA Applicants consisted of a short email (which contained no date) from Mr. Jonathan Weizel, who described himself as a sales representative at Royal LePage Terrequity Realty in Thornhill. Soorty deposed that Weizel had been responsible for selling out the Midland Condo Project before the previous owners were placed into a receivership.

[57] Soorty also deposed that the CCAA Applicants proposed "…leaving the balance of the Applicants' assets as a basis for a proposal to the Applicants' remaining creditors". In terms of the amounts due to those "remaining creditors", Crowe Soberman Inc., in its April 30, 2014 Pre-

Filing Report in its capacity as the proposed Monitor, estimated the amounts owed by Hugel Lofts at $15.98 million, consisting of $12 million due to Romspen, $958,000 due to lien claimants, and $3 million due to unsecured creditors, including related parties. Soorty deposed:

> The most significant unsecured creditors are Zoran and I with respect to shareholder loans we have made to facilitate completion of the Condo Project.

[58] Soorty, in his *CCAA* affidavit, deposed that save for Hugel Lofts, the other CCAA Applicants have "nominal financial obligations", and Crowe Soberman made no mention of any other liabilities concerning the CCAA Applicants, from which I infer that such liabilities are limited to the amounts contained in the charges registered against the Ramara and Cambridge properties owned by the CCAA Applicants.

IV. Analysis

A. A summary of the applicable legal principles

[59] Romspen seeks the appointment of SF Partners Inc. as receiver and construction lien trustee over the respondents under *BIA* s. 243(1), section 101 of the *Courts of Justice Act* and section 68 of the *Construction Lien Act*. In *Bank of Nova Scotia v. Freure Village on Clair Creek*, the court reviewed the factors to be taken into account in considering a request to appoint a receiver:

> The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently…It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed….
>
> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an

> examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager. [1]

[60] The CCAA Applicants seek the making of an initial order under *CCAA* s. 11.02. In broad terms, the purpose of the *CCAA* is to permit a debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. As pointed out by the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*:

> There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership.[2]

[61] Both an order appointing a receiver and an initial order under the *CCAA* are highly discretionary in nature, requiring a court to consider and balance the competing interests of the various economic stakeholders. As a result, the specific factors taken into account by a court are very circumstance-oriented. In the case of land development companies, some courts have identified several of the factors which might influence a decision about whether to grant an initial order under the *CCAA*. For example, in *Cliffs over Maple Bay Investments Ltd. v. Fisgard Captial Corp.*, the British Columbia Court of Appeal stated:

> Although the *CCAA* can apply to companies whose sole business is a single land development as long as the requirements set out in the *CCAA* are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development

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[1] (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div.), paras. 10 and 12.
[2] [2010] 3 S.C.R. 379, para. 14.

while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.[3]

[62] More recently, C. Campbell J., in *Re Dondeb Inc.*, after quoting the above passage from *Cliffs over Maple Bay*, stated:

> Similarly, in *Octagon Properties Group Ltd.*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Q.B.), paragraph 17, Kent, J. made the following comments:
>
> > This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.
>
> A similar result occurred in *Shire International Real Estate Investments Ltd.*, [2010] A.J. No. 143, 2010 CarswellAlta 234, even after an initial order had been granted.
>
> In *Edgeworth*, dealing with the specifics of that case I noted:
>
> > Were it not for the numerous individual investors (UDIs, MICs) and others who claim to have any interest in various of the lands as opposed to being general creditors of the Edgeworth companies, I doubt I could have been persuaded to grant the Initial CCAA Order.
>
> …
>
> [In the present case] the request for an Initial Order under the *CCAA* was dismissed for the simple reason that I was not satisfied that a successful plan could be developed that would receive approval in any meaningful fashion from the creditors. To a large extent,

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[3] 2008 BCCA 327, para. 36.

> Mr. Dandy is the author of his own misfortune not just for the liquidity crisis in the first place but also for a failure to engage with creditors as a whole at an early date.
>
> In his last affidavit filed Mr. Dandy explained why certain properties were transferred into individual corporations to allow additional financing that would permit the new creditors access to those properties in the event of default. To a certain extent this was perceived by creditors as "robbing Peter to pay Paul" and led to the distrust and lack of confidence the vast majority of creditors exhibit. Had there been full and timely communication both the creditors and the court may have concluded that a *CCAA* plan could be developed.
>
> …
>
> Following further submissions on behalf of the debtor I advised the parties that in my view the conditions necessary for approval of an Initial *CCAA* Order were not met but that a comprehensive Receivership Order should achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity.[4]

B. Applying the legal principles to the evidence

[63] The evidence adduced by Romspen established the indebtedness of the Borrowers under the Loan, the maturing of the Loan facility in September, 2013, the demands for payment, the failure of the Borrowers to repay the amount demanded and the validity of the security held by Romspen on the Ramara, Midland and Cambridge properties. The Borrowers did not dispute the amount owed, and the security documents contained a clear contractual right of Romspen to appoint a receiver upon an act of default and required the Borrowers, in such circumstances, to consent to an order appointing a receiver. An active development was underway on only one of the properties securing the Loan – the Midland Condo Project – the other lands being vacant and undeveloped. The other creditors who hold security against the Cambridge lands did not oppose the appointment of a receiver. Pezzack Financial simply submitted that in the event a receiver were appointed, the receiver should not enjoy priority over Pezzack Financial for its fees and expenses on those properties where Pezzack Financial held the first mortgages. The lien claimants against the Midland Condo Project did not appear on the return of the application, although served with the court materials. Sierra Construction provided the Borrowers with a letter of support, but did not formally appear in the proceeding.

[64] In the usual course of affairs those circumstances would point towards the appropriateness of granting the requested order appointing a receiver, as well as a construction lien trustee. However, the Borrowers opposed the making of such an order on two main grounds. First, they argued that by its conduct Rompsen had caused the Borrowers to default

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[4] 2012 ONSC 6087, paras. 19-21, 25, 26 and 31.

under the Loan and Romspen should not be allowed to take advantage of such conduct. Second, they contended that the plan advanced by the CCAA Applicants offered a fairer way to balance the competing economic interests at play and any consideration of the appointment of a receiver should be deferred until the CCAA Applicants had been afforded an opportunity to complete the Midland Condo Project. Let me deal with each argument in turn.

[65] First, Soorty, in his affidavit in support of the CCAA application, and the CCAA Applicants in their written submissions to the Court, contended that their default on the Loan was caused by Romspen's wrongful failure to advance the full amount of the Loan as it was contractually required to do, leading to the trades to lien the Midland Condo Project. The CCAA Applicants argued that a lender was not entitled to take advantage of, or seek relief in respect of, a default which its own wrongful conduct had created.

[66] While the authorities certainly contemplate that a court may refuse to appoint a receiver where the lender's conduct has placed the debtor in default of its borrowing obligations,[5] that is not this case. When the Loan facility was amended to permit the use of funds for the continued construction of the Midland Condo Project, the Second Supplement, by incorporating Section 4 of Romspen's Standard Construction Conditions, made quite express the circumstances under which Rompsen was required to advance further funds for that project:

> The Lender shall not be required to make any advance unless prior to making such advance, the Lender is satisfied that the unadvanced portion of the Loan will be sufficient to pay the cost to complete the Project. Where insufficient unadvanced funds remain, the Borrower shall be required to pay such additional funds to the Lender so as to make the unadvanced portion of the Loan equal to the cost to complete.

[67] The June, 2013 Forbearance Letter contained an acknowledgement by the Borrowers of their failure to have advanced their own funds towards the Midland Condo Project:

> At this time, the amount required to be invested by you to comply with Section 4 above, is $3,180,994.00. You have advised that you have been and are currently unable to fund this amount. *Your failure to fund this amount constitutes an act of default under the loan and the security granted in connection therewith*.

[68] In sum, the evidence established that it was the failure of the Borrowers to abide by the terms of the Commitment Letter, as amended by the Second Supplement and the Forbearance Letter, which led to them to commit acts of default.

[69] The CCAA Applicants also strongly intimated in their evidence that throughout the earlier part of this year Romspen had misled them into thinking that the difficulties with the Loan could be worked out. In support of that submission they pointed to language in an April 4, 2014

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[5] *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 456 C.B.R. (3d) 267 (Ont. Gen. Div.)

email from Roitman to them which talked about the completion of the Midland Condo Project as "clearly…the best outcome for all of us". That was not an accurate characterization of the email by the CCAA Applicants, as can be seen when one reads the email in full:

> Al, these emails are not really very useful. As we have discussed at length, Romspen's lawyers need to push our case forward as forcefully as they can. This does not prevent us from changing course later on. When you and Zoran have your affairs arranged to the point where you can move the project forward again, we will be glad to discuss terms for reinstating the loan and completing the project. Clearly this would be the best outcome for all of us, *but we have waited about one year already for you guys to work things out between each other and to find the funding to cover the cost, and we just can't wait forever*. (emphasis added)

[70] The last phrase in Roitman's email most likely suggests the real reason for the default of the CCAA Applicants under the Loan – internal disagreements between Soorty and Cocov about how much each of them should contribute to the continued construction of the Midland Condo Project. The June 7, 2013 forbearance agreement signed by both hinted at this problem, with its reference to Soorty and Cocov having advised "that you have been and are currently unable to fund this amount" (i.e. $3.18 million). Soorty expressly referred to the internal problems in paragraph 55 of his *CCAA* initial affidavit when he deposed: "As a sign of our good faith, I was prepared to put $2 million towards the Condo Project immediately, however, Zoran required additional time to finalize similar financing".

[71] Turning to the second argument advanced by the Borrowers/CCAA Applicants, does their proposed approach to complete the construction of the Midland Condo Project offer a better, more practical alternative to Romspen's proposed appointment of a receiver?

[72] At a high level, a certain unfairness characterizes the plan of the CCAA Applicants. Under their plan, they would see the development of the Midland Condo Project to its end and use the unit sales proceeds to pay off Romspen in full and, evidently, to pay most of the amounts sought by the lien claimants. They would then develop out the other secured properties to propose a plan to the other unsecured creditors, but according to Soorty most of the unsecured debt consists of shareholders loans from Cocov and himself. Reduced to its essence, the plan seems to be no more than asking the court to impose on Romspen an extension of the term of the Loan beyond its 2-year term and to allow management to continue operating as they have in the past. In other words, the CCAA Applicants do not propose the compromise of debt or the liquidation of part of their businesses – they want to carry on just as they have in the past.

[73] I accept the evidence of Romspen about the unfairness of such an approach. Romspen stated that it had "absolutely no confidence" in the ability of Soorty and Cocov to manage the affairs of the CCAA Applicants during any stay period, pointing to them letting the first general contractor on the Midland Condo Project, Dineen, place liens on it, and allowing subsequent contractors to do so as well. Roitman also deposed about Soorty and Cocov:

> They have evidently been unable to manage their mutual partnership relationship. Moreover, notwithstanding their purported ability according to the Soorty affidavit to refinance their obligations to Romspen with other assets they control, they have had over 12 months to make those arrangements and have failed to do so. Had they done so, Romspen would have extended the facility.
>
> There is no plan acceptable to Romspen short of immediate payment in full. The plan proposed by the Debtors, apart from the priming of Rompsen's security and the multi-layered professional expenses associated with a CCAA, in circumstances where there is no operating business, amounts to little more than what Messrs. Soorty and Cocov have been unable to do over the past 12 months.

[74] Two other questions arise as part of this higher level analysis. First, the RE Appraisal recited that management had told the appraiser that "all units were completely presold by the previous owner" and "many of the previous buyers show strong interest in coming back". If that in fact was the case, why have Soorty and Cocov been unable to attract replacement financing for the Midland Condo Project? Second, the CCAA Applicants emphasized the significant equity available in the other Midland properties, as well as the Ramara and Cambridge properties, arguing that Romspen should hang in for the duration of the Midland Condo Project because it was fully secured. Perhaps the more appropriate question to pose is why the CCAA Applicants are not prepared to realize on some of the equity in those other properties to pay out Romspen now, given that the Loan matured well over half a year ago? The answer appears to be that they want the *CCAA* initial order to secure for them a compelled extension of the term of the Romspen Loan at minimal cost. I do not regard that as a proper use of the *CCAA* process in the circumstances.

[75] Other questions arise when one turns to the specifics of the general plan proposed by the CCAA Applicants. It is apparent that the proposed DIP financing would be wholly inadequate to complete the construction of the Midland Condo Project. Where will the other funds come from? The suggestion by the CCAA Applicants that National Bank and Harbour Mortgage may serve as sources for such financing simply is not borne out by the specifics contained in the respective Discussion Paper and Term Sheet. Put another way, I see no credible evidence before the Court to suggest that that the CCAA Applicants are anywhere close to finding sources to fund the costs to complete the construction of the Midland Condo Project, let alone to resolve the existing lien claims which one would expect would be one of the necessary first steps to get this project back up and running.

[76] Further, the 30-day Cash Flow statement filed in support of the short-term plan to build model suites rested heavily on the receipt of the HST Refund, yet the CCAA Applicants placed no evidence before the Court from CRA which would indicate that such a refund would be received within the next 30 days.

[77] Finally, I would have very strong reservations about leaving the court-supervised completion of the Midland Condo Project in the hands of Soorty and Cocov, even with a Monitor present. As I mentioned earlier, their allegations that their signatures had been forged on the

First Supplement were without foundation and most seriously undermined their credibility. Also, Soorty exaggerated his evidence on other important issues, such as the actual purposes of the funds being sought from National Bank and Harbour Mortgage, as well as his initial characterization of Sierra Construction having offered a "guaranteed" cost to complete.

[78] For these reasons, I dismiss the application by the CCAA Applicants for an initial order under the *CCAA*, and I grant the application of Romspen for the appointment of SF Partners Inc. as receiver and construction lien trustee.

C. The scope of the appointment

[79] Romspen holds security, by way of mortgages and general security agreements, over the companies which own the Ramara Properties – 6711162 Canada Inc. and 1794247 Ontario Inc. – the companies which own the Cambridge Properties – 1387267 Ontario Inc., 1564168 Ontario Inc. and 2033387 Ontario Inc. – and the company which owns the Midland Properties – Hugel Lofts Ltd. A receiver is appointed over those companies and those properties.

[80] One of the Ramara Properties – 4271-4275 Hopkins Bay Road, Rama – is owned by Altaf Soorty and Zoran Cocov. At the hearing I had questioned Romspen's counsel about why his client was seeking the appointment of a receiver over Soorty and Cocov. He responded by pointing to GSAs given by both individuals to Romspen. After further discussion counsel advised that he had received instructions to withdraw the request for a receiver over Soorty and Cocov. I had not been able to read most of the application records prior to the hearing. I now see that Romspen obtained a charge from Soorty and Cocov over the Hopkins Bay Road properties owned by them. My queries about the need to appoint a receiver over the individual respondents were not focused on that property, but on whatever other assets the two individuals possessed. Consequently, I consider it most appropriate to appoint a receiver over the property owned by Soorty and Cocov at 4271-4275 Hopkins Bay Road, Rama.

[81] Much ink was spilt by both sides over the appointment of a receiver over Casino R.V. Resorts Inc. That issue can be dealt with quickly. Romspen loaned money to Casino and received a package of security in return, part of which included the addition of Casino as a "Borrower" under the Commitment Letter pursuant to the First Supplement. All parties agreed that that loan was repaid in full. On July 16, 2012, Romspen wrote that upon receipt of the amount to pay out the loan to Casino, it would provide its signed authorization to register its assignment of its *PPSA* registrations in respect of the loan, as well as a release of its interest. The loan was repaid, but apparently Romspen did not provide those documents. It contended it was never asked to do so.

[82] Be that as it may, while I am prepared to grant Romspen's request to add Casino R.V. Resorts Inc. as a party to the receivership application, I am not prepared to appoint a receiver over Casino or any properties it previously provided as security. The appointment of a receiver is an equitable remedy. Casino repaid the loan and Romspen agreed to release its interest. Under those circumstances, it is neither fair nor reasonable for Romspen to seek the appointment of a receiver over Casino.

[83] Counsel for Romspen circulated a draft appointment order at the hearing. On behalf of Pezzack Financial Services Inc., Mr. Tingley submitted that the receiver's charge should not enjoy priority over his client's first mortgages on Cambridge Properties because the receivership really concerned a dispute involving the Midland Condo Project. That was a reasonable request in the circumstances, and I order that in respect of the Cambridge Properties the charge granted to the receiver shall stand subordinate to any first charges registered against those properties by any person other than Romspen.

[84] A sealing order shall issue in respect of the Confidential Exhibits to the Affidavit of Wesley Roitman in order to preserve the integrity of any sales and marketing process undertaken by the Receiver. Counsel can submit a revised draft appointment order to my attention through the Commercial List Office for issuance.

V. Costs

[85] I would encourage the parties to try to settle the costs of these applications. If they cannot, Rompsen may serve and file with my office written cost submissions, together with a Bill of Costs, by May 16, 2014. Any party against whom costs are sought may serve and file with my office responding written cost submissions by May 29, 2014. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

[86] Any responding cost submissions should include a Bill of Costs setting out the costs which that party would have claimed on a full, substantial, and partial indemnity basis. If a party opposing a cost request fails to file its own Bill of Costs, I shall take that failure into account as one factor when considering the objections made by the party to the costs sought by any other party. As Winkler J., as he then was, observed in *Risorto v. State Farm Mutual Automobile Insurance Co.*, an attack on the quantum of costs where the court did not have before it the bill of costs of the unsuccessful party "is no more than an attack in the air".[6]

D. M. Brown J.

Date: May 5, 2014

[6] (2003), 64 O.R. (3d) 135 (S.C.J.), para. 10, quoted with approval by the Divisional Court in *United States of America v. Yemec*, [2007] O.J. No. 2066 (Div. Ct.), para. 54.

TAB "3"

Manulife Bank of Canada *Appellant*

v.

John Joseph Conlin *Respondent*

INDEXED AS: MANULIFE BANK OF CANADA *v.* CONLIN

File No.: 24499.

1996: May 30; 1996: October 31.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgages — Guarantee — Renewal agreement — Release of guarantor from liability — Mortgagor's husband guaranteeing mortgage — Mortgage clause providing that guarantors liable "as principal debtors and not as sureties" — Guarantee to remain binding "notwithstanding the giving of time for payment . . . or the varying of the terms of payment" — Mortgagor renewing mortgage at different interest rate — Renewal agreement not signed by guarantor — Whether guarantor waived equitable right to be released when principal loan renewed.

Courts — Jurisdiction — Mortgagor defaulting on mortgage — Bank obtaining summary judgment against mortgagor and guarantor — Whether Court of Appeal exceeded its jurisdiction in setting aside judgment and dismissing action against guarantor.

The respondent guaranteed a mortgage for a three-year term with an interest rate of 11.5 percent per annum which his wife had provided as security for a loan from the appellant bank. In clause 34 of the mortgage agreement, the guarantors promised, as "principal debtors and not as sureties", to pay the money secured by the mortgage. The guarantee was to remain binding "notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon". Shortly before the mortgage was to mature, the mortgagor and the bank executed an agreement which renewed the mortgage for a further three-year term at a yearly interest rate of 13 percent. The renewal forms provided spaces for the signature of the "registered owner" and the "guarantor", but

Banque Manuvie du Canada *Appelante*

c.

John Joseph Conlin *Intimé*

RÉPERTORIÉ: BANQUE MANUVIE DU CANADA *c.* CONLIN

N° du greffe: 24499.

1996: 30 mai; 1996: 31 octobre.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Iacobucci et Major.

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

Hypothèques — Cautionnement — Convention de renouvellement — Libération de la caution — Cautionnement de l'hypothèque par l'époux de la débitrice hypothécaire — Clause de l'hypothèque prévoyant que les cautions sont responsables «à titre de débiteurs principaux et non de cautions» — Cautionnement devant demeurer valide «nonobstant l'attribution d'un délai de paiement [. . .] ou la modification de[s] conditions de paiement» — Débitrice hypothécaire renouvelant l'hypothèque à un taux d'intérêt différent — Convention de renouvellement non signée par la caution — La caution a-t-elle renoncé à son droit en equity d'être libérée lorsque le prêt principal a été renouvelé?

Tribunaux — Compétence — Défaut de paiement de l'hypothèque de la part de la débitrice hypothécaire — Banque obtenant un jugement sommaire contre la débitrice hypothécaire et la caution — La Cour d'appel a-t-elle excédé sa compétence en infirmant le jugement et en rejetant l'action intentée contre la caution?

L'intimé s'est porté garant d'une hypothèque de trois ans, portant intérêt au taux de 11,5 pour 100 par année, que sa femme avait offerte en garantie de remboursement d'un prêt obtenu auprès de la banque appelante. À la clause 34 de la convention hypothécaire, les cautions se sont engagées, «à titre de débiteurs principaux et non de cautions», à rembourser la somme garantie par l'hypothèque. Le cautionnement devait demeurer valide «nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt». Peu avant que l'hypothèque vienne à échéance, la débitrice hypothécaire et la banque ont signé une convention de renouvellement de l'hypothèque pour une autre période de trois ans, à un taux d'intérêt de 13 pour 100 par année.

the agreement was signed only by the mortgagor. The mortgagor defaulted on the mortgage, and the bank obtained a summary judgment against the mortgagor and the guarantors for the principal owing under the mortgage with interest at 13 percent per annum. The Court of Appeal, in a majority decision, set aside the judgment and dismissed the action against the respondent guarantor. This appeal is to determine (1) whether the Court of Appeal exceeded its jurisdiction in allowing the appeal and dismissing the action, rather than sending the matter back to trial, and (2) whether under the terms of the loan agreement, the respondent was released from his promise to pay the principal sum and other moneys secured by the mortgage when the term of the mortgage was extended and the rate of interest increased, without notice to him.

Held (L'Heureux-Dubé, Gonthier and Iacobucci JJ. dissenting): The appeal should be dismissed.

(1) *Jurisdiction*

The Court of Appeal has jurisdiction to make any order or decision that ought to or could have been made by the court or tribunal appealed from. Considered in light of Rule 1.04(1), which provides that the rules are to be liberally construed, Rules 20.04(2) and (4) of the *Rules of Civil Procedure* gave the motions court judge the jurisdiction to dismiss the action against the respondent. The judge could either have found that there was no genuine issue for trial or he could have found that the only genuine issue was an issue of law. In either case, it would have been within his jurisdiction and, by extension, within the jurisdiction of the Court of Appeal, to dispose of the matter by dismissing the appellant's claim. The appellant was not deprived of its right to have its case fully heard and to test all of the respondent's evidence. Under Rule 39.02(1), a party to a motion may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion. The appellant chose not to exercise this right and left the respondent's evidence unchallenged.

(2) *Release from liability*

Per La Forest, Sopinka, Cory and Major JJ.: It has long been clear that a guarantor will be released from liability on the guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the guarantor. A surety can contract out of the protection provided to a guarantor by the common

Les formules de renouvellement comportaient un espace pour la signature du «propriétaire enregistré» et de la «caution», mais la convention n'a été signée que par la débitrice hypothécaire. Il y a eu défaut de paiement de l'hypothèque de la part de la débitrice hypothécaire et la banque a obtenu un jugement sommaire contre la débitrice hypothécaire et les cautions pour le capital dû en vertu de l'hypothèque, avec intérêts au taux de 13 pour 100 par année. La Cour d'appel à la majorité a infirmé le jugement et rejeté l'action intentée contre la caution intimée. Le présent pourvoi vise à déterminer (1) si la Cour d'appel a excédé sa compétence en accueillant l'appel et en rejetant l'action, au lieu de renvoyer l'affaire au procès, et (2) si, en vertu des conditions de la convention de prêt, l'intimé a été libéré de sa promesse de payer le capital et les autres sommes garantis par l'hypothèque, lorsque l'hypothèque a été prorogée et le taux d'intérêt augmenté, sans qu'il en soit informé.

Arrêt (les juges L'Heureux-Dubé, Gonthier et Iacobucci sont dissidents): Le pourvoi est rejeté.

(1) *Compétence*

La Cour d'appel a compétence pour rendre l'ordonnance ou la décision que le tribunal dont il y a appel aurait dû ou pu rendre. À la lumière du par. 1.04(1) des Règles, qui prévoit que les règles doivent recevoir une interprétation large, les par. 20.04(2) et (4) des *Règles de procédure civile* conféraient au juge des requêtes compétence pour rejeter l'action intentée contre l'intimé. Le juge aurait pu conclure soit qu'il n'y avait pas de question litigieuse soit que la seule question litigieuse portait sur une question de droit. Dans un cas comme dans l'autre, lui-même et, par extension, la Cour d'appel auraient eu compétence pour trancher l'affaire en rejetant la demande de l'appelante. On n'a pas refusé à l'appelante le droit de faire entendre pleinement sa preuve et de vérifier l'exactitude de tout le témoignage de l'intimé. En vertu du par. 39.02(1) des Règles, une partie à une requête peut contre-interroger le déposant d'un affidavit signifié par une partie ayant des intérêts opposés relativement à cette requête. L'appelante a choisi de ne pas exercer ce droit et de ne pas contester le témoignage de l'intimé.

(2) *Libération de responsabilité*

Les juges La Forest, Sopinka, Cory et Major: Il est clair depuis longtemps que la caution est libérée de sa responsabilité en vertu du cautionnement lorsque le créancier et le débiteur principal conviennent d'apporter une modification importante aux conditions de la dette contractuelle sans son consentement. Une caution peut renoncer par contrat à la protection que lui accorde la

law or equity, but any contracting out of the equitable principle must be clear. The issue as to whether a surety remains liable will be determined by interpreting the contract between the parties and determining the intention of the parties as demonstrated by the words of the contract and the events and circumstances surrounding the transaction as a whole. If there is any ambiguity in the terms used in the guarantee, the words of the documents should be construed against the party which drew it, by applying the *contra proferentem* rule. As well, this Court has stated that the surety is a favoured creditor in the eyes of the law whose obligation should be strictly examined and strictly enforced. The guarantor in this case comes within the class of accommodation sureties, or those who enter into the guarantee in the expectation of little or no remuneration. The law has protected such guarantors by strictly construing their obligations and limiting them to the precise terms of the contract of surety.

Clause 34 and clause 7, dealing with renewal or extension of time, unambiguously indicate that the respondent was not bound by the renewal agreement. If the guarantor is to be treated as a principal debtor and not as a guarantor, then the failure of the bank to notify the respondent of the renewal agreement and the new terms of the contract must release him from his obligations since he is not a party to the renewal. Moreover, even if it were thought that the principal debtor clause does not convert the guarantor into a principal debtor, the equitable or common law rules relieving the surety from liability where the contract has been materially altered by the creditor and the principal debtor without notice to the surety would apply, in the absence of an express agreement to the contrary. Two aspects of the renewal agreement itself lead to the conclusion that the guarantor is not to be bound. First, the renewal agreement is once again a standard form prepared and used by the bank and it calls for the signature of the guarantor. Secondly, the renewal agreement states that the terms of the old mortgage will form part of the agreement, and by doing so indicates that this is a new agreement rather than merely an extension of an old agreement. Further, clause 7 of the original mortgage specifically distinguishes between extensions and renewals both in its heading and in its text. The failure to refer to a renewal agreement or even to a renewal in clause 34 strongly suggests that it has no application to a renewal. The words used in clauses 34 and 7 are sufficiently clear to conclude that the guarantor did not waive his equitable and common law rights either as a principal debtor or as a guarantor. If the wording of the two clauses should be found to be ambiguous, the *con-*

common law ou l'*equity*, mais toute renonciation par contrat au principe d'*equity* doit être claire. Pour savoir si la responsabilité de la caution subsiste, il faut interpréter le contrat liant les parties et déterminer leur intention eu égard aux mots qu'elles ont utilisés et aux circonstances de l'ensemble de l'opération. Il y a lieu d'appliquer la règle *contra proferentem* selon laquelle une clause de cautionnement ambiguë doit être interprétée au détriment de la partie qui l'a rédigée. De même, notre Cour a affirmé que la caution est, aux yeux de la common law, un créancier privilégié dont l'obligation devrait être interprétée et exécutée strictement. La caution, dans la présente affaire, tombe dans la catégorie des cautions de complaisance, ou de celles qui ont conclu le contrat de cautionnement en espérant peu de rétribution, si ce n'est aucune. La loi a protégé ces cautions en interprétant leurs obligations de façon stricte et en les limitant aux conditions précises du contrat de cautionnement.

La clause 34 et la clause 7, qui porte sur le renouvellement ou la prorogation de délai, indiquent nettement que l'intimé n'était pas lié par la convention de renouvellement. S'il faut traiter la caution comme un débiteur principal et non comme une caution, alors le défaut de la banque d'aviser l'intimé de la convention de renouvellement et des nouvelles conditions du contrat doit le libérer de ses obligations étant donné qu'il n'est pas partie au renouvellement. De plus, même si l'on pensait que la clause de débiteur principal ne transforme pas la caution en un débiteur principal, les règles d'*equity* et de common law qui libèrent la caution de sa responsabilité, lorsque le créancier et le débiteur principal ont modifié sensiblement le contrat sans l'aviser, s'appliqueraient, en l'absence d'un consentement explicite à ce qu'il en soit autrement. Deux aspects de la convention de renouvellement elle-même mènent à la conclusion que la caution ne doit pas être liée. Premièrement, la convention de renouvellement est une formule type préparée et utilisée par la banque, qui requiert la signature de la caution. Deuxièmement, la convention de renouvellement prévoit que les conditions de l'ancienne hypothèque feront partie de la convention, indiquant ainsi qu'il s'agit d'une nouvelle convention plutôt qu'une simple prorogation de l'ancienne. En outre, la clause 7 de l'hypothèque initiale distingue expressément les prorogations des renouvellements, tant dans sa rubrique que dans son texte même. L'absence de mention d'une convention de renouvellement ou même d'un renouvellement dans la clause 34 donne fortement à penser qu'elle ne s'applique pas à un renouvellement. Les mots utilisés dans les clauses 34 et 7 sont suffisamment clairs pour conclure que la caution n'a pas renoncé aux droits que

tra proferentem rule must be applied against the bank. The wording of clause 34 binding the guarantor to variations in the event of an extension of the mortgage should not be applied to bind the guarantor to a renewal without notice since there is ambiguity as to whether clause 34 applies to renewals at all. In these circumstances as well, the guarantor should be relieved of liability.

Per Gonthier and Iacobucci JJ. (dissenting): Clause 34 amounts to a waiver of the respondent's right to be discharged as a result of a material variation of the principal contract. Guarantee contracts are basically contracts, like any others, and should be construed according to the ordinary rules of contractual interpretation. The cardinal interpretive rule of contracts is that the court should give effect to the intentions of parties as expressed in their written document. The court will deviate from the plain meaning of the words only if a literal interpretation of the contractual language would lead either to an absurd result or to a result which is plainly repugnant to the intention of the parties. By clause 34, the guarantors agree to remain bound by the guarantee contract notwithstanding the giving of time for payment of the mortgage or the varying of the rate of interest. While clause 34 does not refer to "renewal" agreements by name, it does contain a clear waiver of the guarantors' right to be discharged in the event of an extension of time or an increase in the rate of interest. The plain ordinary meaning of the words "the giving of time for payment . . . or the varying of the terms of payment" encompasses the renewal agreement. While the parties used a renewal agreement, at bottom, that renewal agreement extended the time for payment and increased the interest rate, events that are expressly covered in clause 34. Under clause 34, the bank did not have to notify the guarantors of the renewal agreement. The language of the clause is clear, and it would be odd to infer a condition of notice when the undertaking is so clear and unambiguous. As "principal debtors", the guarantors would not be expected to sign the renewal agreement. The evident intention of the parties, in using this kind of language, was to preserve the liability of the surety even in circumstances where the principal obligation was no longer enforceable. The space for the guarantors' signature on the renewal agreement is not helpful in trying to interpret the guarantee contract, since the wording or form of another subsequent contract, entered into three years later, cannot change the meaning of the

l'*equity* et la common law lui confèrent à titre de débiteur principal ou de caution. Si l'on conclut que le texte des deux clauses est ambigu, il faut appliquer la règle *contra proferentem* au détriment de la banque. Le texte de la clause 34 liant la caution aux modifications qui peuvent être apportées en cas de prorogation de l'hypothèque ne devrait pas être interprété de manière à lier la caution à un renouvellement effectué sans donner avis, étant donné qu'il y a ambiguïté quant à savoir si la clause 34 s'applique de quelque façon que ce soit aux renouvellements. Dans ces circonstances aussi, la caution devrait être libérée de sa responsabilité.

Les juges Gonthier et Iacobucci (dissidents): La clause 34 équivaut à une renonciation par l'intimé au droit d'être libéré en raison d'une modification importante du contrat principal. Les contrats de cautionnement sont au fond des contrats comme les autres, qui devraient être interprétés selon les règles ordinaires d'interprétation des contrats. La principale règle d'interprétation des contrats veut que les tribunaux mettent à exécution les intentions que les parties ont exprimées dans leur document écrit. La cour ne s'écartera du sens ordinaire des mots que si une interprétation littérale des termes du contrat menait à un résultat absurde ou à un résultat nettement inconciliable avec l'intention des parties. À la clause 34, les cautions consentent à rester liées par le contrat de cautionnement nonobstant l'attribution d'un délai de paiement de l'hypothèque ou la modification du taux d'intérêt. Bien qu'elle ne mentionne pas expressément les conventions de «renouvellement», la clause 34 contient une renonciation claire au droit des cautions d'être libérées dans le cas d'une prorogation de délai ou d'une augmentation du taux d'intérêt. Le sens clair et ordinaire des mots «l'attribution d'un délai de paiement [. . .] ou la modification de[s] conditions de paiement» comprend la convention de renouvellement. Bien que les parties aient conclu une convention de renouvellement, au fond, cette convention de renouvellement prorogeait le délai de paiement et augmentait le taux d'intérêt, ce qui était expressément prévu à la clause 34. En vertu de la clause 34, la banque n'était pas tenue d'aviser les cautions de la convention de renouvellement. Le texte de cette clause est clair et il serait étrange de déduire l'existence d'une exigence d'avis en présence d'un engagement aussi clair et net. On ne s'attendrait pas à ce que, à titre de «débiteurs principaux», les cautions soient signataires de la convention de renouvellement. Les parties avaient manifestement l'intention, en utilisant cette terminologie, de maintenir la responsabilité de la caution même dans le cas où l'obligation principale ne pourrait plus être exécutée. L'espace prévu pour la signature de la caution dans la con-

original agreement. The respondent promised to guarantee the payment of the money secured by the original mortgage, and the terms of that mortgage thus determine the extent of his liability. The respondent is not liable for interest at the increased rate of 13 percent, but simply to repay the balance owing on the principal sum with interest charged at 11.5 percent per annum.

Per L'Heureux-Dubé J. (dissenting): Subject to the following comment, Iacobucci J.'s reasons are substantially agreed with. Courts should generally use the "modern contextual approach" as the standard, normative approach to judicial interpretation, and may exceptionally resort to the old "plain meaning" rule in appropriate circumstances. To determine the appropriate definition of the phrase "the giving of time for payment . . . or the varying of the terms of payment" in the present context, Iacobucci J. reviewed the provisions in their immediate context, the contract as a whole, the consequences of proposed interpretations, the applicable presumptions and rules of interpretation, and admissible external aids. This process is not an application of the "plain meaning" approach but rather an application of the "modern contextual approach" to judicial interpretation. The rules which govern the interpretation of deeds and contracts generally are essentially the same as the rules for statutory interpretation. The "modern contextual approach" for statutory interpretation, with appropriate adaptations, is equally applicable to contractual interpretation. Statutory interpretation and contractual interpretation are but two species of the general category of judicial interpretation. Here, the resulting interpretation did not come from the "plain meaning" of the words, but from their "meaning in law", because they are "legal terms of art". Where an instrument uses a legal term of art, there is a presumption that the term of art is used in its correct legal sense, and this is the presumption that is resorted to by Iacobucci J. when he makes use of admissible external aids in determining the correct meaning of the phrase "to give time".

vention de renouvellement n'est d'aucune utilité pour tenter d'interpréter le contrat de cautionnement, puisque le texte ou la forme d'un autre contrat conclu trois ans plus tard ne saurait changer le sens de la convention initiale. L'intimé a promis de garantir le paiement des sommes garanties par l'hypothèque initiale, et les conditions de cette hypothèque déterminent donc l'étendue de sa responsabilité. L'intimé est responsable non pas des intérêts calculés au taux majoré de 13 pour 100 par année, mais simplement du remboursement du solde exigible du capital, avec intérêts calculés au taux de 11,5 pour 100 par année.

Le juge L'Heureux-Dubé (dissidente): Sous réserve du commentaire suivant, il y a accord, pour l'essentiel, avec les motifs du juge Iacobucci. Les tribunaux doivent généralement utiliser la «méthode contextuelle moderne» comme méthode normative standard d'interprétation judiciaire et ils peuvent exceptionnellement recourir à l'ancienne règle du «sens ordinaire» quand les circonstances s'y prêtent. Pour définir l'expression «l'attribution d'un délai de paiement [. . .] ou la modification de[s] conditions de paiement» dans le présent contexte, le juge Iacobucci a examiné les dispositions dans leur contexte immédiat, le contrat dans son ensemble, les conséquences des interprétations proposées, les présomptions et les règles d'interprétation applicables, ainsi que les sources acceptables d'aide extérieure. Cette démarche est une application non pas de la méthode du «sens ordinaire», mais plutôt de la «méthode contextuelle moderne» d'interprétation judiciaire. Les règles qui régissent l'interprétation des actes et des contrats en général sont essentiellement les mêmes que les règles d'interprétation des lois. La «méthode contextuelle moderne» d'interprétation des lois s'applique également, avec les adaptations nécessaires, à l'interprétation des contrats. L'interprétation des lois et l'interprétation des contrats ne sont que deux subdivisions de la grande catégorie de l'interprétation judiciaire. En l'espèce, l'interprétation qui a résulté découlait non pas du «sens ordinaire» des mots, mais plutôt de leur «sens en droit» parce que ce sont des «termes techniques propres au domaine juridique». Lorsqu'un instrument emploie un terme technique propre au domaine juridique, ce terme technique est présumé être employé dans son sens juridique exact, et c'est la présomption à laquelle recourt le juge Iacobucci lorsqu'il utilise une source acceptable d'aide extérieure pour déterminer le sens exact de l'expression «accorder un délai».

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By Iacobucci J. (dissenting)

Holme v. Brunskill (1878), 3 Q.B.D. 495; *Re Rotenberg and Borough of York (No. 2)* (1976), 13 O.R. (2d) 101; *Keltic Leasing Corp. v. Curtis* (1993), 133 N.B.R. (2d) 73; *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551; *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102; *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888; *Stevenson v. Reliance Petroleum Ltd.*, [1956] S.C.R. 936; *Cornish v. Accident Insurance Co.* (1889), 23 Q.B.D. 453; *Citadel General Assurance Co. v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513.

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H. Stephen Lee, for the appellant.

Raymond F. Leach and *Barbara F. Fischer*, for the respondent.

The judgment of La Forest, Sopinka, Cory and Major JJ. was delivered by

CORY J. — I have read with great interest the clear and concise reasons of Justice Iacobucci. I am in agreement with his finding that the Court of Appeal had jurisdiction to make the order dismissing the action against the respondent. However, I must differ with his conclusion that by the terms of the guarantee, the respondent waived the equitable right of a guarantor to be released upon renewal of the mortgage loan with a different term and interest rates to which the guarantor did not consent.

The Position of a Guarantor as Defined by Equity and the Common Law

It has long been clear that a guarantor will be released from liability on the guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the guarantor. The principle was enunciated by Cotton L.J. in *Holme v. Brunskill* (1878), 3 Q.B.D. 495 (C.A.), at pp. 505-6, in this way:

Driedger on the Construction of Statutes, 3rd ed. By Ruth Sullivan. Toronto: Butterworths, 1994.
Fridman, G. H. L. *The Law of Contract in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 1994.
McGuinness, Kevin Patrick. *The Law of Guarantee*, 2nd ed. Scarborough, Ont.: Carswell, 1996.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1994), 20 O.R. (3d) 499, 120 D.L.R. (4th) 234, 41 R.P.R. (2d) 283, 75 O.A.C. 117, 17 B.L.R. (2d) 143, qui a infirmé une décision de la Cour de l'Ontario (Division générale) qui avait conclu que l'intimé était responsable du paiement d'une hypothèque. Pourvoi rejeté, les juges L'Heureux-Dubé, Gonthier et Iacobucci sont dissidents.

H. Stephen Lee, pour l'appelante.

Raymond F. Leach et *Barbara F. Fischer*, pour l'intimé.

Version française du jugement des juges La Forest, Sopinka, Cory et Major rendu par

LE JUGE CORY — J'ai lu avec grand intérêt les motifs clairs et concis du juge Iacobucci. Je suis d'accord avec sa conclusion que la Cour d'appel avait compétence pour délivrer l'ordonnance rejetant l'action contre l'intimé. Toutefois, je dois exprimer mon désaccord avec sa conclusion qu'en vertu des conditions du cautionnement l'intimé a renoncé au droit qu'une caution possède en *equity* d'être libérée en cas de renouvellement du prêt hypothécaire où l'échéance et le taux d'intérêt sont modifiés sans son consentement. 1

La situation de la caution en vertu de l'*equity* et de la common law

Il est clair depuis longtemps que la caution est libérée de sa responsabilité en vertu du cautionnement lorsque le créancier et le débiteur principal conviennent d'apporter une modification importante aux conditions de la dette contractuelle sans son consentement. Ce principe est énoncé ainsi par le lord juge Cotton dans l'arrêt *Holme c. Brunskill* (1878), 3 Q.B.D. 495 (C.A.), aux pp. 505 et 506: 2

The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court . . . will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.

This rule has been adopted in a number of Canadian cases. See for example *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551, at p. 562.

3 The basis for the rule is that any material alteration of the principal contract will result in a change of the terms upon which the surety was to become liable, which will, in turn, result in a change in the surety's risk. The rationale was set out in *The Law of Guarantee* (2nd ed. 1996) by Professor K. P. McGuinness in this way, at p. 534:

The foundation of the rule in equity is certainly consistent with traditional thinking, but it is a fair question whether it is necessary to invoke the aid of equity at all in order to conclude that in a case where the principal contract is varied materially without the surety's consent, the surety is not liable for any subsequent default. Essentially, a specific or discrete guarantee (as opposed to an all accounts guarantee) is an undertaking by the surety against the risks arising from a particular contract with the principal. If that contract is varied so as to change the nature or extent of the risks arising under it, then the effect of the variation is not so much to cancel the liability of the surety as to remove the creditor from the scope of the protection that the guarantee affords. When so viewed, the foundation of the surety's defence appears in law rather than equity: it is not that the surety is no longer liable for the original contract as it is that the original contract for which the surety assumed liability has ceased to apply. In varying the principal contract without the consent of the surety, the creditor embarks upon a frolic of his own, and if misfortune occurs it occurs at the sole risk of the creditor. A law based

[TRADUCTION] La véritable règle est, à mon avis, la suivante: s'il y a une convention entre les parties principales quant au contrat cautionné, la caution doit être consultée et, si elle n'a pas consenti à la modification, même dans le cas où il est parfaitement évident que la modification n'est pas importante ou qu'elle ne peut que lui être profitable, la caution ne peut être libérée; cependant, s'il n'est pas évident en soi que la modification n'est pas importante ou qu'elle n'est pas susceptible de porter préjudice à la caution, la cour [. . .] statuera alors qu'il revient à la caution elle-même de décider si elle consent à rester liée nonobstant la modification, et si elle ne donne pas ce consentement, elle sera libérée.

Cette règle a été adoptée dans un certain nombre de décisions canadiennes. Voir, par exemple, l'arrêt *Banque de Montréal c. Wilder*, [1986] 2 R.C.S. 551, à la p. 562.

La règle est fondée sur le raisonnement selon lequel toute modification importante du contrat principal a pour résultat de modifier les conditions auxquelles la responsabilité de la caution devait être engagée, ce qui a pour effet de modifier le risque auquel la caution est exposée. Ce raisonnement a été formulé par le professeur K. P. McGuinness dans *The Law of Guarantee* (2e éd. 1996), à la p. 534:

[TRADUCTION] Le fondement de la règle d'*equity* est certainement compatible avec le courant de pensée traditionnel, mais il est juste de se demander s'il est nécessaire d'invoquer de quelque façon l'*equity* pour conclure que, dans le cas où une modification importante est apportée au contrat principal sans le consentement de la caution, cette dernière ne verra pas sa responsabilité engagée en cas d'inexécution subséquente. Au fond, un cautionnement particulier ou distinct (par opposition à un cautionnement général) est un engagement par lequel la caution se porte garante des risques découlant d'un contrat particulier avec le débiteur principal. Si ce contrat est modifié de manière à changer la nature et l'ampleur des risques qui en découlent, la modification n'a pas tant pour effet d'annuler la responsabilité de la caution que de soustraire le créancier à la protection que le cautionnement accorde. Sous cet angle, la défense de la caution paraît reposer sur la common law plutôt que sur l'*equity*: ce n'est pas que la caution n'assume plus aucune responsabilité relativement au contrat initial, mais plutôt que le contrat initial pour lequel la caution a assumé une responsabilité ne s'applique plus. En modi-

approach to the defence is in certain respects attractive, because it moves the surety's right of defence in the case of material variation from the discretionary and therefore relatively unsettled realm of equity into the more absolute and certain realm of law. In any event, it is clear quite certainly in equity and quite probably in law as well, that the material variation of the principal contract without the surety's consent (unless subsequently ratified by the surety) will result in the discharge of the surety from liability under the guarantee.

And further at p. 541, he wrote:

Where the risk to which the surety is exposed is changed, the rationale for the complete release of the surety is easily explained. To change the principal contract is to change the basis upon which the surety agreed to become liable. A surety's liability extends only to the contract which he has agreed to guarantee. If the terms of that contract (and consequently the terms of the surety's risk) are varied then the creditor should no longer be entitled to hold the surety to his obligation under the guarantee. To require a surety to maintain a guarantee in such a situation would be to allow the creditor and the principal to impose a guarantee upon the surety in respect of a new transaction. Such a power in the hands of the principal and creditor would amount to a radical departure from the principles of consensus and voluntary assumption of duty that form the basis of the law of contract.

The Right of a Guarantor to Contract Out of the Protection Provided by the Common Law

Generally, it is open to parties to make their own arrangements. It follows that a surety can contract out of the protection provided to a guarantor by the common law or equity. See for example *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 107. The Ontario Court of Appeal, correctly in my view, added that any contracting out of the equitable principle must be clear. See *First City Capital Ltd. v. Hall* (1993), 11 O.R. (3d) 792 (C.A.), at p. 796.

fiant le contrat principal sans le consentement de la caution, le créancier le fait à ses risques et périls, et si une malchance survient, elle survient uniquement aux dépens du créancier. Une façon d'aborder la défense sous l'angle de la common law est attrayante à certains égards, parce que cela fait passer le droit de la caution de se défendre, dans le cas où il y a eu modification importante, du domaine discrétionnaire et donc relativement incertain de l'*equity* au domaine plus absolu et certain de la common law. De toute manière, il est clair, très certainement en *equity* et fort probablement en common law aussi, que la modification importante du contrat principal effectuée sans le consentement de la caution (à moins qu'elle ne l'ait ratifiée ultérieurement) aura pour résultat de libérer la caution de sa responsabilité aux termes du cautionnement.

Il écrit ensuite, à la p. 541:

[TRADUCTION] Si le risque auquel la caution est exposée est modifié, la libération totale de la caution se justifie facilement. Modifier le contrat principal, c'est modifier le motif pour lequel la caution a convenu d'être responsable. La responsabilité de la caution se limite au contrat pour lequel elle s'est portée garante. Si les conditions de ce contrat (et donc les conditions du risque auquel est exposée la caution) sont modifiées, alors le créancier ne devrait plus avoir le droit d'exiger de la caution l'exécution de son obligation en vertu du cautionnement. Dans un tel cas, exiger d'une caution qu'elle maintienne son cautionnement équivaudrait à permettre au créancier et au débiteur principal de forcer la caution à se porter garante d'une nouvelle opération. Un tel pouvoir de la part du créancier et du débiteur principal représenterait une dérogation radicale aux principes de consensus et d'acceptation volontaire d'obligations sur lesquels repose le droit des contrats.

Le droit de la caution de renoncer par contrat à la protection de la common law

De façon générale, il est loisible aux parties de conclure leurs propres arrangements. Il s'ensuit qu'une caution peut renoncer par contrat à la protection que lui accorde la common law ou l'*equity*; voir, par exemple, l'arrêt *Bauer c. Banque de Montréal*, [1980] 2 R.C.S. 102, à la p. 107. La Cour d'appel de l'Ontario a ajouté, à juste titre selon moi, que toute renonciation par contrat au principe d'*equity* doit être claire. Voir *First City Capital Ltd. c. Hall* (1993), 11 O.R. (3d) 792 (C.A.), à la p. 796.

The principle was explained by Professor McGuinness in *The Law of Guarantee*, *supra*, at p. 546, in these words:

There are certain types of amendment that may be made to the terms of a principal contract (or departures from the terms of the principal contract) that will not have the effect of discharging the surety under that contract, even though those changes may be of a material nature. For instance, where the changes that have been made to the principal contract were specifically authorized by the surety or were otherwise within the contemplation of the contract, the surety will not be discharged. Similarly, changes which are authorized within the guarantee will not relieve the surety from liability.

It is a question of interpretation whether such changes are authorized or contemplated.

The author added at p. 547 the following sage advice to lending institutions:

Since the courts have tended to give a narrow construction to provisions in standard form guarantees which authorize such changes, it would be most unwise for a creditor to agree to changes without first obtaining the consent of the surety, except where there is clear authorization for him to act solely upon his own initiative. Where the creditor seeks to show that the guarantee agreement provides a blanket authorization to make material alterations to the principal contract, the wording must be very clear that such a right was intended. [Emphasis added.]

The issue as to whether a surety remains liable will be determined by interpreting the contract between the parties and determining the intention of the parties as demonstrated by the words of the contract and the events and circumstances surrounding the transaction as a whole.

Principles of Interpretation

In many if not most cases of guarantees a contract of adhesion is involved. That is to say the document is drawn by the lending institution on a standard form. The borrower and the guarantor have little or no part in the negotiation of the agreement. They have no choice but to comply with its terms if the loan is to be granted. Often the guarantors are family members with limited com-

Dans *The Law of Guarantee*, *op. cit.*, le professeur McGuinness explique ainsi ce principe, à la p. 546:

[TRADUCTION] Il y a certaines modifications des conditions d'un contrat principal (ou dérogations à ces conditions) qui n'auront pas pour effet de libérer la caution à l'égard de ce contrat, même si ces modifications peuvent être importantes. Par exemple, si les modifications du contrat principal ont été précisément autorisées par la caution ou si elles étaient par ailleurs prévues par le contrat, la caution ne sera pas libérée. De même, les modifications autorisées apportées au cautionnement ne libéreront pas la caution de sa responsabilité.

La question de savoir si ces modifications sont autorisées ou prévues est une question d'interprétation.

À la page 547, l'auteur ajoute à l'intention des établissements de crédit le sage conseil suivant:

[TRADUCTION] Étant donné que les tribunaux ont tendance à donner une interprétation restrictive aux dispositions des contrats types de cautionnement qui autorisent ces modifications, il serait extrêmement imprudent, de la part d'un créancier, de convenir de faire des modifications sans d'abord obtenir préalablement le consentement de la caution, sauf lorsqu'il est clairement autorisé à agir de son propre chef. Lorsque le créancier cherche à démontrer que la convention de cautionnement lui accorde une autorisation générale d'apporter des modifications importantes au contrat principal, il doit être écrit très clairement qu'on a voulu conférer ce droit. [Je souligne.]

Pour savoir si la responsabilité de la caution subsiste, il faut interpréter le contrat liant les parties et déterminer leur intention eu égard aux mots qu'elles ont utilisés et aux circonstances de l'ensemble de l'opération.

Principes d'interprétation

De nombreux cautionnements, voir la plupart, sont consentis au moyen d'un contrat d'adhésion. En d'autres termes, le document proposé par l'établissement de crédit est une formule type. L'emprunteur et la caution ne participent que peu ou pas du tout à la négociation de la convention. Ils ne peuvent rien faire d'autre que d'accepter les conditions du prêt, s'ils veulent qu'il leur soit

mercial experience. As a matter of accommodation for a family member or friend they sign the guarantee. Many guarantors are unsophisticated and vulnerable. Yet the guarantee extended as a favour may result in a financial tragedy for the guarantor. If the submissions of the bank are accepted, it will mean in effect that a guarantor, without the benefit of notice or any further consideration, will be bound indefinitely to further mortgages signed by the mortgagor at varying rates of interest and terms. The guarantor is without any control over the situation. The position adopted by the bank, if it is correct, could in the long run have serious consequences. Guarantors, once they become aware of the extent of their liability, will inevitably drop out of the picture with the result that many simple and straightforward loans will not proceed since they could not be secured by guarantors.

accordé. Souvent, les cautions sont des membres de la famille qui ont une expérience limitée des affaires. C'est par complaisance pour un membre de la famille ou un ami qu'elles souscrivent le cautionnement. Bien des cautions sont des personnes non averties et vulnérables. Pourtant le cautionnement accordé à titre de faveur peut engendrer une tragédie financière pour la caution. Si les arguments de la banque sont retenus, cela signifiera, en fait, que, sans avoir bénéficié d'un avis ou de quelque autre contrepartie, la caution sera liée indéfiniment par d'autres hypothèques souscrites par le débiteur hypothécaire à des conditions et à des taux d'intérêt variables. La caution n'a aucun contrôle sur la situation. La position adoptée par la banque, à supposer que ce soit la bonne, peut avoir de graves conséquences à long terme. Lorsqu'elles se seront rendu compte de l'ampleur de leur responsabilité, les cautions disparaîtront inévitablement du paysage de sorte que de nombreux prêts tout simples ne seront pas conclus faute de caution.

In my view, it is eminently fair that if there is any ambiguity in the terms used in the guarantee, the words of the documents should be construed against the party which drew it, by applying the *contra proferentem* rule. This is a sensible and satisfactory way of approaching the situation since the lending institutions that normally draft these agreements can readily amend their documents to ensure that they are free from ambiguity. The principle is supported by academic writers.

8 À mon avis, il est parfaitement juste d'appliquer la règle *contra proferentem* selon laquelle une clause de cautionnement ambiguë doit être interprétée au détriment de la partie qui l'a rédigée. C'est une façon raisonnable et satisfaisante d'aborder la situation étant donné que les établissements de crédit qui rédigent normalement ces conventions peuvent facilement modifier leurs documents de façon à ce qu'ils ne comportent aucune ambiguïté. La doctrine appuie ce principe.

G. H. L. Fridman, in his text *The Law of Contract in Canada* (3rd ed. 1994), at pp. 470-71, puts the position in this way:

> The *contra proferentem* rule is of great importance, especially where the clause being construed creates an exemption, exclusion or limitation of liability. . . .
>
> Where the contract is ambiguous, the application of the *contra proferentem* rule ensures that the meaning least favourable to the author of the document prevails.

9 Dans *The Law of Contract in Canada* (3e éd. 1994), aux pp. 470 et 471, G. H. L. Fridman décrit ainsi la situation:

> [TRADUCTION] La règle *contra proferentem* est d'une grande importance, particulièrement lorsque la clause interprétée crée une exonération totale ou partielle de responsabilité . . .
>
> Lorsque le contrat est ambigu, l'application de la règle *contra proferentem* assure que l'interprétation la moins favorable à l'auteur du document sera retenue.

Professor McGuinness, in his work *The Law of Guarantee*, *supra*, at pp. 612-13, explains the application of the rule as follows:

Dans *The Law of Guarantee*, *op. cit.*, aux pp. 612 et 613, le professeur McGuinness explique ainsi l'application de la règle:

. . . the *contra proferentum* rule of construction (under which the provisions of an agreement that were inserted by a party for his own protection are subjected to a strict interpretation) provides one method through which the courts can restrict the scope of extremely broad provisions which purport to eliminate the rights of the surety. The justification for giving such provisions a narrow construction is clear: it is one thing to say that a party may, if he so chooses, agree to assume an excessive burden, and to waive the rights which the law generally recognizes as existing for his protection. It is quite another thing to assume that parties necessarily intend to enter into such obligations. The more natural assumption is the exact opposite. Where the guarantee was drafted by the creditor, and there is any ambiguity or imprecision in the terms of a provision which purports to limit the rights of a surety, it is only fair that the ambiguity be resolved against the party who prepared the document. If the creditor wishes to take away a right belonging to the surety, he should use clear language in the document.

McGuinness further explains the principle and its justification in these words, at p. 244:

Where it is the creditor who drafted the terms of the contract, consistence of principle would call for the guarantee to be construed narrowly and thus in effect against the creditor. It is submitted that the correct rule is that where there is only one reasonable interpretation that the words used in a guarantee can bear, the guarantee should be given that interpretation. In such a case, the *contra proferentum* rule would not come into play. Where, however, the agreement is ambiguous in the sense that there are two or more interpretations that might reasonably be given to its terms, the guarantee should be construed against the party who prepared it or proposed its adoption, whether that be the creditor or the surety.

10 As well, this Court has stated that the surety is a favoured creditor in the eyes of the law whose obligation should be strictly examined and strictly enforced. This appears from the reasons of Davis J. in *Holland-Canada Mortgage Co. v. Hutchings*, [1936] S.C.R. 165, at p. 172:

A surety has always been a favoured creditor in the eyes of the law. His obligation is strictly examined and strictly enforced.

He goes on to say:

[TRADUCTION] . . . la règle d'interprétation *contra proferentem* (en vertu de laquelle les dispositions d'une convention qui y ont été incluses par une partie pour sa propre protection sont sujettes à une interprétation restrictive) offre aux tribunaux un moyen de restreindre la portée de dispositions extrêmement générales qui ont pour effet d'éliminer les droits de la caution. La justification d'une telle interprétation restrictive de ces dispositions est claire: c'est une chose que de dire qu'une partie peut, si elle le désire, consentir à assumer un fardeau excessif et renoncer aux droits que la common law lui reconnaît généralement pour sa protection. C'est une toute autre chose que de présumer que les parties veulent nécessairement souscrire à de telles obligations. Il est plus naturel de présumer le contraire. Lorsque le cautionnement a été rédigé par le créancier et qu'il y a une ambiguïté ou une imprécision dans une clause qui a pour effet de limiter les droits d'une caution, il n'est que juste que l'ambiguïté soit dissipée au détriment de la partie qui a préparé le document. Si le créancier désire retirer un droit à la caution, il doit le préciser clairement dans le document.

McGuinness explique, en outre, le principe et sa justification en ces termes, à la p. 244:

[TRADUCTION] Lorsque c'est le créancier qui a rédigé les conditions du contrat, il serait logique que le cautionnement soit interprété de façon restrictive et donc au détriment du créancier. On prétend que la règle à appliquer est la suivante: s'il n'y a qu'une façon raisonnable d'interpréter les termes d'un cautionnement, cette interprétation doit être donnée au cautionnement. Dans ce cas, la règle *contra proferentem* ne joue pas. Toutefois, si la convention est ambiguë en ce sens qu'il y a deux interprétations ou plus qui pourraient raisonnablement lui être données, le cautionnement doit être interprété au détriment de la partie qui l'a rédigé ou qui en a proposé l'adoption, que ce soit le créancier ou la caution.

De même, notre Cour a affirmé que la caution est, aux yeux de la common law, un créancier privilégié dont l'obligation devrait être interprétée et exécutée strictement. C'est ce qui ressort des motifs du juge Davis dans *Holland-Canada Mortgage Co. c. Hutchings*, [1936] R.C.S. 165, à la p. 172:

[TRADUCTION] La caution a toujours été un créancier privilégié aux yeux de la common law. Son obligation est interprétée et exécutée strictement.

Il ajoute:

"It must always be recollected," said Lord Westbury in *Blest v. Brown* (1862), 4 De G. F. & J. 367, at 376,

in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say, "The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end."

Apart from any express stipulation to the contrary, where the change is in respect of a matter that cannot "plainly be seen without inquiry to be unsubstantial or necessarily beneficial to the surety," . . . the surety, if he has not consented to remain liable notwithstanding the alteration, will be discharged whether he is in fact prejudiced or not.

Those comments are as true today as they were at the time they were written.

The appellant contends that this principle of interpretation has been abandoned and for that proposition relies upon the reasons of this Court in *Bauer*, *supra*. I cannot agree with this submission. The issue in that case was whether a particular clause within the guarantee was an exemption clause and thus subject to the special rules of construction applying to those clauses. It was held that the clause in question was not, in fact, an exemption clause. The general question as to whether the scope of surety obligations should be construed strictly was not explicitly addressed by the Court. It is also significant that the Alberta Court of Appeal in *Alberta Opportunity Co. v. Schinnour*, [1991] 2 W.W.R. 624, found that the clause they were considering was analogous to that in issue in *Bauer*. Nonetheless they determined, correctly in my view, that it should be interpreted in accordance with the general rules of construction. Those rules should, in my view, include the *contra proferentem* rule and thus will be generally applicable to guarantee or surety clauses.

[TRADUCTION] «Il faut toujours se souvenir», a dit lord Westbury, dans *Blest c. Brown* (1862), 4 De G. F. & J. 367, à la p. 376,

de quelle façon la caution est liée. Vous l'obligez à respecter son engagement à la lettre. Au-delà de l'interprétation correcte de cet engagement, vous n'avez aucun pouvoir sur elle. Elle ne touche aucun avantage ni aucune contrepartie. Elle n'est donc liée qu'en vertu de l'interprétation et de l'effet réguliers de l'engagement écrit qu'elle a souscrit. Si la moindre modification est apportée à cet engagement, peu importe que ce soit à son avantage ou que la modification ait été faite innocemment, elle a le droit de dire: «Le contrat n'est plus celui que je me suis engagée à cautionner; vous avez mis fin au contrat dont je me suis portée garante et, par conséquent, mon obligation n'existe plus.»

Sauf stipulation expresse contraire, si la modification porte sur une question qui ne peut pas «de toute évidence et indéniablement être considérée comme non importante ou nécessairement profitable à la caution,» [. . .] la caution, si elle n'a pas consenti à demeurer responsable en dépit de la modification, sera libérée, peu importe que la modification lui soit préjudiciable ou pas.

Ces commentaires sont aussi vrais aujourd'hui qu'ils l'étaient à l'époque où ils ont été rédigés.

11 L'appelante soutient que ce principe d'interprétation a été abandonné et, à ce propos, elle invoque les motifs de notre Cour dans l'arrêt *Bauer*, précité. Je ne puis souscrire à cet argument. La question en litige dans cet arrêt était de savoir si une certaine clause du cautionnement était une clause d'exonération et si elle était, ainsi, assujettie aux règles spéciales d'interprétation applicables à ces clauses. On a statué que la clause en question n'était pas, en réalité, une clause d'exonération. La Cour n'a pas abordé expressément la question générale de savoir si l'étendue des obligations d'une caution devait être interprétée restrictivement. Il est également révélateur que la Cour d'appel de l'Alberta ait conclu, dans *Alberta Opportunity Co. c. Schinnour*, [1991] 2 W.W.R. 624, que la clause qu'elle examinait était analogue à celle en cause dans *Bauer*. Elle a néanmoins décidé, à juste titre selon moi, qu'elle devait être interprétée selon les règles générales d'interprétation. À mon sens, ces règles doivent comprendre la règle *contra proferentem* et seront ainsi généralement applicables aux clauses de cautionnement.

12 The position set out in *Holland-Canada Mortgage Co., supra*, was confirmed in *Citadel General Assurance Co. v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513. At p. 521 of that case, it was said that "accommodation sureties" are those who entered into the guarantee "in the expectation of little or no remuneration and for the purpose of accommodating others or of assisting others in the accomplishment of their plans". The protection offered to this class of guarantors was explained also at p. 521:

> In respect of them, the law has been astute to protect them by strictly construing their obligations and limiting them to the precise terms of the contract of surety.

13 These sureties were contrasted with "compensated sureties" whose business consists of guaranteeing performance and payment in return for a premium. With respect to this latter class of sureties it was held at p. 524:

> . . . in the case of the compensated surety it cannot be every variation in the guaranteed contract, however minor, or every failure of a claimant to meet the conditions imposed by the bond, however trivial, which will enable the surety to escape liability.

Although the primary issue in the case was the distinction between accommodation sureties and those who receive compensation, these words nonetheless represent the considered opinion of the Court. In my view, they are correct.

14 I would note in passing that the guarantor in this case comes within the class of accommodation sureties.

15 It follows that if there is a doubt or ambiguity as to the construction or meaning of the clauses binding the guarantor in this case, they must be strictly interpreted and resolved in favour of the guarantor. Further, as a result of the favoured position of guarantors, the clauses binding them must be strictly construed.

16 Finally, when the guarantee clause is interpreted, it must be considered in the context of the entire transaction. This flows logically from the

Le point de vue énoncé dans *Holland-Canada Mortgage Co.*, précité, a été confirmé dans *Citadel General Assurance Co. c. Johns-Manville Canada Inc.*, [1983] 1 R.C.S. 513. À la page 521, la Cour affirme que les «cautions de complaisance» sont celles qui ont conclu le contrat de cautionnement «en espérant peu de rétribution, si ce n'est aucune, et dans le but de rendre service à d'autres personnes ou de les aider à réaliser leur projet». La protection accordée à cette catégorie de cautions est également expliquée, à la p. 521:

> En ce qui les concerne, la loi s'est avisée de les protéger en interprétant leurs obligations de façon stricte et en les limitant aux conditions précises du contrat de cautionnement.

Ces cautions ont été comparées aux «cautions rétribuées» qui garantissent l'exécution et le paiement moyennant une contrepartie. La Cour statue, au sujet de cette dernière catégorie de cautions, à la p. 524:

> . . . dans le cas de caution rétribuée il ne faut pas que toutes les dérogations au contrat de garantie, même mineures, ni toutes les omissions du réclamant de se conformer aux conditions du cautionnement, si minimes soient-elles, permettent à la caution d'échapper à sa responsabilité.

Bien que, dans cette affaire, le litige ait principalement porté sur la distinction entre les cautions de complaisance et les cautions rétribuées, ces propos représentent néanmoins l'opinion réfléchie de la Cour. Ils sont exacts quant à moi.

Je ferais remarquer en passant que la caution, dans la présente affaire, tombe dans la catégorie des cautions de complaisance.

Il s'ensuit que, s'il y a un doute ou une ambiguïté quant à l'interprétation ou au sens des clauses liant la caution en l'espèce, ces clauses doivent être interprétées de façon restrictive et en faveur de la caution. De plus, en raison de la situation privilégiée des cautions, les clauses qui les lient doivent être interprétées de façon restrictive.

Finalement, l'interprétation de la clause de cautionnement doit tenir compte du contexte de toute l'opération. Cela découle logiquement du point de

bank's position that the renewal agreement was an integral part of the original contract of guarantee. This position I believe is correct. It follows that fairness demands that the entire transaction be considered and this must include the terms and arrangements for the renewal agreement.

Application of the Principles of Interpretation to the Guarantee and Renewal Agreement Presented in this Case

It may be helpful to set out once again clauses 34 and 7 of the original guarantee agreement and recall that the renewal agreement called for the signature of the guarantor.

Clause 34: Guarantee and Indemnity

IT IS A CONDITION of the making of the loan secured by the within mortgage that the covenants set forth herein should be entered into by us, the Guarantors, namely John Joseph Conlin and Conlin Engineering & Planning Ltd. and now we the said Guarantors, and each of us, on behalf of ourselves, our respective heirs, executors, administrators and assigns, in consideration of the making of the said loan by the Mortgagee, do hereby jointly and severally covenant, promise and agree as principal debtors and not as sureties, that we and each of us shall and will well and truly pay or cause to be paid to the Mortgagee, the principal sum and all other moneys hereby secured, together with interest upon the same on the days and times and in the manner set forth in this mortgage, and will in all matters pertaining to this mortgage well and truly do, observe, fulfill and keep all and singular the covenants, provisos, conditions, agreements and stipulations contained in this mortgage, and do hereby agree to all the covenants, provisos, conditions, agreements and stipulations by this mortgage made binding upon the Mortgagor; and do further agree that this covenant shall bind us, and each of us notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon or the giving of a release or partial release or covenant not to sue to any of us; and we and each of us agree that the Mortgagee may waive breaches and accept other covenants, sureties or securities without notice to us or any of us and without relieving us from our liability hereunder, which shall be a continuous liability and shall subsist until payment in

vue de la banque selon lequel la convention de renouvellement faisait partie intégrante du contrat de cautionnement initial. Je crois que ce point de vue est exact. Il s'ensuit que la justice exige que l'on examine toute l'opération, y compris les conditions et les arrangements relatifs à la convention de renouvellement.

Application des principes d'interprétation à la convention de cautionnement et de renouvellement en l'espèce

Il peut être utile de reproduire à nouveau les clauses 34 et 7 de la convention de cautionnement initiale et de se rappeler que la convention de renouvellement exigeait la signature de la caution.

Clause 34: Cautionnement et indemnité

[TRADUCTION] EST UNE CONDITION du prêt garanti par la présente hypothèque que nous, les cautions, à savoir John Joseph Conlin et Conlin Engineering & Planning Ltd., souscrivions aux engagements stipulés aux présentes, et que, par conséquent, nous, lesdites cautions, en notre propre nom, au nom de nos héritiers, exécuteurs, administrateurs et ayants droit respectifs, en contrepartie dudit prêt consenti par le créancier hypothécaire, convenions, promettions et acceptions solidairement, aux présentes, à titre de débiteurs principaux et non de cautions, ensemble ou individuellement, de payer ou de faire payer bel et bien au créancier hypothécaire le capital et toutes les autres sommes garantis par les présentes, de même que les intérêts sur ces sommes au moment et de la manière stipulés dans la présente hypothèque, et que, relativement à toute question concernant la présente hypothèque, nous observions, remplissions et respections bel et bien tous et chacun des engagements, réserves, conditions, conventions et stipulations de la présente hypothèque, et que, par les présentes, nous convenions de respecter tous les engagements, réserves, conditions, conventions et stipulations de la présente hypothèque qui lient le débiteur hypothécaire; et que nous convenions que cet engagement nous liera toutes, ensemble et individuellement, nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt, ou le fait que l'une ou l'autre de nous obtienne une libération complète ou partielle ou un engagement de ne pas faire l'objet de poursuites; et que nous convenions toutes et chacune que le créancier hypothécaire puisse renoncer au droit de résiliation pour violation et accepter d'autres

full of the principal sum and all other moneys hereby secured.

Clause 7: Renewal or Extension of Time

PROVIDED that no extension of time given by the Mortgagee to the Mortgagor, or anyone claiming under it, or any other dealing by the Mortgagee with the owner of the equity of redemption of said lands, shall in any way affect or prejudice the rights of the Mortgagee against the Mortgagor or any other person liable for the payment of the monies hereby secured, and that this Mortgage may be renewed by an agreement in writing for any term with or without an increased rate of interest, or amended from time to time as to any of its terms including without limitation increasing the interest rate or principal amount notwithstanding that there may be subsequent encumbrances. And it shall not be necessary to register any such agreement in order to retain the priority of this Mortgage so altered over any instrument delivered or registered subsequent to this Mortgage.

engagements, cautionnements ou sûretés sans nous donner avis à toutes ou à l'une ou l'autre de nous, et sans que cela nous libère de notre responsabilité continue aux termes des présentes, qui subsistera jusqu'au paiement complet du capital et de toutes les autres sommes garantis par les présentes.

Clause 7: Renouvellement ou prorogation de délai

POURVU qu'aucune prorogation de délai accordée par le créancier hypothécaire au débiteur hypothécaire ou à toute personne cherchant à s'en prévaloir, ou qu'aucune autre négociation entre le créancier hypothécaire et le détenteur du droit de rachat desdits terrains n'affecte ou ne compromette de quelque façon que ce soit les droits que le créancier hypothécaire peut exercer contre le débiteur hypothécaire ou toute autre personne responsable du paiement des sommes garanties par les présentes, et que la présente hypothèque puisse être renouvelée par convention écrite pour quelque durée que ce soit, avec ou sans augmentation du taux d'intérêt, ou que l'une ou l'autre de ses conditions puisse être modifiée à l'occasion, notamment, sans limiter la portée de ce qui précède, que le taux d'intérêt ou le capital puisse être augmenté nonobstant toute charge ultérieure. Et il ne sera pas nécessaire d'enregistrer une telle convention pour conserver la priorité de rang de l'hypothèque ainsi modifiée par rapport à tout instrument délivré ou enregistré après la présente hypothèque.

18 Counsel for the appellant contended that there was no ambiguity in these clauses and that they made it clear that the respondent's obligations as guarantor continued in spite of the renewal agreement. Counsel for the respondent came to exactly the opposite conclusion. He submitted that on the plain meaning of the clauses, the guarantor was not bound. A somewhat cynical observer might conclude that it should not be unexpected that counsel for the opposing parties would take these positions. However, the same conclusion cannot possibly be reached with regard to the judges who have considered these clauses. The trial judge and the minority in the Court of Appeal came to the same conclusion as the appellant. The majority in the Court of Appeal came to the opposite conclusion. That skilled and experienced judges could come to opposite conclusions with regard to the clauses might well lead one to suspect that the meaning of the clauses is unclear; in a word, they are ambiguous. Of course, if that be the case, the *contra proferentem* rule should be applied. How-

L'avocat de l'appelante a soutenu qu'il n'y avait aucune ambiguïté dans ces clauses et qu'elles prévoyaient clairement que l'intimé continuait d'assumer ses obligations de caution malgré la convention de renouvellement. L'avocat de l'intimé est arrivé exactement à la conclusion contraire. Il a prétendu que, selon le sens ordinaire de ces clauses, la caution n'était pas liée. Un observateur quelque peu cynique pourrait conclure qu'il n'y a rien d'étonnant à ce que les avocats des parties opposées adoptent ces positions. Cependant, il n'est pas possible de tirer la même conclusion en ce qui concerne les juges qui ont examiné ces clauses. Le juge du procès et le juge dissident de la Cour d'appel sont arrivés à la même conclusion que l'appelante. La Cour d'appel à la majorité a conclu le contraire. Le fait que des juges compétents et expérimentés puissent être arrivés à des conclusions opposées en ce qui concerne les clauses en question pourrait bien nous amener à soupçonner que le sens de ces clauses n'est pas clair, somme toute, qu'elles sont ambiguës. Évidem-

ever, for the reasons set out above, my view is that the clauses unambiguously indicate that the respondent was not bound by the renewal agreement. If I am in error and if the *contra proferentem* rule were applied it would strengthen and support my conclusion as to the interpretation of the clauses.

The Effect of the "Principal Debtor Obligation" Set Out in Clause 34

In *Canadian Imperial Bank of Commerce v. Patel* (1990), 72 O.R. (2d) 109 (H.C.), at p. 119, it was held that a principal debtor clause converts a guarantor into a full-fledged principal debtor. I agree with this conclusion. If the guarantor is to be treated as a principal debtor and not as a guarantor, then the failure of the bank to notify the respondent of the renewal agreement and the new terms of the contract must release him from his obligations since he is not a party to the renewal. This conclusion does not require recourse to equitable rules regarding material variation of contracts of surety. It is simply apparent from the contract that a principal debtor must have notice of material changes and consent to them. Of course, a guarantor who, by virtue of a principal debtor clause, has a right to notice of material changes, may, by the terms of the contract, waive these rights. However, in the absence of a clear waiver of these rights, such a guarantor must be given notice of the material changes and, if he is to be bound, consent to them.

The appellant contended that the words in clause 34 which provide "the said Guarantors . . . covenant, promise and agree as principal debtors and not as sureties" indicate that the respondent is bound as a principal debtor yet without any of the usual rights and benefits of a principal debtor such as notice with regard to renewal, and the opportunity to negotiate and consent to its terms. To take this position seems to me to be unfair and unreasonable.

ment, si c'est le cas, il y a lieu d'appliquer la règle *contra proferentem*. Toutefois, pour les motifs exposés plus haut, je suis d'avis que les clauses indiquent nettement que l'intimé n'était pas lié par la convention de renouvellement. Si je me trompe, l'application éventuelle de la règle *contra proferentem* renforcerait et appuierait ma conclusion quant à l'interprétation de ses clauses.

L'effet de l'«obligation à titre de débiteur principal» énoncée à la clause 34

Dans *Canadian Imperial Bank of Commerce c. Patel* (1990), 72 O.R. (2d) 109 (H.C.), à la p. 119, on a statué qu'une clause de débiteur principal transformait une caution en un débiteur principal à part entière. Je suis d'accord avec cette conclusion. S'il faut traiter la caution comme un débiteur principal et non comme une caution, alors le défaut de la banque d'aviser l'intimé de la convention de renouvellement et des nouvelles conditions du contrat doit le libérer de ses obligations étant donné qu'il n'est pas partie au renouvellement. Cette conclusion n'exige pas que l'on recoure à des règles d'*equity* concernant la modification importante de contrats de cautionnement. Il ressort simplement du contrat que le débiteur principal doit être avisé des modifications importantes et y consentir. Il va sans dire qu'une caution qui, en vertu d'une clause de débiteur principal, a le droit d'être avisée des modifications importantes peut, aux termes du contrat, renoncer à ces droits. Cependant, en l'absence d'une renonciation claire à ces droits, une telle caution doit être avisée des modifications importantes et y consentir pour être liée par celles-ci.

L'appelante prétend que les mots de la clause 34 [TRADUCTION] «nous, lesdites cautions, [. . .] conven[ons], promett[ons] et accept[ons] [. . .], à titre de débiteurs principaux et non de cautions» indiquent que l'intimé est lié à titre de débiteur principal, sans cependant jouir des droits et avantages d'un débiteur principal, comme le droit d'être avisé d'un renouvellement et la possibilité de négocier et d'accepter les conditions de ce renouvellement. Adopter ce point de vue me semble injuste et déraisonnable.

21 The mortgagor as a principal debtor must be given notice of the renewal agreement. This is evident from the requirement that the mortgagor sign the renewal agreement. The principal debtor clause converts the guarantor into a full-fledged principal debtor with all the duties and obligations which that term implies. If the guarantor is to be responsible to the lending institution as a "full-fledged principal debtor" then he or she is entitled to the same notice of a renewal agreement as the principal debtor mortgagor. That is undoubtedly the reason the standard form of the renewal agreement provides a place for the guarantor to sign. Not just fairness and equity but the designation of the guarantor as a principal debtor leads to the conclusion that the guarantor must have notice of and agree to the renewal before he is bound by its terms. A guarantor reading clause 34 would be led to believe that as a principal debtor he would have the same notice of a renewal agreement as would the principal debtor mortgagor. If a lending institution wishes to have the guarantor obligated as a principal debtor, then the guarantor must be entitled to the same rights as the principal debtor which would include both notice and agreement as a party to a renewal.

Le débiteur hypothécaire doit, à titre de débiteur principal, être avisé de la convention de renouvellement. Cela ressort clairement de l'exigence que le débiteur hypothécaire signe la convention de renouvellement. La clause de débiteur principal transforme la caution en un débiteur principal à part entière qui assume toutes les responsabilités et les obligations que cette expression implique. Si la caution doit être responsable envers l'établissement de crédit à titre de «débiteur principal à part entière», elle a alors le droit d'être avisée de la convention de renouvellement au même titre que le débiteur principal qu'est le débiteur hypothécaire. C'est sans doute la raison pour laquelle la formule-type de la convention de renouvellement comporte un espace pour la signature de la caution. Non seulement la justice et l'*equity*, mais aussi la désignation de la caution à titre de débiteur principal mènent à la conclusion que la caution doit être avisée du renouvellement et y consentir pour être liée par ses conditions. Une caution qui lirait la clause 34 serait amenée à croire qu'à titre de débiteur principal elle serait avisée du renouvellement de la convention au même titre que le débiteur principal qu'est le débiteur hypothécaire. Si un établissement de crédit souhaite que la caution soit liée à titre de débiteur principal, alors la caution doit avoir les mêmes droits que le débiteur principal, y compris celui d'être avisée d'un renouvellement et d'y consentir à titre de partie.

22 Even if it were thought that the principal debtor clause does not convert the guarantor into a principal debtor, the equitable or common law rules relieving the surety from liability where the contract has been materially altered by the creditor and the principal debtor without notice to the surety would apply, in the absence of an express agreement to the contrary. The question is whether in this case, either as principal debtor or as surety, the guarantor has expressly contracted out of the normal protections accorded to him. This question must be determined as a matter of interpretation of the clauses of the agreement, through consideration of the transaction as a whole, and the application of the appropriate rules of construction.

Même si l'on pensait que la clause de débiteur principal ne transforme pas la caution en un débiteur principal, les règles d'*equity* et de common law qui libèrent la caution de sa responsabilité, lorsque le créancier et le débiteur principal ont modifié sensiblement le contrat sans l'aviser, s'appliqueraient, en l'absence d'un consentement explicite à ce qu'il en soit autrement. En l'espèce, il s'agit de savoir si, soit à titre de débiteur principal, soit à titre de garant, la caution a expressément renoncé par contrat aux protections qui lui sont normalement accordées. Pour répondre à cette question, il faut interpréter les clauses de la convention en fonction de l'ensemble de l'opération, et appliquer les règles d'interprétation appropriées.

Effect of the Renewal Agreement

In my view, the renewal agreement must be considered an integral part of the transaction. There are two aspects of the renewal agreement itself which lead to the conclusion that the guarantor is not to be bound. First, the renewal agreement is once again a standard form prepared and used by the bank and it calls for the signature of the guarantor. It must be assumed that all these standard form agreements prepared by the bank as a lending institution were meant to mesh with and complement each other. The requirement by the standard form of a signature by the guarantor then supports the respondent's position that he was not, by the terms of the original loan agreement, deprived of the equitable and common law protection ordinarily extended to guarantors. Rather, he was expected to sign the renewal agreement. His signature would confirm his notice of the agreement and his consent to it.

The appellant submitted that the renewal agreement is simply an extension of the original mortgage which was contemplated by the terms of that mortgage. This submission should not be accepted. The original mortgage was for a period of three years, a term not uncommon in today's mortgage market. The renewal agreement provides for an agreement as to the term of a new mortgage and the new rate of interest. The document itself appears to indicate that the renewal agreement constitutes a new mortgage arrangement. This can be gathered from the provision which reads:

> All the covenants, conditions, powers and matters in the said mortgage shall apply to and form part of *this* agreement, except those amended herein. [Emphasis added.]

The standard form indicates that many variations in the original mortgage are to be agreed upon. For example, the mortgagor can select the length of the term of the loan; the rate of interest is to be agreed upon between the mortgagor and the lending institution. If the renewal agreement is no

Effet de la convention de renouvellement

23 À mon avis, la convention de renouvellement doit être considérée comme une partie intégrante de l'opération. Deux aspects de la convention de renouvellement elle-même mènent à la conclusion que la caution ne doit pas être liée. Premièrement, je le répète, la convention de renouvellement est une formule type préparée et utilisée par la banque, qui requiert la signature de la caution. Il faut présumer que toutes ces conventions types préparées par la banque, à titre d'établissement de crédit, sont destinées à s'agencer et à se compléter mutuellement. Le fait que la formule type requiert la signature de la caution appuie alors la thèse de l'intimé selon laquelle, aux termes de la convention de prêt initiale, il n'a pas été dépouillé de la protection que l'*equity* et la common law accordent généralement aux cautions. Au contraire, on s'attendait à ce qu'il signe la convention de renouvellement. Sa signature confirmerait qu'il avait été avisé de la convention et qu'il y consentait.

24 L'appelante soutient que la convention de renouvellement est une simple prorogation de l'hypothèque initiale, prévue dans l'hypothèque même. Il n'y a pas lieu de retenir cet argument. L'hypothèque initiale était pour une durée de trois ans, ce qui n'est pas inhabituel dans le marché hypothécaire actuel. La convention de renouvellement comporte une entente sur la durée d'une nouvelle hypothèque et un nouveau taux d'intérêt. Le document même paraît indiquer que la convention de renouvellement constitue une nouvelle convention hypothécaire. Cela peut se déduire de la disposition qui prévoit:

> [TRADUCTION] Tous les engagements, conditions, pouvoirs et questions inclus dans ladite hypothèque s'appliquent à la présente convention et *en* font partie, sauf dans la mesure des modifications apportées aux présentes. [Je souligne.]

25 La formule type indique que bien des modifications de l'hypothèque initiale doivent faire l'objet d'un consentement. Par exemple, le débiteur hypothécaire peut choisir l'échéance du prêt; le taux d'intérêt doit être fixé par convention entre le débiteur hypothécaire et l'établissement de crédit. Si la

more than the extension of the original mortgage, the mischief that that position creates becomes obvious. What if the renewal provided for an extension of the term to 25 years at a substantially increased rate of interest? What if the situation with regard to the security had changed remarkably as a result of new zoning regulations or a new building code or there had been a marked change of use in the surrounding lands? To say that despite the changed circumstances the guarantor is, beyond the strict terms of the agreement, bound without any notice to an indefinite guarantee of a mortgage containing substantial changes in the term of the loan and the interest rate is worrisome indeed.

26 Further, it is significant that the renewal agreement states that the terms of the old mortgage will form part of the agreement. By doing so it indicates that this is a new agreement rather than merely an extension of an old agreement. This serves to strengthen my view that the respondent was no longer bound by the terms of the original guarantee upon the execution without notice to him of the renewal agreement.

Significance of Clause 7 of the Original Agreement

27 The reasons of Finlayson and Carthy JJ.A. forming the majority of this case in the Court of Appeal are in my view correct. Finlayson J.A. wrote ((1994), 20 O.R. (3d) 499, at p. 513):

> The reference in cl. 7 to the renewal agreement taking priority over subsequent encumbrancers indicates to me that the mortgagee was not directing its corporate mind to the guarantors when negotiating this document. . . . Certainly, there is no express reference to the renewal agreement in cl. 34. On balance, and keeping in mind that these documents were all drawn and presented by the mortgagee, I conclude that the renewal agreement was a material change to the original mortgage debt not contemplated by the language of the guarantee and has the effect of releasing the guarantors from their obligations as sureties.

convention de renouvellement n'est rien de plus qu'une prorogation de l'hypothèque initiale, le tort causé par cette position devient évident. Que penser d'un renouvellement qui prorogerait la durée de l'hypothèque à 25 ans, à un taux d'intérêt sensiblement supérieur? Que penser d'un changement marqué de la situation de la caution qui résulterait d'un nouveau règlement de zonage ou d'un nouveau code du bâtiment, ou d'une modification sensible de l'utilisation des terrains environnants? Affirmer que, malgré les nouvelles circonstances, la caution est, au-delà des conditions strictes de la convention et en l'absence d'avis, tenue de garantir de façon indéfinie une hypothèque sensiblement modifiée quant à la durée du prêt et quant au taux d'intérêt a de quoi inquiéter.

Il est en outre significatif que la convention de renouvellement prévoie que les conditions de l'ancienne hypothèque feront partie de la convention. Elle indique ainsi qu'il s'agit d'une nouvelle convention plutôt qu'une simple prorogation de l'ancienne. Cela renforce mon opinion que l'intimé n'est plus lié par les conditions du cautionnement initial depuis que la convention de renouvellement a été signée sans qu'il en soit avisé.

L'importance de la clause 7 dans la convention initiale

À mon avis, les motifs que la Cour d'appel à la majorité, composée des juges Finlayson et Carthy, a exposés en l'espèce sont exacts. Le juge Finlayson écrit ((1994), 20 O.R. (3d) 499, à la p. 513):

> [TRADUCTION] Dans la clause 7, la mention que la convention de renouvellement a priorité sur toute charge ultérieure m'indique que la personne morale créancière hypothécaire ne songeait pas aux cautions en négociant le présent document [. . .] Certes, il n'y a aucune mention expresse de la convention de renouvellement dans la clause 34. Tout bien considéré et compte tenu du fait que ces documents ont tous été préparés et présentés par la créancière hypothécaire, je conclus que la convention de renouvellement constituait une modification importante de la dette hypothécaire initiale, qui n'était pas prévue par le libellé du cautionnement et qui a pour effet de libérer les cautions de leurs obligations à ce titre.

Carthy J.A.'s interpretation of the contract supports that of Finlayson J.A. but emphasizes different aspects. First, he stresses that clause 34 makes no reference to renewals. In his view, this is significant because it is a term commonly used with respect to mortgages and it is explicitly used in other clauses such as clause 7. Moreover, he found that clause 34 is perfectly capable of coherently referring to changes in the terms within the period of the original mortgage itself.

It is, I think, noteworthy and telling that clause 7 specifically distinguishes between extensions and renewals both in its heading and its text. This leads me to conclude that these terms do not refer to the same eventuality. Since clause 7 so carefully distinguishes between extensions and renewals, they must be referring to different situations. Both *Black's* legal dictionary and *The Oxford Dictionary* give separate and distinct definitions of the terms extension and renewal. *Black's Law Dictionary* (5th ed. 1979) at p. 1165 defines "renewal" as "[t]he act of renewing or reviving. A revival or rehabilitation of an expiring subject; that which is made anew or re-established" while it defines "extension" at p. 523 as "[a]n increase in length of time (*e.g.* of expiration date of lease, or due date of note). The word 'extension' ordinarily implies the existence of something to be extended". This clearly indicates that an "extension" refers to extending an agreement which already exists, while a renewal refers to the revival of an agreement which has expired. This distinction is confirmed by *The Concise Oxford Dictionary of Current English* (9th ed. 1995) at p. 476, which defines "extend" as "lengthen or make larger in space or time" while "renew" is defined at p. 1164 as "revive; regenerate; make new again; restore to the original state". It follows that the failure to refer to a renewal agreement or even to a renewal in clause 34 strongly suggests that it has no application to a renewal. If the lending institutions wished to have clause 34 apply to renewals, it would be a simple matter to use the specific term

28

L'interprétation donnée au contrat par le juge Carthy appuie celle du juge Finlayson, mais elle met l'accent sur des aspects différents. Premièrement, le juge Carthy souligne que la clause 34 ne mentionne pas les renouvellements. À son avis, cela est révélateur parce que c'est une condition courante en matière d'hypothèque et qu'on y recourt expressément dans d'autres clauses comme la clause 7. De plus, il a conclu que la clause 34 est parfaitement susceptible de renvoyer de façon cohérente à des modifications des conditions pendant la durée de l'hypothèque initiale même.

29

Il est, je pense, remarquable et révélateur que la clause 7 distingue expressément les prorogations des renouvellements, tant dans sa rubrique que dans son texte même. Cela m'amène a conclure que ces deux termes ne désignent pas la même chose. Étant donné que la clause 7 distingue avec tant de soin les prorogations des renouvellements, ces termes doivent désigner des choses différentes. Tant le dictionnaire juridique *Black's* que *The Oxford Dictionary* donnent des définitions différentes des termes *extension* (prorogation) et *renewal* (renouvellement). *Black's Law Dictionary* (5e éd. 1979), à la p. 1165, définit le terme «*renewal*» («renouvellement») comme [TRADUCTION] «[l]'action de renouveler ou de remettre en vigueur; la remise en état d'une chose qui vient à expiration; chose faite à nouveau ou rétablie», alors qu'il définit le terme «*extension*» («prorogation»), à la p. 523, comme étant [TRADUCTION] «[u]n accroissement de la durée (par exemple, de l'échéance d'un bail ou d'un billet). Le mot «*extension*» («prorogation») implique ordinairement l'existence d'une chose qui doit être prorogée». Cela indique clairement qu'une «prorogation» désigne la prolongation d'une convention qui existe déjà, alors que le renouvellement désigne la remise en vigueur d'une convention expirée. *The Concise Oxford Dictionary of Current English* (9e éd. 1995), à la p. 476, confirme cette distinction en définissant «*extend*» par [TRADUCTION] «allonger ou accroître dans l'espace ou dans le temps» alors que «*renew*» est défini à la p. 1164 comme [TRADUCTION] «remettre en vigueur; régénérer; rénover; rétablir dans l'état original». Il s'ensuit que l'absence de mention d'une convention de renouvelle-

which is well known in the commercial world of mortgages.

30 Finally, the renewal agreement refers to incorporating the mortgage terms into the agreement. Clause 3 of the renewal agreement provides that:

> All the covenants, conditions, powers and matters in the said mortgage shall apply to and form part of this agreement, except those amended herein. [Emphasis added.]

This, too, suggests that the renewal agreement is a new agreement and not an extension, since the original mortgage terms are only incorporated to the extent that they are not altered by the renewal. Although clause 34 contemplates a change in the interest rate, an extension would not ordinarily involve an alteration of the original terms, but rather a continuation of the same terms over a longer time period.

31 The appellant sought comfort from *Co-operative Trust Co. of Canada v. Kirkby*, [1986] 6 W.W.R. 90 (Sask. Q.B.). In that case, Armstrong J. noted that in some cases, a mortgage extension or renewal agreement could have exactly the same effect as a new mortgage. However, he concluded, correctly I believe, that on the facts of that case, there was no evidence to support the contention that the mortgage extension agreement was in fact a new mortgage. In my view, such a determination will involve a review of the particular guarantee clause and the whole transaction between the parties. The appellant also referred to the decisions in *Royal Trust Corp. of Canada v. Reid* (1985), 40 R.P.R. 287 (P.E.I. C.A.), and *Veteran Appliance Service Co. v. 109272 Development Ltd.* (1985), 67 A.R. 117 (Q.B.). In both those decisions, the terms renewal and extension agreement were used interchangeably. Yet I think that it becomes clear in reading both these decisions that this was not a

ment ou même d'un renouvellement dans la clause 34 donne fortement à penser qu'elle ne s'applique pas à un renouvellement. Si les établissements de crédit souhaitaient que la clause 34 s'applique aux renouvellements, il leur suffirait d'utiliser ce terme spécifique bien connu dans le milieu des prêts hypothécaires.

Finalement, la convention de renouvellement mentionne l'incorporation des conditions de l'hypothèque dans la convention. La clause 3 de la convention de renouvellement prévoit:

> [TRADUCTION] Tous les engagements, conditions, pouvoirs et questions inclus dans ladite hypothèque s'appliquent à la présente convention et en font partie, sauf dans la mesure des modifications apportées aux présentes. [Je souligne.]

Cela aussi donne à penser que la convention de renouvellement est une nouvelle convention et non une prorogation, étant donné que les conditions de l'hypothèque initiale sont incorporées seulement dans la mesure où elles ne sont pas modifiées par le renouvellement. Bien que la clause 34 envisage une modification du taux d'intérêt, une prorogation comporte normalement non pas une modification des conditions initiales, mais plutôt le maintien des mêmes conditions pour une période plus longue.

L'appelante a invoqué la décision *Co-operative Trust Co. of Canada c. Kirkby*, [1986] 6 W.W.R. 90 (B.R. Sask.). Dans cette décision, le juge Armstrong a fait remarquer que, dans certains cas, une prorogation d'hypothèque ou une convention de renouvellement peuvent avoir exactement le même effet qu'une nouvelle hypothèque. Il a toutefois conclu, à juste titre selon moi, que, d'après les faits de cette affaire, il n'y avait aucune preuve à l'appui de l'argument selon lequel la convention de prorogation de l'hypothèque était, en fait, une nouvelle hypothèque. À mon avis, pour décider cela, il faut examiner la clause de cautionnement en question et l'ensemble de l'opération conclue par les parties. L'appelante a aussi mentionné les décisions *Royal Trust Corp. of Canada. c. Reid* (1985), 40 R.P.R. 287 (C.A. Î.-P.-É.), et *Veteran Appliance Service Co. c. 109272 Development Ltd.* (1985), 67 A.R. 117 (B.R). Dans ces deux affaires, les expressions «convention de renouvellement» et

central or major issue in the case. To repeat, it will be a question of fact to be determined on the particular transaction, agreement and circumstances presented in each case whether a renewal agreement is a new contract or simply an extension of the existing agreement.

«convention de prorogation» ont été utilisées indifféremment. Je pense cependant qu'il devient évident, à la lecture de ces deux décisions, que ce n'était pas alors une question majeure ou importante. Je le répète, la question de savoir si une convention de renouvellement est un nouveau contrat ou une simple prorogation de la convention existante est une question de fait qui doit être tranchée en fonction de l'opération, de la convention et des circonstances en cause dans chaque affaire.

It follows I find that the words used in clauses 34 and 7 are sufficiently clear to conclude that the guarantor did not waive his equitable and common law rights either as a principal debtor or as a guarantor. The renewal agreement which was entered into without notice to, or the agreement of, the guarantor materially altered the provisions of the original loan agreement. The guarantor was thereby relieved of his obligation.

Je conclus donc que les mots utilisés dans les clauses 34 et 7 sont suffisamment clairs pour conclure que la caution n'a pas renoncé aux droits que l'*equity* et la common law lui confèrent à titre de débiteur principal ou de caution. La convention de renouvellement qui a été conclue sans qu'avis ne soit donné à la caution, ou sans le consentement de cette dernière, a modifié sensiblement les dispositions de la convention de prêt initiale. La caution a ainsi été libérée de son obligation.

If the wording of the two clauses should be found to be ambiguous, the *contra proferentem* rule must be applied against the bank. The wording of clause 34 binding the guarantor to variations in the event of an extension of the mortgage should not be applied to bind the guarantor to a renewal without notice since there is ambiguity as to whether clause 34 applies to renewals at all. In these circumstances as well, the guarantor should be relieved of liability.

Si l'on conclut que le texte des deux clauses est ambigu, il faut appliquer la règle *contra proferentem* au détriment de la banque. Le texte de la clause 34 liant la caution aux modifications qui peuvent être apportées en cas de prorogation de l'hypothèque ne devrait pas être interprété de manière à lier la caution à un renouvellement effectué sans donner avis, étant donné qu'il y a ambiguïté quant à savoir si la clause 34 s'applique de quelque façon que ce soit aux renouvellements. Dans ces circonstances aussi, la caution devrait être libérée de sa responsabilité.

Disposition

I would dismiss the appeal with costs.

Dispositif

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

The following are the reasons delivered by

Les motifs suivants ont été rendus par

L'HEUREUX-DUBÉ J. (dissenting) — I substantially agree with my colleague Justice Iacobucci's reasons and the result he reaches. I have only one comment which relates to the judicial interpretation methodology relied upon by my colleague.

LE JUGE L'HEUREUX-DUBÉ (dissidente) — Je suis substantiellement d'accord avec les motifs de mon collègue le juge Iacobucci et le résultat auquel il arrive. Mon seul commentaire portera sur la méthode d'interprétation judiciaire utilisée par mon collègue.

36 The "modern contextual approach" is, in my view, the standard, normative approach to judicial interpretation, and one may exceptionally resort to the old "plain meaning" rule in appropriate circumstances. One example of the latter is statutory interpretation in the area of taxation, where the words and expressions used in legislative provisions quite often have a well-defined "plain meaning" within the business community.

37 In the case at bar, our Court is called upon to determine the appropriate definition of the phrase "the giving of time for payment . . . or the varying of the terms of payment", in the context and factual situation of the instant case.

38 My colleague decides the issue by going through a contractual interpretation exercise as follows. Firstly, the impugned contractual provisions are reviewed in the context of the whole contract. Secondly, the issue of the *contra proferentem* rule is addressed. Thirdly, the issue of the difference between "accommodating" and "compensated" sureties is examined. Fourthly, an authoritative academic text is relied upon: K. P. McGuinness, *The Law of Guarantee* (2nd ed. 1996).

39 Thus, after reviewing the provisions in their immediate context, the contract as a whole, the consequences of proposed interpretations, the applicable presumptions and rules of interpretation, and admissible external aids, my colleague comes to a contextual interpretation of the impugned phrase. I fully agree with both the process used and the conclusions he arrived at. However, with respect, that process is not an application of the "plain meaning" approach: in fact, the "modern contextual approach" to judicial interpretation is the one that is actually used in the instant case.

40 I agree with my colleague that "[t]he rules respecting the interpretation of guarantees are essentially the same as the rules which govern the interpretation of deeds and contracts generally". But the rules which govern the interpretation of deeds and contracts generally are essentially the

La «méthode contextuelle moderne» est, à mon avis, la méthode normative standard d'interprétation judiciaire même s'il y a lieu, exceptionnellement, de recourir à l'ancienne règle du «sens ordinaire» lorsque les circonstances s'y prêtent. Par exemple, il y a l'interprétation des lois en matière fiscale, dans lesquelles on utilise des mots et expressions qui ont bien souvent un «sens ordinaire» bien défini dans le monde des affaires.

En l'espèce, notre Cour est appelée à définir l'expression [TRADUCTION] «l'attribution d'un délai de paiement [. . .] ou la modification de[s] conditions de paiement», selon le contexte et les faits de la présente affaire.

Mon collègue tranche la question en adoptant la démarche suivante en matière d'interprétation des contrats. Premièrement, les dispositions contractuelles attaquées sont examinées dans le contexte du contrat dans son ensemble. Deuxièmement, la question de la règle *contra proferentem* est abordée. Troisièmement, la question de la différence entre la caution «de complaisance» et la caution «rétribuée» est analysée. Quatrièmement, un texte de doctrine faisant autorité est invoqué: K. P. McGuinness, *The Law of Guarantee* (2e éd. 1996).

Ainsi, après avoir examiné les dispositions dans leur contexte immédiat, le contrat dans son ensemble, les conséquences des interprétations proposées, les présomptions et les règles d'interprétation applicables, ainsi que les sources acceptables d'aide extérieure, mon collègue arrive à une interprétation contextuelle de l'expression contestée. Je suis entièrement d'accord avec la démarche adoptée et les conclusions auxquelles il est arrivé. En toute déférence, cependant, cette démarche ne constitue pas une application de la méthode du «sens ordinaire»: en fait, c'est la «méthode contextuelle moderne» d'interprétation judiciaire qui est utilisée en l'espèce.

Je conviens avec mon collègue que «[l]es règles applicables à l'interprétation des cautionnements sont essentiellement les mêmes que celles qui régissent l'interprétation des actes et des contrats en général». Mais les règles qui régissent l'interprétation des actes et des contrats en général sont

same as the rules for statutory interpretation. As Lord Blackburn stated in *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743 (H.L.), at pp. 763-65:

. . . I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. . . .

In construing written instruments I think the same principle applies. In the cases of wills the testator is speaking of and concerning all his affairs; . . .

In the case of a contract, the two parties are speaking of certain things only. . . . [In both cases] the Court . . . declares what the intention, indicated by the words used under such circumstances, really is.

And this, as applied to the construction of statutes, is no new doctrine. . . . My Lords, *mutatis mutandis*, I think this is applicable to the construction of statutes as much as of wills. And I think it is correct. [Emphasis added.]

Therefore, the "modern contextual approach" for statutory interpretation, with appropriate adaptations, is equally applicable to contractual interpretation. Statutory interpretation and contractual interpretation are but two species of the general category of judicial interpretation. In the instant case, the methodological reference provided by R. Sullivan in *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 131, applies equally to contractual interpretation:

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of [that which is to be judicially interpreted] in its total context, having regard to [its] purpose . . ., the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of [. . .] meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the [. . .] text; (b) its efficacy, that is, its promotion of the [. . .] purpose; and (c) its acceptability,

essentiellement les mêmes que les règles d'interprétation des lois. Comme lord Blackburn l'affirme dans *River Wear Commissioners c. Adamson* (1877), 2 App. Cas. 743 (H.L.), aux pp. 763 à 765:

[TRADUCTION] . . . j'exposerai donc de façon aussi précise que possible quels sont, d'après moi, les principes établis dans la jurisprudence, sur lesquels les cours de justice se fondent pour interpréter un instrument. Dans tous les cas il s'agit de découvrir quelle est l'intention exprimée par les mots employés. . . .

Je pense que le même principe s'applique à l'interprétation des instruments. Dans le cas d'un testament, le testateur parle de toutes ses affaires; . . .

Dans le cas d'un contrat, les deux parties parlent de certaines choses seulement, [. . .] [Dans les deux cas] la cour [. . .] énonce quelle est réellement l'intention indiquée par les mots employés dans ces circonstances.

Et cela n'est pas un principe nouveau en matière d'interprétation des lois. [. . .] Vos Seigneuries, je pense que cela s'applique *mutatis mutandis* à l'interprétation des lois autant qu'à celle des testaments. Et je pense qu'il est bien qu'il en soit ainsi. [Je souligne.]

41 Par conséquent, la «méthode contextuelle moderne» d'interprétation des lois s'applique également, avec les adaptations nécessaires, à l'interprétation des contrats. L'interprétation des lois et l'interprétation des contrats ne sont que deux subdivisions de la grande catégorie de l'interprétation judiciaire. En l'espèce, la méthodologie exposée par R. Sullivan dans *Driedger on the Construction of Statutes* (3e éd. 1994), à la p. 131, s'applique également à l'interprétation des contrats:

[TRADUCTION] Il n'existe qu'une seule règle d'interprétation moderne: les tribunaux sont tenus de déterminer le sens de [ce qui doit être interprété judiciairement] dans son contexte global, en tenant compte de [son] objet [. . .], des conséquences des interprétations proposées, des présomptions et des règles spéciales d'interprétation, ainsi que des sources acceptables d'aide extérieure. Autrement dit, les tribunaux doivent tenir compte de tous les indices pertinents et acceptables du sens d'un texte [. . .]. Cela fait, ils doivent ensuite adopter l'interprétation qui est appropriée. L'interprétation appropriée est celle qui peut être justifiée en raison a) de sa plausibilité, c'est-à-dire sa conformité avec le texte [. . .], b) de son efficacité, dans le sens où elle favorise la réalisa-

that is, the outcome is reasonable and just. [Emphasis added.]

42 This methodology was indeed the one followed by my colleague. In the case at bar, however, the resulting interpretation did not really come from the "plain meaning" of the words, but from their "meaning in law", because they are "legal terms of art". As Lord Diplock explained in *Sydall v. Castings Ltd.*, [1967] 1 Q.B. 302, at pp. 313-14:

> Documents which are intended to give rise to legally enforceable rights and duties contemplate enforcement by due process of law which involves their being interpreted by courts composed of judges, each one of whom has his personal idiosyncrasies of sentiment and upbringing, not to speak of age. Such documents would fail in their object if the rights and duties which could be enforced depended on the personal idiosyncrasies of the individual judge or judges upon whom the task of construing them chanced to fall. It is to avoid this that lawyers, whose profession it is to draft and to construe such documents, have been compelled to evolve an English language, of which the constituent words and phrases are more precise in their meaning than they are in the language of Shakespeare or of any of the passengers on the Clapham omnibus this morning. These words and phrases to which a more precise meaning is so ascribed are called by lawyers "terms of art" but are in popular parlance known as "legal jargon". [Emphasis added.]

43 After having specified the nature of "legal terms of art", Lord Diplock stated the basic rule of judicial interpretation, as well as the methodology, that are applicable in that context (at p. 314):

> The words and phrases . . . which are "terms of art" must therefore be given the meaning which attaches to them as terms of art; . . .
>
> The lexicon of terms of art is to be found in the decided cases and in the textbooks consulted by legal practitioners.

44 It is quite obvious that where courts expound judicial interpretations of "legal terms of art" using such external aids as legal textbooks, the resulting

tion de l'objet du texte [. . .], et c) de son acceptabilité, dans le sens où le résultat est raisonnable et juste. [Je souligne.]

En réalité, c'est cette méthode que mon collègue a suivie. En l'espèce, cependant, l'interprétation qui en a résulté ne découlait pas vraiment du «sens ordinaire» des mots, mais plutôt de leur «sens en droit» parce que ce sont des «termes techniques propres au domaine juridique». Comme lord Diplock l'a expliqué dans *Sydall c. Castings Ltd.*, [1967] 1 Q.B. 302, aux pp. 313 et 314:

> [TRADUCTION] Les documents qui visent à donner naissance à des droits et à des obligations exécutoires sur le plan juridique envisagent leur mise à exécution par application régulière de la loi, ce qui comprend leur interprétation par des tribunaux composés de juges dont chacun a son propre tempérament issu de ses sentiments, de son éducation, et évidemment de son âge. Ces documents n'atteindraient pas leur objectif si les droits et obligations qui pourraient être mis à exécution dépendaient du tempérament personnel du ou des juges qui seraient appelés à les interpréter. C'est pour éviter cela que les avocats, dont c'est la profession de rédiger et d'interpréter ces documents, ont dû mettre au point une langue anglaise composée de mots et d'expressions ayant un sens plus précis que ceux utilisés par Shakespeare ou par n'importe quel usager du transport en commun de Clapham, ce matin. Ces mots et expressions auxquels est ainsi attribué un sens plus précis sont qualifiés de «termes techniques» par les avocats, mais dans le langage populaire, ils sont connus sous le nom de «jargon juridique». [Je souligne.]

Après avoir précisé la nature des «termes techniques propres au domaine juridique», lord Diplock a formulé la règle fondamentale d'interprétation judiciaire et la méthode applicables dans ce contexte (à la p. 314):

> [TRADUCTION] Les mots et expressions [. . .] qui sont des «termes techniques» doivent donc recevoir le sens qui leur est propre en tant que termes techniques; . . .
>
> Le lexique des termes techniques se trouve dans la jurisprudence et les ouvrages consultés par les praticiens du droit.

Il est tout à fait évident que, lorsque les tribunaux interprètent un «terme technique propre au domaine juridique» en recourant à des sources

outcome cannot appropriately be labelled a "plain meaning" definition.

Where an instrument uses a legal term of art, there is a presumption that the term of art is used in its correct legal sense: *Inland Revenue Commissioners v. Williams*, [1969] 1 W.L.R. 1197 (Ch.; Megarry J.).

This is the presumption that is resorted to by my colleague Iacobucci J. when he makes use of admissible external aids — i.e.: McGuinness, *supra*, — in determining the correct meaning of the phrase "to give time". As McGuinness reviews extensive case-law authority that establishes the generally accepted "meaning in law" of these "legal terms of art", it is an admissible external aid to judicial interpretation: see *Driedger, supra*, at pp. 428, 468 and 474; see also P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at pp. 449-53 and 457-58.

Subject to the above considerations, I concur with my colleague's disposition of the appeal.

The reasons of Gonthier and Iacobucci JJ. were delivered by

IACOBUCCI J. (dissenting) — This appeal raises questions regarding the proper method for interpreting guarantees. Specifically, we are asked to determine whether the wording of the contract in issue was clear enough to waive the guarantors' equitable right to be released when the principal loan was renewed.

I. Background

On February 20, 1987, the appellant Manulife Bank of Canada (at the time known as The Regional Trust Company) made a loan of $275,000 to Dina Conlin. The loan was for a term of three years and bore interest at the rate of 11.5 percent

d'aide extérieure comme des ouvrages juridiques, on ne peut, à juste titre, dire que la définition ainsi obtenue repose sur le «sens ordinaire» du terme en cause.

Lorsqu'un instrument emploie un terme technique propre au domaine juridique, ce terme technique est présumé être employé dans son sens juridique exact: *Inland Revenue Commissioners c. Williams*, [1969] 1 W.L.R. 1197 (Ch., le juge Megarry).

C'est la présomption à laquelle recourt mon collègue le juge Iacobucci lorsqu'il utilise une source acceptable d'aide extérieure, soit l'ouvrage de McGuinness, *op. cit.*, pour déterminer le sens exact de l'expression [TRADUCTION] «accorder un délai». Comme McGuinness passe en revue une jurisprudence abondante qui établit le «sens en droit» généralement accepté de ces «termes techniques propres au domaine juridique», il s'agit d'une source d'aide extérieure acceptable en matière d'interprétation judiciaire: voir *Driedger*, *op. cit.*, aux pp. 428, 468 et 474; voir également P.-A. Côté, *Interprétation des lois* (2e éd. 1990), aux pp. 516 à 520, de même qu'à la p. 526.

Sous réserve de ces considérations, je souscris à la façon dont mon collègue tranche le pourvoi.

Version française des motifs des juges Gonthier et Iacobucci rendus par

LE JUGE IACOBUCCI (dissident) — Le présent pourvoi soulève des questions concernant la bonne façon d'interpréter les contrats de cautionnement. Plus précisément, on nous demande de déterminer si le libellé du contrat en cause était suffisamment clair pour constituer une renonciation du droit en *equity* des cautions d'être libérées de leur obligation lorsque le prêt principal a été renouvelé.

I. Le contexte

Le 20 février 1987, l'appelante, la Banque Manuvie du Canada (à l'époque connue sous le nom de «La Compagnie de Fiducie Régionale») a accordé un prêt de 275 000 $ à Dina Conlin. Le prêt était consenti pour une période de trois ans et

per annum. Dina Conlin provided security for the loan in the form of a first mortgage against lands located in Welland, Ontario.

50 The terms of the loan required the signature of two guarantors: the respondent John Joseph Conlin, who was the mortgagor's husband; and Conlin Engineering and Planning Limited, an Ontario corporation. In clause 34 of the mortgage agreement, the two promised, "as principal debtors and not as sureties", to pay the money secured by the mortgage. They further agreed to all of the particular conditions and stipulations of the mortgage which were binding upon the mortgagor.

51 The guarantee was to remain binding "notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon". The liability of the guarantors was stated to be continuous, subsisting "until payment in full of the principal sum and all other moneys hereby secured".

52 In 1989, the respondent and Dina Conlin separated.

53 In 1990, shortly before the mortgage was to mature, Dina Conlin and the appellant executed an agreement which renewed the mortgage for a further three-year term at a yearly interest rate of 13 percent. The renewal forms provided spaces for the signature of the "registered owner" and the "guarantor", but the agreement was signed only by Dina Conlin. The respondent had no notice or knowledge of the renewal.

54 In March of 1992, Dina Conlin defaulted on the mortgage.

55 After fruitless efforts to sell the Welland lands, the bank initiated proceedings for summary judgment against Dina Conlin and the guarantors. The bank claimed the principal owing under the mort-

il portait intérêt au taux de 11,5 pour 100 par année. Dina Conlin a offert en garantie de remboursement une première hypothèque sur des terrains situés à Welland (Ontario).

Les conditions du prêt exigeaient la signature de deux cautions: l'intimé John Joseph Conlin, qui était l'époux de la débitrice hypothécaire, et Conlin Engineering and Planning Limited, une société ontarienne. À la clause 34 de la convention hypothécaire, les deux se sont engagés, [TRADUCTION] «à titre de débiteurs principaux et non de cautions», à rembourser la somme garantie par l'hypothèque. Ils ont aussi accepté toutes les autres conditions et stipulations de l'hypothèque qui liaient la débitrice hypothécaire.

Le cautionnement devait demeurer valide [TRADUCTION] «nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt». La responsabilité des cautions était qualifiée de continue et elle devait subsister [TRADUCTION] «jusqu'au paiement complet du capital et de toutes les autres sommes garantis par les présentes».

En 1989, l'intimé et Dina Conlin se sont séparés.

En 1990, peu avant que l'hypothèque vienne à échéance, Dina Conlin et l'appelante ont signé une convention de renouvellement de l'hypothèque pour une autre période de trois ans, à un taux d'intérêt de 13 pour 100 par année. Les formules de renouvellement comportaient un espace pour la signature du [TRADUCTION] «propriétaire enregistré» et de la «caution», mais la convention n'a été signée que par Dina Conlin. L'intimé n'a reçu aucun avis et n'a pas eu connaissance du renouvellement.

En mars 1992, il y a eu défaut de paiement de l'hypothèque de la part de Dina Conlin.

Après avoir vainement tenté de vendre les terrains de Welland, la banque a engagé des procédures pour obtenir un jugement sommaire contre Dina Conlin et les cautions. La banque réclamait le

gage with interest at the rate of 13 percent per annum. Judgment was obtained on the motion. However, a majority of the Court of Appeal set aside the judgment and dismissed the action against the respondent: (1994), 20 O.R. (3d) 499, 120 D.L.R. (4th) 234, 41 R.P.R. (2d) 283, 75 O.A.C. 117, 17 B.L.R. (2d) 143.

II. Relevant Contractual Provisions

(7) RENEWAL OR EXTENSION OF TIME

PROVIDED that no extension of time given by the Mortgagee to the Mortgagor, or anyone claiming under it, or any other dealing by the Mortgagee with the owner of the equity of redemption of said lands, shall in any way affect or prejudice the rights of the Mortgagee against the Mortgagor or any other person liable for the payment of the monies hereby secured, and that this Mortgage may be renewed by an agreement in writing for any term with or without an increased rate of interest, or amended from time to time as to any of its terms including without limitation increasing the interest rate or principal amount notwithstanding that there may be subsequent encumbrances. And it shall not be necessary to register any such agreement in order to retain the priority of this Mortgage so altered over any instrument delivered or registered subsequent to this Mortgage.

(34) GUARANTEE AND INDEMNITY

IT IS A CONDITION of the making of the loan secured by the within mortgage that the covenants set forth herein should be entered into by us, the Guarantors, namely John Joseph Conlin and Conlin Engineering & Planning Ltd. and now we the said Guarantors, and each of us, on behalf of ourselves, our respective heirs, executors, administrators and assigns, in consideration of the making of the said loan by the Mortgagee, do hereby jointly and severally covenant, promise and agree as principal debtors and not as sureties, that we and each of us shall and will well and truly pay or cause to be paid to the Mortgagee, the principal sum and all other moneys hereby secured, together with interest upon the same on the days and times and in the manner set forth in this mortgage, and will in all matters pertain-

capital dû en vertu de l'hypothèque, avec intérêts au taux de 13 pour 100 par année. La banque a obtenu gain de cause relativement à cette requête. Cependant, la Cour d'appel à la majorité a infirmé ce jugement et rejeté l'action intentée contre l'intimé: (1994), 20 O.R. (3d) 499, 120 D.L.R. (4th) 234, 41 R.P.R. (2d) 283, 75 O.A.C. 117, 17 B.L.R. (2d) 143.

II. Dispositions contractuelles pertinentes

[TRADUCTION]

(7) RENOUVELLEMENT OU PROROGATION DE DÉLAI

POURVU qu'aucune prorogation de délai accordée par le créancier hypothécaire au débiteur hypothécaire, ou à toute personne cherchant à s'en prévaloir, ou qu'aucune autre négociation entre le créancier hypothécaire et le détenteur du droit de rachat desdits terrains n'affecte ou ne compromette de quelque façon que ce soit les droits que le créancier hypothécaire peut exercer contre le débiteur hypothécaire ou toute autre personne responsable du paiement des sommes garanties par les présentes, et que la présente hypothèque puisse être renouvelée par convention écrite pour quelque durée que ce soit, avec ou sans augmentation du taux d'intérêt, ou que l'une ou l'autre de ses conditions puisse être modifiée à l'occasion, notamment, sans limiter la portée de ce qui précède, que le taux d'intérêt ou le capital puisse être augmenté nonobstant toute charge ultérieure. Et il ne sera pas nécessaire d'enregistrer une telle convention pour conserver la priorité de rang de l'hypothèque ainsi modifiée par rapport à tout instrument délivré ou enregistré après la présente hypothèque.

(34) CAUTIONNEMENT ET INDEMNITÉ

EST UNE CONDITION du prêt garanti par la présente hypothèque que nous, les cautions, à savoir John Joseph Conlin et Conlin Engineering & Planning Ltd., souscrivions aux engagements stipulés aux présentes, et que, par conséquent, nous, lesdites cautions, en notre propre nom, au nom de nos héritiers, exécuteurs, administrateurs et ayants droit respectifs, en contrepartie dudit prêt consenti par le créancier hypothécaire, convenions, promettions et acceptions solidairement, aux présentes, à titre de débiteurs principaux et non de cautions, ensemble ou individuellement, de payer ou de faire payer bel et bien au créancier hypothécaire le capital et toutes les autres sommes garantis par les présentes, de même que les intérêts sur ces sommes au moment et de la manière stipulés dans la présente hypothèque, et que,

ing to this mortgage well and truly do, observe, fulfill and keep all and singular the covenants, provisos, conditions, agreements and stipulations contained in this mortgage, and do hereby agree to all the covenants, provisos, conditions, agreements and stipulations by this mortgage made binding upon the Mortgagor; and do further agree that this covenant shall bind us, and each of us notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon or the giving of a release or partial release or covenant not to sue to any of us; and we and each of us agree that the Mortgagee may waive breaches and accept other covenants, sureties or securities without notice to us or any of us and without relieving us from our liability hereunder, which shall be a continuous liability and shall subsist until payment in full of the principal sum and all other moneys hereby secured.

relativement à toute question concernant la présente hypothèque, nous observions, remplissions et respections bel et bien tous et chacun des engagements, réserves, conditions, conventions et stipulations de la présente hypothèque, et que, par les présentes, nous convenions de respecter tous les engagements, réserves, conditions, conventions et stipulations de la présente hypothèque qui lient le débiteur hypothécaire; et que nous convenions que cet engagement nous liera toutes, ensemble et individuellement, nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt, ou le fait que l'une ou l'autre de nous obtienne une libération complète ou partielle ou un engagement de ne pas faire l'objet de poursuites; et que nous convenions toutes et chacune que le créancier hypothécaire puisse renoncer au droit de résiliation pour violation et accepter d'autres engagements, cautionnements ou sûretés sans nous donner avis à toutes ou à l'une ou l'autre de nous, et sans que cela nous libère de notre responsabilité continue aux termes des présentes, qui subsistera jusqu'au paiement complet du capital et de toutes les autres sommes garantis par les présentes.

III. Judgments Appealed From

A. *Ontario Court (General Division)*

57 In a very succinct judgment, Killeen J. granted the bank's motion for summary judgment against both Dina Conlin and the respondent. He found that, according to the "clear and unequivocal language" of clauses 7 and 34, the respondent was liable under his guarantee despite the renewal of the mortgage and despite the increase in the rate of interest: "In my view, there is no escape for the guarantor".

B. *Ontario Court of Appeal* (1994), 20 O.R. (3d) 499

(a) Finlayson J.A.

58 Finlayson J.A. first considered the following language in clause 34: "the said guarantors . . . covenant, promise and agree as principal debtors and not as sureties . . ." (emphasis added). He found an apparent inconsistency between this last phrase and the fact that, on the face of the contract, the respondent appeared to be signing as a surety and not as a principal debtor. Having briefly discussed the difference between contracts of

III. Juridictions inférieures

A. *Cour de l'Ontario (Division générale)*

Dans un jugement très succinct, le juge Killeen a fait droit à la requête de la banque visant à obtenir un jugement sommaire contre Dina Conlin et l'intimé. Il a conclu que, selon le [TRADUCTION] «texte clair et net» des clauses 7 et 34, l'intimé était responsable en vertu de son cautionnement malgré le renouvellement de l'hypothèque et l'augmentation du taux d'intérêt: [TRADUCTION] «À mon avis, la caution n'a aucune échappatoire»

B. *Cour d'appel de l'Ontario* (1994), 20 O.R. (3d) 499

a) Le juge Finlayson

Le juge Finlayson a d'abord examiné le passage suivant de la clause 34: «nous, lesdites cautions [. . .] conven[ons], promett[ons] et accept[ons] [. . .] à titre de débiteurs principaux et non de cautions» (je souligne). Il a conclu que ce passage semblait incompatible avec le fait qu'à la lecture du contrat l'intimé paraissait signer à titre de caution et non de débiteur principal. Après avoir brièvement analysé la différence entre les contrats

indemnity and contracts of guarantee, Finlayson J.A. concluded that it was unnecessary to resolve the exact nature of the guarantor's status, stating: "the reference to the guarantor as principal debtor can be disregarded for the purposes of this appeal" (p. 511).

Finlayson J.A. then turned to the main issue of whether the renewal agreement extinguished the respondent's liability under his guarantee. He noted that, in equity, either an increase of the interest rate or an extension of the mortgage's term constitutes a material change of the original contract which will extinguish a guarantor's liability.

Therefore, it was necessary to determine whether clause 34 constituted a waiver, on the part of the sureties, of these equitable rights. After reviewing several cases where the language of a particular guarantee was held to embrace a renewal agreement, Finlayson J.A. stated that "each of these cases must be confined to its own wording" (pp. 511-12). Furthermore, the language of the Manulife guarantee clause did not, in the opinion of Finlayson J.A., clearly contemplate the renewal agreement. Accordingly, the material change to the loan, effected through the renewal agreement, released the guarantors from their respective obligations.

(b) Carthy J.A. (concurring with Finlayson J.A. in the result)

Carthy J.A. began by stating that the law has always treated sureties as "favoured" creditors. While a surety can contract out of his legal rights, the language used to do so must be clear.

Applying a "strict" interpretation to the loan agreement, Carthy J.A. concluded that the guarantee agreement was not "explicit enough to embrace a renewal" (p. 515). Furthermore, he found that the wording of clause 7 did not stipulate clearly that the loan could be renewed by an agreement which

d'indemnité et les contrats de cautionnement, le juge Finlayson a conclu qu'il n'était pas nécessaire de déterminer le statut exact de la caution, affirmant qu'[TRADUCTION] «aux fins du présent appel, il est possible de ne pas tenir compte de la mention de la caution en tant que débiteur principal» (p. 511).

59 Le juge Finlayson a ensuite examiné la question principale de savoir si la convention de renouvellement avait mis fin à la responsabilité qui incombait à l'intimé en vertu du cautionnement qu'il avait consenti. Il a fait remarquer qu'en *equity* une augmentation du taux d'intérêt ou une prorogation de l'hypothèque constituent une modification importante du contrat initial, qui met fin à la responsabilité d'une caution.

60 Il était donc nécessaire de déterminer si la clause 34 constituait une renonciation, de la part des cautions, à ces droits en *equity*. Après avoir examiné plusieurs affaires où on a jugé que le texte d'un cautionnement englobait une convention de renouvellement, le juge Finlayson a affirmé que [TRADUCTION] «chacune de ces affaires doit se limiter à son propre libellé» (pp. 511 et 512). En outre, le texte de la clause de cautionnement de Manuvie ne prévoyait pas clairement, selon le juge Finlayson, la convention de renouvellement. Par conséquent, la modification importante apportée au contrat de prêt au moyen de la convention de renouvellement libérait les cautions de leurs obligations respectives.

b) Le juge Carthy (souscrivant à l'opinion du juge Finlayson quant au résultat)

61 Le juge Carthy a commencé par affirmer que le droit a toujours considéré les cautions comme des créanciers «privilégiés». Une caution peut renoncer par contrat aux droits que lui confère la loi, mais cela doit être fait en termes clairs.

62 Interprétant «restrictivement» la convention de prêt, le juge Carthy a conclu que la convention de cautionnement n'était pas [TRADUCTION] «suffisamment explicite pour comprendre un renouvellement» (p. 515). Il a, en outre, conclu que le texte de la clause 7 ne stipulait pas clairement que le

was not signed by the guarantors. The guarantors had not waived their equitable rights and, accordingly, the renewal agreement extinguished their liability.

(c) Robins J.A. (dissenting)

63 Robins J.A. first reviewed the rule in *Holme v. Brunskill* (1878), 3 Q.B.D. 495 (C.A.) which states that any material variation of the principal contract without the surety's consent will discharge the surety. He went on to note that a guarantor can contract out of this equitable protection.

64 Robins J.A. then looked at the terms of clause 34 which stated that the guarantee would remain binding "notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon". He concluded that these words clearly contemplated both the extension of the mortgage's term and the increase in the interest rate, as implemented by the renewal agreement. In other words, by clause 34, the guarantors waived their equitable rights to be released from their obligations in the event of these particular changes to the loan contract.

65 Having decided that the respondent was liable as a guarantor, Robins J.A. did not find it necessary to consider whether the guarantors were, in fact, "principal debtors".

66 However, while he found the respondent to be liable under the guarantee, Robins J.A. would have varied the order of the motions court judge such that Conlin would only be liable for the principal amount secured under the mortgage and interest thereon calculated at 11.5 percent per annum. He based this variation on the finding that the guarantors agreed to be liable for the moneys secured under the original mortgage. In his view, although they agreed to be liable notwithstanding any

prêt pourrait être renouvelé au moyen d'une convention non signée par les cautions. Les cautions n'avaient pas renoncé à leurs droits en *equity* et, par conséquent, la convention de renouvellement mettait fin à leur responsabilité.

c) Le juge Robins (dissident)

Le juge Robins a d'abord examiné la règle établie dans l'arrêt *Holme c. Brunskill* (1878), 3 Q.B.D. 495 (C.A.), selon laquelle toute modification importante du contrat principal sans le consentement de la caution libère cette dernière. Puis, il a fait remarquer qu'une caution peut renoncer par contrat à cette protection dont il bénéficie en *equity*.

Le juge Robins a ensuite examiné le texte de la clause 34 qui prévoit que le cautionnement demeure valide [TRADUCTION] «nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt». Il a conclu que ces mots prévoyaient clairement à la fois la prorogation de l'hypothèque et l'augmentation du taux d'intérêt effectuées par la convention de renouvellement. Autrement dit, à la clause 34, les cautions avaient renoncé à leur droit en *equity* d'être libérées de leurs obligations dans le cas où de telles modifications seraient apportées au contrat de prêt.

Ayant décidé que l'intimé était responsable à titre de caution, le juge Robins n'a pas considéré nécessaire de déterminer si les cautions étaient, en fait, des «débiteurs principaux».

Toutefois, bien qu'il ait conclu que l'intimé était responsable en vertu du cautionnement consenti, le juge Robins aurait modifié l'ordonnance du juge des requêtes, de manière à ce que Conlin ne soit responsable que du capital garanti en vertu de l'hypothèque et des intérêts sur ce montant calculés au taux de 11,5 pour 100 par année. Il a fondé cette modification sur la conclusion que les cautions avaient convenu d'être responsables des sommes garanties en vertu de l'hypothèque initiale. À son avis, bien qu'elles aient convenu d'être responsables nonobstant toute modification du taux d'in-

change in the interest rate, they did not agree to be liable for that higher rate of interest.

IV. Issues

Before our Court, the appellant raised a threshold issue of jurisdiction. It claimed that the Court of Appeal had erred in dismissing the action when that order was not requested by either party at the motion for summary judgment or on appeal and when neither counsel nor the courts ever discussed this form of relief. Accordingly, there are two major issues before us:

1. Did the majority of the Ontario Court of Appeal exceed its jurisdiction in allowing the appeal and dismissing the action, rather than sending the matter back to trial?
2. Under the terms of the loan agreement, was the respondent John Joseph Conlin released from his promise to pay the principal sum and other moneys secured by the mortgage, when the term of the mortgage was extended and the rate of interest increased, without notice to the respondent?

V. Analysis

A. *Did the Court of Appeal have jurisdiction to dismiss the action as against the respondent?*

Section 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, states as follows:

134. — (1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just.

The order originally appealed from was granted on a motion for summary judgment brought by the bank. The respondent Conlin had brought no cross-motion for summary judgment dismissing the action. There had been no examination for discovery and no trial. Given that an appeal court may not make an order which the trial judge would not

térêt, elles n'avaient pas convenu d'être responsables relativement à ce taux d'intérêt majoré.

IV. Questions en litige

Devant notre Cour, l'appelante a soulevé une question de compétence préliminaire. Elle a allégué que la Cour d'appel avait commis une erreur en rejetant l'action alors que cela ne lui avait été demandé ni par l'une ou l'autre des parties à la requête en obtention d'un jugement sommaire, ni en appel, et alors que ni les avocats ni les cours n'avaient parlé de cette forme de réparation. Par conséquent, deux questions principales se posent devant nous: 67

1. La Cour d'appel de l'Ontario, à la majorité, a-t-elle excédé sa compétence en accueillant l'appel et en rejetant l'action, au lieu de renvoyer l'affaire au procès?
2. En vertu des conditions de la convention de prêt, l'intimé John Joseph Conlin a-t-il été libéré de sa promesse de payer le capital et les autres sommes garantis par l'hypothèque, lorsque l'hypothèque a été prorogée et le taux d'intérêt augmenté, sans qu'il en soit informé?

V. Analyse

A. *La Cour d'appel avait-elle compétence pour rejeter l'action intentée contre l'intimé?*

Le paragraphe 134(1) de la *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43, se lit ainsi: 68

134 (1) Sauf disposition contraire, le tribunal saisi d'un appel peut:

a) rendre l'ordonnance ou la décision que le tribunal dont il y a appel aurait dû ou pu rendre;

b) ordonner un nouveau procès;

c) rendre toute ordonnance ou toute décision qu'il estime juste.

L'ordonnance qui a fait l'objet d'un appel au départ a été accordée à la suite de la requête de la banque visant à obtenir un jugement sommaire. L'intimé Conlin n'avait déposé aucune requête incidente pour faire rejeter l'action par jugement sommaire. Il n'y avait eu ni interrogatoire préalable ni procès. L'appelante a soutenu devant nous 69

have had the jurisdiction to make (*Re Rotenberg and Borough of York (No. 2)* (1976), 13 O.R. (2d) 101 (C.A.), at p. 110), the appellant argued before us that the Court of Appeal had jurisdiction only to set aside the order for summary judgment and send the matter back for trial. The question to be answered, therefore, is whether the motions court judge had the jurisdiction to dismiss the action against the respondent.

70 The original motion for summary judgment was brought pursuant to Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rule 20.04(2) states:

> Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

Rule 20.04(4) states:

> Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, . . .

The interpretive guide to the Rules is set out in Rule 1.04(1):

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

71 Considered in light of Rule 1.04(1), in my opinion, Rules 20.04(2) and (4) gave Killeen J. the jurisdiction to dismiss the action against the respondent. The motions court judge could either have found that there was no genuine issue for trial or he could have found that the only genuine issue was an issue of law. In either case, it would have been within his jurisdiction and, by extension, within the jurisdiction of the Court of Appeal, to dispose of the matter by dismissing Manulife's claim.

72 However, the appellant further argues that Finlayson and Carthy JJ.A. erred in basing their decisions on the unproven assertion that Conlin had never consented to the 1990 renewal agreement. The appellant claims that it had no opportunity to

que la Cour d'appel n'avait compétence que pour annuler l'ordonnance de jugement sommaire et renvoyer l'affaire au procès, étant donné qu'une cour d'appel ne peut pas délivrer une ordonnance que le juge du procès n'aurait pas eu le pouvoir de rendre (*Re Rotenberg and Borough of York (No. 2)* (1976), 13 O.R. (2d) 101 (C.A.), à la p. 110). Il s'agit donc de savoir si le juge des requêtes avait compétence pour rejeter l'action intentée contre l'intimé.

La requête initiale en obtention d'un jugement sommaire était fondée sur l'art. 20 des *Règles de procédure civile*, R.R.O. 1990, règl. 194. Le paragraphe 20.04(2) se lit ainsi:

> Le tribunal, s'il est convaincu qu'une demande ou une défense ne soulève pas de question litigieuse, rend un jugement sommaire en conséquence.

Le paragraphe 20.04(4) prévoit ceci:

> Le tribunal, s'il est convaincu que la seule question litigieuse porte sur une question de droit, peut trancher cette question et rendre un jugement en conséquence. . . .

Le paragraphe 1.04(1) énonce la façon d'interpréter les Règles:

> Les présentes règles doivent recevoir une interprétation large afin d'assurer la résolution équitable sur le fond de chaque instance civile, de la façon la plus expéditive et la moins onéreuse.

J'estime qu'à la lumière du par. 1.04(1) les par. 20.04(2) et (4) conféraient au juge Killeen compétence pour rejeter l'action intentée contre l'intimé. Le juge des requêtes aurait pu conclure soit qu'il n'y avait pas de question litigieuse soit que la seule question litigieuse portait sur une question de droit. Dans un cas comme dans l'autre, lui-même et, par extension, la Cour d'appel auraient eu compétence pour trancher l'affaire en rejetant la demande de Manuvie.

Toutefois, l'appelante prétend, en outre, que les juges Finlayson et Carthy de la Cour d'appel ont commis une erreur en fondant leurs décisions sur l'affirmation non prouvée que Conlin n'avait jamais consenti à la convention de renouvellement

fully test Conlin's affidavit evidence with regard to consent and that, therefore, it was denied the right to have its case fully heard.

de 1990. L'appelante fait valoir qu'elle n'a pas eu l'occasion de vérifier pleinement l'exactitude du témoignage par affidavit de Conlin concernant le consentement et que, par conséquent, on lui a refusé le droit de faire entendre pleinement sa preuve.

I do not agree with this assertion. The appellant did, in fact, have the opportunity to test Conlin's evidence. Rule 39.02(1) of the *Rules of Civil Procedure* says that a party to a motion may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion. However, the bank chose not to exercise this right and left Conlin's evidence unchallenged. Therefore, in my opinion, the appellant was not deprived of its right to have its case fully heard and to test all of the respondent's evidence.

Je ne suis pas de cet avis. L'appelante a bel et bien eu la possibilité de vérifier l'exactitude du témoignage de Conlin. Le paragraphe 39.02(1) des *Règles de procédure civile* prévoit qu'une partie à une requête peut contre-interroger le déposant d'un affidavit signifié par une partie ayant des intérêts opposés relativement à cette requête. Toutefois, la banque a choisi de ne pas exercer ce droit et de ne pas contester le témoignage de Conlin. Par conséquent, je suis d'avis qu'on n'a pas refusé à l'appelante le droit de faire entendre pleinement sa preuve et de vérifier l'exactitude de tout le témoignage de l'intimé. 73

This case is far from the circumstances that arose in *Keltic Leasing Corp. v. Curtis* (1993), 133 N.B.R. (2d) 73 (C.A.). In that case, the trial judge erred in making a finding of fact on a question which had not been addressed at all by the parties. The Court of Appeal found that this deprived the plaintiff of its right to adduce evidence in support of its position. However, in the case before us, the question of Conlin's consent, or lack thereof, to the renewal agreement was addressed before Killeen J. and, as discussed above, the appellant had full opportunity to counter this with evidence to the contrary.

Les circonstances de la présente affaire sont loin de ressembler à celles dont il était question dans l'arrêt *Keltic Leasing Corp. c. Curtis* (1993), 133 R. N.-B. (2e) 73 (C.A.). Dans cette affaire, le juge du procès avait erronément tiré une conclusion de fait sur une question qui n'avait pas été abordée par les parties. La Cour d'appel a conclu que cela avait privé la demanderesse de son droit de présenter des éléments de preuve à l'appui de sa thèse. Cependant, dans l'affaire qui nous est soumise, la question du consentement ou de l'absence de consentement de Conlin à la convention de renouvellement a été abordée devant le juge Killeen et, comme nous l'avons vu précédemment, l'appelante a eu pleinement l'occasion de répliquer à cela au moyen d'une preuve contraire. 74

For these reasons, it is my view that there is no reason to interfere with the Court of Appeal's procedural handling of this case.

Pour ces motifs, je suis d'avis qu'il n'y a aucune raison d'intervenir dans la façon dont la Cour d'appel a procédé en l'espèce. 75

B. *Under the terms of the loan agreement, was the respondent released from his promise to pay the principal sum and other moneys secured by the mortgage when the term of the mortgage was extended and the rate of interest increased without the respondent's consent?*

B. *En vertu des conditions de la convention de prêt, l'intimé a-t-il été libéré de sa promesse de payer le capital et les autres sommes garantis par l'hypothèque, lorsque l'hypothèque a été prorogée et le taux d'intérêt augmenté, sans son consentement?*

76 It is well accepted that any material variation of the terms of a contract between debtor and creditor, which is prejudicial to the guarantor and which is made without the guarantor's consent, will discharge the guarantor: *Holme v. Brunskill*, *supra*, at pp. 505-6; *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551, at p. 562. An increase in the rate of interest and an extension of the time for payment are both material changes to the loan agreement sufficient to discharge a surety: K. P. McGuinness, *The Law of Guarantee* (2nd ed. 1996), at ¶¶ 10.23 and 10.51.

77 However, this right to be discharged as a result of a material variation of the principal contract can be waived by the surety. As McIntyre J. said in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 107, "it is open to the parties to make their own arrangements, and a surety is competent to contract himself out of the protection of the equitable rule". The question to be resolved, therefore, is whether clause 34 amounts to a waiver of the respondent's equitable rights. Before dealing with this question, I believe it would be helpful to discuss briefly some of the interpretive principles relating to guarantees.

(a) Interpretive principles relating to guarantees

78 In my opinion, there is no special rule of construction for guarantees. Guarantee contracts are basically contracts, like any others, and should be construed according to the ordinary rules of contractual interpretation. As McGuinness states, *supra*, at p. 238, "The rules respecting the interpretation of guarantees are essentially the same as the rules which govern the interpretation of deeds and contracts generally."

79 The cardinal interpretive rule of contracts is that the court should give effect to the intentions of parties as expressed in their written document. As Estey J. said in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at p. 899, quoting Meredith J.A. in *Pense v. Northern Life Assurance Co.*

Il est bien reconnu que toute modification importante des conditions d'un contrat entre un débiteur et un créancier qui est préjudiciable à la caution et qui est faite sans son consentement, libère cette dernière: *Holme c. Brunskill*, précité, aux pp. 505 et 506; *Banque de Montréal c. Wilder*, [1986] 2 R.C.S. 551, à la p. 562. Une augmentation du taux d'intérêt et une prorogation du délai de paiement sont toutes deux des modifications importantes de la convention de prêt qui sont suffisantes pour libérer une caution: K. P. McGuinness, *The Law of Guarantee* (2e éd. 1996), aux ¶¶ 10.23 et 10.51.

Cependant, la caution peut renoncer à ce droit d'être libérée en raison d'une modification importante du contrat principal. Comme le juge McIntyre l'a dit dans *Bauer c. Banque de Montréal*, [1980] 2 R.C.S. 102, à la p. 107: «les parties peuvent conclure leur propre entente, et une caution peut renoncer à la protection de la règle d'*equity*». Il s'agit donc de savoir si la clause 34 équivaut à une renonciation par l'intimé aux droits qui lui sont reconnus en *equity*. Avant d'examiner cette question, je crois qu'il serait utile d'analyser brièvement certains principes d'interprétation en matière de cautionnement.

a) Principes d'interprétation en matière de cautionnement

À mon avis, il n'existe aucune règle particulière d'interprétation des cautionnements. Les contrats de cautionnement sont au fond des contrats comme les autres, qui devraient être interprétés selon les règles ordinaires d'interprétation des contrats. Comme McGuinness l'affirme, *op. cit.*, à la p. 238: [TRADUCTION] «Les règles applicables à l'interprétation des cautionnements sont essentiellement les mêmes que celles qui régissent l'interprétation des actes et des contrats en général».

La principale règle d'interprétation des contrats veut que les tribunaux mettent à exécution les intentions que les parties ont exprimées dans leur document écrit. Comme le juge Estey l'a dit dans l'arrêt *Exportations Consolidated Bathurst Ltée c. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 R.C.S. 888, à la p. 899, en citant les pro-

(1907), 15 O.L.R. 131, at p. 137: "[In all contracts], effect must be given to the intention of the parties, to be gathered from the words they have used." The court will deviate from the plain meaning of the words only if a literal interpretation of the contractual language would lead either to an absurd result or to a result which is "plainly repugnant to the intention of the parties": McGuinness, *supra*, at p. 239; and see the reasons of Estey J. in *Consolidated-Bathurst*, *supra*, at p. 901.

When interpreting guarantees, like other contracts, the court may apply the *contra proferentem* rule where the wording of the guarantee supports more than one meaning. According to this rule, the ambiguity will be resolved in favour of the party who did not draft the contract. This is an interpretive rule of last resort, to be used only when all other means of ascertaining the intentions of the parties, as expressed by their written contract, have failed. See the words of Cartwright J. in *Stevenson v. Reliance Petroleum Ltd.*, [1956] S.C.R. 936, at p. 953. As Lindley L.J. said in *Cornish v. Accident Insurance Co.* (1889), 23 Q.B.D. 453, at p. 456:

> . . . this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty.

There is some suggestion in the case law that guarantee agreements entered into by an "uncompensated" or "accommodating" surety will be interpreted more strictly than those entered into by a compensated surety. In this respect, most notable is the decision of the Court in *Citadel General Assurance Co. v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513.

In that case, the respondent, Johns-Manville, had entered into a contract with a supplier. That supplier had entered into a payment bond which named the appellant, Citadel, as guarantor of the supply contract. A condition of the bond was that

pos tenus par le juge Meredith dans *Pense c. Northern Life Assurance Co.* (1907), 15 O.L.R. 131, à la p. 137: «[Dans tous les contrats], il faut donner effet à l'intention des parties qui se dégage des mots qu'elles ont employés.» La cour ne s'écartera du sens ordinaire des mots que si une interprétation littérale des termes du contrat menait à un résultat absurde ou à un résultat [TRADUCTION] «nettement inconciliable avec l'intention des parties»: McGuinness, *op. cit.*, à la p. 239; voir aussi les motifs du juge Estey dans l'arrêt *Consolidated Bathurst*, précité, à la p. 901.

Pour interpréter un cautionnement, la cour peut, comme pour les autres contrats, appliquer la règle *contra proferentem* lorsqu'il est possible d'attribuer plus d'un sens au texte du cautionnement. Selon cette règle, l'ambiguïté doit être dissipée en faveur de la partie qui n'a pas rédigé le contrat. Il s'agit d'une règle d'interprétation de dernier recours, qui ne doit être utilisée que lorsque tous les autres moyens de vérifier les intentions des parties, exprimées par écrit dans leur contrat, ont échoué. Voir les propos du juge Cartwright dans l'arrêt *Stevenson c. Reliance Petroleum Ltd.*, [1956] R.C.S. 936, à la p. 953. Comme le lord juge Lindley l'a affirmé dans *Cornish c. Accident Insurance Co.* (1889), 23 Q.B.D. 453, à la p. 456:

> [TRADUCTION] . . . ce principe ne devrait être appliqué que pour dissiper un doute, et non pour créer un doute ou amplifier une ambiguïté, quand les circonstances de l'affaire ne posent aucune difficulté réelle.

La jurisprudence laisse entendre jusqu'à un certain point qu'une convention de cautionnement souscrite par une caution «non rétribuée» ou «de complaisance» sera interprétée d'une façon plus restrictive que celle souscrite par une caution rétribuée. À cet égard, l'arrêt de notre Cour *Citadel General Assurance Co. c. Johns-Manville Canada Inc.*, [1983] 1 R.C.S. 513, est des plus remarquables.

Dans cette affaire, l'intimée, Johns-Manville, avait conclu un contrat avec un fournisseur. Ce fournisseur avait souscrit un cautionnement qui désignait l'appelante, Citadel, comme caution du contrat d'approvisionnement. Une condition du

no suit could be commenced under the bond without proper notice being given to the appellant surety and to the supplier. The supplier defaulted and the respondent commenced an action against the guarantor, Citadel. The respondent gave proper notice to the guarantor. However, while notice was given to the supplier, it did not strictly comply with the requirements of the bonding agreement. The guarantor denied liability under the bond on the basis that the notice provisions of the bond had not been complied with.

83 The Court rejected this argument and held that the guarantor was liable under the bonding agreement despite the respondent's failure to comply strictly with the terms of the contract. The basis for the decision was that guarantee agreements entered into for valuable consideration should be interpreted according to the ordinary rules of contractual construction. In *obiter*, McIntyre J., at pp. 521 and 523, went on to suggest that a different, stricter rule would apply to guarantors who had not received compensation:

> In respect of them [i.e., uncompensated sureties], the law has been astute to protect them by strictly construing their obligations and limiting them to the precise terms of the contract of surety. Any material variation in the terms of the guaranteed indebtedness and any extension of time or postponement of the debtor's obligation, or any discharge or relinquishment of any security for the debt without the consent of the surety will discharge him. In other words, courts have adopted the *strictissimi juris* construction of the surety contract.
>
> . . . surety contracts should be more liberally construed in favour of claimants in the case of compensated sureties than in the case of accommodation sureties.

84 In my opinion, the above statement should be understood in the context in which it was made. In *Citadel General Assurance*, the issue was not one of contractual interpretation. Rather, it was a question of what consequences were to flow from a clear breach of the contract. For these reasons, it is my view that the comments in *Citadel General Assurance* are not a sufficient basis for holding

cautionnement était qu'aucune poursuite ne pouvait être engagée en vertu du cautionnement sans qu'un avis approprié n'en soit donné à la caution appelante et au fournisseur. Le fournisseur a manqué à ses obligations et l'intimée a intenté une action contre la caution Citadel. L'intimée a donné un avis approprié à la caution. Toutefois, bien qu'un avis ait été donné au fournisseur, il ne satisfaisait pas strictement aux exigences de la convention de cautionnement. La caution a affirmé qu'elle n'était pas responsable en vertu du cautionnement, pour le motif que les dispositions du cautionnement relatives à l'avis n'avaient pas été respectées.

La Cour a rejeté cet argument et a statué que la caution était responsable en vertu de la convention de cautionnement malgré le défaut de l'intimée de respecter strictement les conditions du contrat. La raison de cette décision était que les conventions de cautionnement souscrites à titre onéreux devraient être interprétées selon les règles ordinaires d'interprétation des contrats. Dans une opinion incidente, aux pp. 521 et 523, le juge McIntyre a laissé entendre qu'une règle différente plus stricte s'appliquerait aux cautions non rétribuées:

> En ce qui les concerne [les cautions non rétribuées], la loi s'est avisée de les protéger en interprétant leurs obligations de façon stricte et en les limitant aux conditions précises du contrat de cautionnement. Toute modification substantielle des conditions de la dette garantie, toute prorogation de délai ou tout délai accordé au débiteur, toute remise ou abandon de sûreté à l'égard de la dette sans le consentement de la caution libérait cette dernière. En d'autres termes, les cours ont adopté une interprétation *strictissimi juris* du contrat de cautionnement.
>
> . . . il faut interpréter les contrats de cautionnement plus libéralement en faveur des réclamants s'il s'agit de cautions rétribuées plutôt que de cautions de complaisance.

À mon avis, l'énoncé qui précède doit être interprété dans son contexte. Dans l'arrêt *Citadel General Assurance*, le litige ne portait pas sur une interprétation de contrat. Il s'agissait plutôt de déterminer quelles conséquences découleraient d'une violation claire du contrat. Pour ces motifs, je suis d'avis que les commentaires faits dans *Citadel General Assurance* ne sont pas suffisants pour

generally that guarantee contracts should be subject to special, stricter rules of interpretation if the guarantor has not received compensation.

(b) Application of the rules of interpretation to the contract between Conlin and Manulife

In applying the above principles to this case, a number of sub-questions arise from the arguments of the parties which I now will address.

(i) *Does clause 34 amount to a waiver of the respondent's equitable rights?*

By clause 34, the guarantors agree to remain bound by the guarantee contract notwithstanding the giving of time for payment of the mortgage or the varying of the rate of interest.

The respondent argued that clause 34 does not include a waiver of the guarantors' right to be discharged in the event of a renewal of the mortgage. According to this argument, since the renewal agreement constituted a material change, it discharged the guarantors.

It is true, as the respondent contends, that clause 34 does not refer to "renewal" agreements by name. However, the clause does contain a clear waiver of the guarantors' right to be discharged in the event of an extension of time or an increase in the rate of interest:

. . . this covenant shall bind us, and each of us notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon . . .

The respondent maintained that a renewal was not the same thing as the giving of time for payment. He pointed out that clause 7 uses the term "renewal" while clause 34 does not. According to this line of argument, if the parties had intended the guarantee agreement to include a waiver of the right of discharge in the event of a renewal of the

conclure, de manière générale, que les contrats de cautionnement devraient être sujets à des règles d'interprétation spéciales plus strictes dans le cas d'une caution non rétribuée.

b) Application des règles d'interprétation au contrat conclu par Conlin et Manuvie

Si on applique les principes susmentionnés à la présente affaire, les arguments des parties soulèvent un certain nombre de questions que je vais maintenant aborder. 85

(i) *La clause 34 équivaut-elle à une renonciation par l'intimé à ses droits en equity?*

À la clause 34, les cautions consentent à rester liées par le contrat de cautionnement nonobstant l'attribution d'un délai de paiement de l'hypothèque ou la modification du taux d'intérêt. 86

L'intimé fait valoir que la clause 34 ne comprend pas une renonciation au droit des cautions d'être libérées en cas de renouvellement de l'hypothèque. Selon cet argument, puisque la convention de renouvellement constituait une modification importante, elle a libéré les cautions. 87

Il est vrai, comme le prétend l'intimé, que la clause 34 ne mentionne pas expressément les conventions de «renouvellement». La clause contient, cependant, une renonciation claire au droit des cautions d'être libérées dans le cas d'une prorogation de délai ou d'une augmentation du taux d'intérêt: 88

[TRADUCTION] . . . cet engagement nous liera toutes, ensemble et individuellement, nonobstant l'attribution d'un délai de paiement de la présente hypothèque ou la modification de ses conditions de paiement ou de son taux d'intérêt . . .

L'intimé a soutenu qu'un renouvellement n'était pas la même chose que l'attribution d'un délai de paiement. Il a fait remarquer que la clause 7 utilise le mot «renouvellement» alors que la clause 34 ne le fait pas. Selon ce raisonnement, si les parties avaient voulu inclure dans la convention de cautionnement une renonciation au droit à la libération 89

mortgage, they would have said so explicitly in clause 34.

90 However, I do not find this argument persuasive. The plain ordinary meaning of the words, "the giving of time for payment . . . or the varying of the terms of payment" encompasses the renewal agreement. Through this agreement, the appellant bank extended the term of the loan by three years and increased the rate of interest charged on the debt. I can see no support for the respondent's contention that the "giving of time for payment", as detailed in clause 34, does not include the giving of time for payment as effected by the renewal agreement.

91 In his book *The Law of Guarantee*, *supra*, at p. 556, McGuinness discusses the effect of agreements "to give time" to the principal debtor and says that the "giving of time" includes those agreements "which provide specifically for an extension of time for performance. . . . [for] further time in which to pay . . . the guaranteed debt". This is precisely what the renewal agreement accomplished and, thus, this is what was contemplated by the language of the guarantee agreement.

92 In other words, what we must consider is the substantive effect of the renewal agreement, rather than the form of the instrument by which it was executed. The parties did use a renewal agreement, but, at bottom, that renewal agreement extended the time for payment and increased the interest rate, events that are expressly covered in clause 34.

93 With respect, I do not agree with Carthy J.A. when he says that the words "notwithstanding the giving of time for payment" should be interpreted to refer only to forbearance by the bank to pursue remedies during the original term of the mortgage. This is a case where we should heed the warning of Lindley L.J. in *Cornish v. Accident Insurance Co.*, *supra*, and not use the *contra proferentem* doctrine in any guise to create a doubt, or to mag-

en cas de renouvellement de l'hypothèque, elles l'auraient fait explicitement à la clause 34.

Toutefois, je ne considère pas cet argument persuasif. Le sens clair et ordinaire des mots [TRADUCTION] «l'attribution d'un délai de paiement [. . .] ou la modification de[s] conditions de paiement» comprend la convention de renouvellement. Grâce à cette convention, la banque appelante a prorogé le prêt pour une durée de trois ans et a augmenté le taux d'intérêt applicable à la dette. Je ne vois rien qui justifie la prétention de l'intimé que «l'attribution d'un délai de paiement», mentionnée dans la clause 34, ne comprend pas l'attribution d'un délai de paiement en vertu de la convention de renouvellement.

Dans son ouvrage intitulé *The Law of Guarantee*, *op. cit.*, à la p. 556, McGuinness analyse l'effet des conventions [TRADUCTION] «accordant un délai» au débiteur principal et affirme que l' [TRADUCTION] «attribution d'un délai» comprend toutes les conventions «qui prévoient expressément une prorogation du délai d'exécution [. . .] [afin] de disposer d'un plus long délai pour payer [. . .] la dette garantie». C'est précisément ce qui a été réalisé par la convention de renouvellement et c'est donc ce qui était prévu par le texte de la convention de cautionnement.

En d'autres termes, il faut prendre en considération l'effet réel de la convention de renouvellement, plutôt que la forme de l'instrument par lequel elle a été mise à exécution. Les parties ont bel et bien conclu une convention de renouvellement, mais, au fond, cette convention de renouvellement prorogeait le délai de paiement et augmentait le taux d'intérêt, ce qui était expressément prévu à la clause 34.

En toute déférence, je ne suis pas d'accord avec le juge Carthy lorsqu'il affirme que les mots [TRADUCTION] «nonobstant l'attribution d'un délai de paiement» devraient être interprétés de manière à désigner seulement une abstention de la part de la banque d'intenter un recours pendant la durée initiale de l'hypothèque. Il s'agit ici d'une affaire où nous devrions tenir compte de la mise en garde du lord juge Lindley dans *Cornish c. Accident Insur-*

nify an ambiguity. Like Killeen J., I am of the view that the plain wording of the agreement in question raises no real difficulty.

(ii) *Under clause 34, did the appellant have to notify the guarantors of the renewal agreement?*

One of the last phrases of clause 34 reads as follows: "we and each of us agree that the Mortgagee may waive breaches and accept other covenants, sureties or securities without notice to us" (emphasis added). By contrast, the preceding phrase which waives the guarantors' rights to be discharged in the event of certain material changes to the principal contract does not contain this phrase, "without notice to us". The respondent contends that this omission means that, if the bank failed to notify the guarantors of the relevant material changes, the guarantors would be discharged from their obligations. Because the respondent received no notice of the renewal agreement, he was released from his liability.

Again, I am unable to agree with this line of argument. As already stated, the language of clause 34 is clear: the guarantor unconditionally promises to remain bound notwithstanding the extending of time or the changing of the rate of interest charged. It is rather odd to infer a condition of notice when the undertaking is so clear and unambiguous. Of course, the parties could have included a requirement of notice, but, as the language of the waiver in clause 34 is so clear, they would have had to do so explicitly. It may be that the insertion of the words "without notice to us", in connection with the waiver of breaches and the accepting of other covenants, sureties or securities, was simply made out of an abundance of caution, but, regardless, this cannot affect the clear waiver relating to extending time and changing the interest rate.

ance Co., précité, et ne pas appliquer la règle *contra proferentem* de manière à créer un doute ou à amplifier une ambiguïté. À l'instar du juge Killeen, je suis d'avis que le texte clair de la convention en cause ne pose aucune difficulté réelle.

(ii) *En vertu de la clause 34, l'appelante était-elle tenue d'aviser les cautions de la convention de renouvellement?*

L'une des dernières phrases de la clause 34 se lit ainsi: [TRADUCTION] «nous conven[ons] toutes et chacune que le créancier hypothécaire [peut] renoncer au droit de résiliation pour violation et accepter d'autres engagements, cautionnements ou sûretés sans nous donner avis» (je souligne). Par contre, la phrase précédente, qui écarte les droits des cautions d'être libérées dans le cas où certaines modifications importantes seraient apportées au contrat principal ne renferme pas l'expression «sans nous donner avis». L'intimé soutient que cette omission signifie que si la banque n'avisait pas les cautions des modifications importantes pertinentes, les cautions seraient libérées de leurs obligations. Puisque l'intimé n'a reçu aucun avis de la convention de renouvellement, il est libéré de sa responsabilité.

Là encore, je suis incapable de souscrire à ce raisonnement. Comme je l'ai déjà affirmé, le texte de la clause 34 est clair: la caution promet, de façon inconditionnelle, de demeurer liée nonobstant la prorogation du délai ou la modification du taux d'intérêt imposé. Il est plutôt étrange de déduire l'existence d'une exigence d'avis en présence d'un engagement aussi clair et net. Évidemment, les parties auraient pu inclure une exigence d'avis, mais, étant donné la clarté du texte de la renonciation figurant à la clause 34, il leur aurait fallu le faire explicitement. Il se peut que l'inclusion des mots «sans nous donner avis», relativement à la renonciation au droit de résiliation pour violation et à l'acceptation d'autres engagements, cautionnements ou sûretés, ait été faite simplement par excès de prudence, mais, néanmoins, cela ne saurait pas affecter la renonciation claire relative à la prorogation de délai et à la modification du taux d'intérêt.

(iii) *What is the effect of the respondent promising "as a principal debtor and not as a surety"?*

96 Clause 34 provides that the respondent and Conlin Engineering enter the agreement "as principal debtors and not as sureties". In his concurring judgment, Carthy J.A. reasoned that, as "principal debtors", the guarantors would be "expected" to be signatories to the renewal agreement. With respect, I do not agree.

97 I agree with Robins J.A.'s conclusion that the evident intention of the parties, in using this kind of language, was to preserve the liability of the surety even in circumstances where the principal obligation was no longer enforceable, although I express no opinion on whether the language is sufficient to accomplish such an objective. In any event, it is unnecessary to consider whether this clause was sufficient to turn clause 34 into an indemnity agreement, because I am of the opinion that the respondent is liable as a guarantor.

(iv) *What is the significance of the fact that the renewal form provides a space for the guarantor's signature?*

98 The respondent points to the fact that the renewal agreement had a space for the signature of the guarantor as proof that the reasonable expectations of the parties were that, in the absence of the guarantors' consent to a renewal agreement, any such agreement would discharge the guarantors. With respect, I do not agree.

99 Our primary task is to determine the meaning of the guarantee contained in clause 34. This agreement was entered into in 1987. The wording or form of another subsequent contract, entered into three years later, cannot change the meaning of the original agreement. In my opinion, the space for the guarantors' signature on the renewal agreement is not helpful in trying to interpret the guarantee contract.

(iii) *Quel est l'incidence du fait que l'intimé a promis «à titre de débiteur principal et non de caution»?*

La clause 34 prévoit que l'intimé et Conlin Engineering concluent la convention [TRADUCTION] «à titre de débiteurs principaux et non de cautions». Dans ses motifs concordants, le juge Carthy a considéré qu'on «s'attendrait» à ce que, à titre de «débiteurs principaux», les cautions soient signataires de la convention de renouvellement. En toute déférence, je ne suis pas de cet avis.

Je suis d'accord avec la conclusion du juge Robins que les parties avaient manifestement l'intention, en utilisant cette terminologie, de maintenir la responsabilité de la caution même dans le cas où l'obligation principale ne pourrait plus être exécutée, quoique je n'exprime aucune opinion quant à savoir si cette terminologie est suffisante pour permettre d'atteindre un tel objectif. De toute façon, il n'est pas nécessaire de déterminer si cette clause était suffisante pour faire de la clause 34 une convention d'indemnisation, parce que je suis d'avis que l'intimé est responsable à titre de caution.

(iv) *Quelle importance faut-il attacher au fait que la formule de renouvellement comportait un espace pour la signature de la caution?*

L'intimé souligne que le fait que la convention de renouvellement comportait un espace pour la signature de la caution prouve que les parties s'attendaient raisonnablement à ce qu'en l'absence du consentement des cautions à une convention de renouvellement, cette convention libérerait ces dernières. En toute déférence, je ne suis pas d'accord.

Il nous incombe, d'abord et avant tout, de déterminer le sens du cautionnement contenu dans la clause 34. Cette convention a été signée en 1987. Le texte ou la forme d'un autre contrat conclu trois ans plus tard ne saurait changer le sens de la convention initiale. À mon avis, l'espace prévu pour la signature de la caution dans la convention de renouvellement n'est d'aucune utilité pour tenter d'interpréter le contrat de cautionnement.

(v) *What exactly is the extent of the respondent's obligation?*

The respondent promised to guarantee the payment of the money secured by the 1987 mortgage. In my view, the terms of that mortgage determine the extent of the respondent's liability. Clause 34 does include a waiver of the guarantors' rights to be discharged in the case of material variation of the terms of the loan agreement. However, the fact that the renewal agreement does not discharge the respondent does not mean that the respondent is liable for the money secured by that renewal agreement — a contract to which he never consented. In clause 34, the guarantors promise to pay "the principal sum and all other moneys hereby secured" (emphasis added), i.e., secured by the original mortgage agreement. In other words, the respondent is not liable for interest at the increased rate of 13 percent. Rather, his responsibility, as specified in the 1987 agreement, and as found by Robins J.A. in the Court of Appeal, is to repay the balance owing on the principal sum with interest charged at the rate of 11.5 percent.

VI. Disposition

For the foregoing reasons, I would allow the appeal, with costs here and below, set aside the judgment of the Court of Appeal, and substitute therefor an order to the effect that the respondent is liable under his guarantee to pay the balance owing on the principal amount with interest at 11.5 percent per annum.

Appeal dismissed with costs, L'HEUREUX-DUBÉ, GONTHIER *and* IACOBUCCI JJ. *dissenting.*

Solicitors for the appellant: Lee, Bowden, Concord, Ontario.

Solicitors for the respondent: Siskind, Cromarty, Ivey & Dowler, London, Ontario.

(v) *Quelle est exactement l'étendue de l'obligation de l'intimé?*

L'intimé a promis de garantir le paiement des sommes garanties par l'hypothèque de 1987. J'estime que les conditions de cette hypothèque déterminent l'étendue de la responsabilité de l'intimé. La clause 34 comprend bel et bien une renonciation aux droits des cautions d'être libérées dans le cas où une modification importante serait apportée aux conditions de la convention de prêt. Toutefois, le fait que la convention de renouvellement ne libère pas l'intimé ne signifie pas qu'il est responsable des sommes garanties par cette convention de renouvellement — un contrat auquel il n'a jamais consenti. À la clause 34, les cautions promettent de payer [TRADUCTION] «le capital et toutes les autres sommes garantis par les présentes» (je souligne), c.-à-d. garantis par la convention hypothécaire initiale. En d'autres termes, l'intimé n'est pas responsable des intérêts calculés au taux majoré de 13 pour 100 par année. La responsabilité qui lui incombe en vertu de la convention de 1987, et selon ce que le juge Robins de la Cour d'appel a conclu, est plutôt de rembourser le solde exigible du capital, avec intérêts calculés au taux de 11,5 pour 100 par année.

VI. Dispositif

Pour les motifs qui précèdent, je suis d'avis d'accueillir le pourvoi, avec dépens devant toutes les cours, d'infirmer l'arrêt de la Cour d'appel et d'y substituer une ordonnance selon laquelle l'intimé a, en vertu de son cautionnement, la responsabilité de payer le solde exigible du capital, avec intérêts calculés au taux de 11,5 pour 100 par année.

Pourvoi rejeté avec dépens, les juges L'HEUREUX-DUBÉ, GONTHIER *et* IACOBUCCI *sont dissidents.*

Procureurs de l'appelante: Lee, Bowden, Concord (Ontario).

Procureurs de l'intimé: Siskind, Cromarty, Ivey & Dowler, London (Ontario).

TAB "4"

Court File No. CV-18-603054-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	THURSDAY, THE 25TH
	)	
JUSTICE DUNPHY	)	DAY OF OCTOBER, 2018

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC.

Applicants

ORDER

(Re Cross-Border Protocol)

THIS MOTION, made by Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals Canada Inc. (together the "**Applicants**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for, among other things, an order approving a cross-border insolvency protocol (the "**Cross-Border Protocol**") was heard this day at 361 University Avenue, Toronto, Ontario.

ON READING the affidavit of Adrian Adams sworn October 19, 2018 and the Exhibits attached thereto, and the report dated October 23, 2018 by Richter Advisory Group Inc., in its capacity as Court-appointed Monitor (the "**Monitor**"), and on hearing the submissions of counsel for the Applicants and the Monitor, no one appearing for any other person on the service list, although duly served as appears from the affidavit of service of Nicholas Avis sworn October 23, 2018 and filed:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

CROSS-BORDER PROTOCOL

2. **THIS COURT ORDERS** that the Cross-Border Protocol in the form attached as Schedule "A" hereto is hereby approved and shall become effective upon its approval by the United States Bankruptcy Court for the Southern District of New York, and the parties to these proceedings and any other Person shall be governed by and shall comply with the Cross-Border Protocol.

GENERAL

3. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

OCT 25 2018

PER / PAR:

SCHEDULE "A"

CROSS-BORDER INSOLVENCY PROTOCOL

1. This cross-border insolvency protocol (the "Protocol") shall govern the conduct of all parties in interest in the Insolvency Proceedings (as such term is defined herein).

2. The Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters (the "Guidelines"), annexed hereto as "Schedule A" hereto, shall be incorporated by reference and form part of this Protocol. To the extent there is any discrepancy between the Protocol and the Guidelines, this Protocol shall prevail.

A. Background

3. On August 10, 2018 (the "Filing Date"), Aralez Pharmaceuticals US Inc. and certain of its affiliates (collectively, the "U.S. Debtors")[1] commenced cases (collectively, the "U.S. Proceedings") under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York and Aralez Pharmaceuticals Inc., the U.S. Debtors' ultimate parent company, and Aralez Pharmaceuticals Canada Inc. (together with Aralez Pharmaceuticals Inc., the "Canadian Debtors," and with the U.S. Debtors, the "Debtors"), the U.S. Debtors' affiliate, also commenced a reorganization proceeding in Canada (the "Canadian Proceedings" and together with the U.S. Proceedings, the "Insolvency Proceedings") by filing an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") with the Ontario Superior Court of Justice (Commercial List) (the "Canadian Court" and together with the U.S. Court, the "Courts" and each individually, a "Court").

4. On the Filing Date, the Canadian Debtors sought an initial order from the Canadian Court (as may be amended from time to time, the "CCAA Order") which, *inter alia*, (a) granted the Canadian Debtors relief under the CCAA; (b) appointed Richter Advisory Group Inc. as monitor of the Canadian Debtors, with the rights, powers, duties and limitations upon liabilities set forth in the CCAA Order; and (c) granted a stay of proceedings in respect of the Canadian Debtors.

5. The U.S. Debtors continue to operate and maintain their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. The Office of the United States Trustee (the "U.S. Trustee") appointed an official committee of unsecured creditors (the "U.S. Creditors' Committee") in the U.S. Proceedings on August 27, 2018.

B. Purpose and Goals

6. While the U.S. Proceedings and the Canadian Proceedings are full and separate proceedings pending in the U.S. and Canada, the implementation of basic administrative procedures is both necessary and desirable to coordinate certain activities in the Insolvency

[1] The U.S. Debtors in the chapter 11 cases and the last four digits of each Debtor's federal taxpayer identification number are as follows: Aralez Pharmaceuticals Holdings Limited (5824); Aralez Pharmaceuticals Management Inc. (7166); POZEN Inc. (7552); Aralez Pharmaceuticals Trading DAC (1627); Aralez Pharmaceuticals US Inc. (6948); Aralez Pharmaceuticals R&D Inc. (9731); Halton Laboratories LLC (9342). For the purposes of these chapter 11 cases, the U.S. Debtors' mailing address is: Aralez Pharmaceuticals, c/o Prime Clerk, P.O. Box 329003, Brooklyn, NY 11232.

Proceedings, protect the rights of parties thereto and ensure the maintenance of the Court's independent jurisdiction and comity. Accordingly, this Protocol has been developed to promote the following mutually desirable goals and objectives in the Insolvency Proceedings:

(a) harmonize and coordinate activities in the Insolvency Proceedings before the Courts;

(b) promote the orderly and efficient administration of the Insolvency Proceedings to, among other things, maximize the efficiency of the Insolvency Proceedings, reduce the costs associated therewith and avoid duplication of effort;

(c) honor the independence and integrity of the Courts and other courts and tribunals of the U.S. and Canada, respectively;

(d) promote international cooperation and respect for comity among the Courts, the Debtors, the U.S. Creditors' Committee, the U.S. Representatives (defined below), the Canadian Representatives (defined below) (together with the U.S. Representatives, the "Estate Representatives"), the U.S. Trustee and other creditors and interested parties in the Insolvency Proceedings;

(e) facilitate the fair, open and efficient administration of the Insolvency Proceedings for the benefit of all of the creditors and interested parties of the Debtors, wherever located; and

(f) implement a framework of general principles to address basic administrative issues arising out of the cross-border and international nature of the Insolvency Proceedings.

C. Comity and Independence of the Courts

7. The approval and implementation of this Protocol shall not divest or diminish the U.S. Court's and the Canadian Court's independent jurisdiction over the subject matter of the U.S. Proceedings and the Canadian Proceedings, respectively. By approving and implementing this Protocol, neither the U.S. Court, the Canadian Court, the Debtors nor any creditors or interested parties shall be deemed to have approved or engaged in any infringement on the sovereignty of the U.S. or Canada.

8. The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct of the U.S. Proceedings and the hearing and determination of matters arising in the U.S. Proceedings. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct of the Canadian Proceedings and the hearing and determination of matters arising in the Canadian Proceedings.

9. In accordance with the principles of comity and independence established in the two preceding paragraphs, nothing contained herein shall be construed to:

(a) increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the U.S. or Canada, including the ability of any such court or tribunal to provide appropriate relief under applicable law on an *ex parte* or "limited notice" basis;

(b) require the U.S. Court to take any action that is inconsistent with its obligations under the laws of the U.S.;

(c) require the Canadian Court to take any action that is inconsistent with its obligations under the laws of Canada;

(d) require the Debtors, the Monitor, the U.S. Creditors' Committee, the Estate Representatives or the U.S. Trustee to take any action or refrain from taking any action that would result in a breach of any duty imposed on them by any applicable law;

(e) authorize any action that requires the specific approval of one or both of the Courts under the Bankruptcy Code or the CCAA after appropriate notice and a hearing (except to the extent that such action is specifically described in this Protocol); or

(f) preclude the Debtors, the Monitor, the U.S. Creditors' Committee, the Estate Representatives, the U.S. Trustee, or any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the U.S., Canada or any other relevant jurisdiction including, without limitation, the rights of interested parties or affected persons to appeal from the decisions taken by one or both of the Courts.

10. Subject to the terms hereof, the Debtors, the U.S. Creditors' Committee, the Estate Representatives and their respective employees, members, agents and professionals shall respect and comply with the independent, non-delegable duties imposed upon them by the Bankruptcy Code, the CCAA, the CCAA Order and other applicable laws and orders of the Courts, as applicable.

D. Cooperation

11. To assist in the efficient administration of the Insolvency Proceedings, the Debtors and the Estate Representatives shall where appropriate:

(a) reasonably cooperate with each other in connection with actions taken in both the U.S. Court and the Canadian Court; and

(b) take any other reasonable steps to coordinate the administration of the U.S. Proceedings and the Canadian Proceedings for the benefit of the Debtors' respective estates and stakeholders, including, without limitation, developing in consultation with the U.S. Creditors' Committee any cross-border claims protocol to be approved by the Canadian and U.S. Courts.

12. To harmonize and coordinate the administration of the Insolvency Proceedings, the U.S. Court and the Canadian Court each may coordinate activities with and defer to the judgment of the other Court, where appropriate and feasible. In furtherance of the foregoing:

(a) The U.S. Court and the Canadian Court may communicate with one another, with or without counsel present, with respect to any procedural or substantive matter relating to the Insolvency Proceedings;

(b) Where the issue of the proper jurisdiction or Court to determine an issue is raised by an interested party in either of the Insolvency Proceedings with respect to a motion or an application filed in either Court, the Court before which such motion or application was initially filed may contact the other Court to determine an appropriate process by which the issue of jurisdiction will be determined. Such process shall be subject to submissions by the Debtors, the Estate Representatives, the U.S. Creditors' Committee, the Monitor, the U.S. Trustee and any interested party before any determination on the issue of jurisdiction is made by either Court; and

(c) The Courts may, but are not obligated to, coordinate activities in the Insolvency Proceedings such that the subject matter of any particular action, suit, request, application, contested matter or other proceeding is determined in a single Court.

13. The U.S. Court and the Canadian Court may conduct joint hearings with respect to any matter relating to the conduct, administration, determination or disposition of any aspect of the U.S. Proceedings and the Canadian Proceedings, if both Courts consider such joint hearings to be necessary or advisable and, in particular, to facilitate or coordinate with the proper and efficient conduct of the U.S. Proceedings and the Canadian Proceedings. With respect to any such hearing, unless otherwise ordered, the following procedures will be followed:

(a) a telephone or video link shall be established so that both the U.S. Court and the Canadian Court shall be able to simultaneously hear the proceedings in the other Court;

(b) notices, submissions or applications by any party that are or become the subject of a joint hearing of the Courts (collectively, "Pleadings") shall be made or filed initially only to the Court in which such party is appearing and seeking relief. Promptly after the scheduling of any joint hearing, the party submitting such Pleadings to one Court shall file courtesy copies with the other Court. In any event, Pleadings seeking relief from both Courts shall be filed with both Courts.

(c) any party intending to rely on any written evidentiary materials in support of a submission to the U.S. Court or the Canadian Court in connection with any joint hearing shall file such materials, which shall be identical insofar as possible and shall be consistent with the procedure and

evidentiary rules and requirements of each Court, in advance of the time of such hearing or the submissions of such application;

(d) If a party has not previously appeared in or attorned or does not wish to attorn to the jurisdiction of either court, it shall be entitled to file such materials without, by the act of filing, being deemed to have attorned to the jurisdiction of the Court in which such material is filed, so long as it does not request in its materials or submissions any affirmative relief from the Court to which it does not wish to attorn;

(e) the Judge of the U.S. Court and the Justice of the Canadian Court who will hear any such application shall be entitled to communicate with each other in advance of the hearing on the application, with or without counsel being present, to establish guidelines for the orderly submission of pleadings, papers and other materials and the rendering of decisions by the U.S. Court and the Canadian Court, and to address any related procedural, administrative or preliminary matters; and

(f) the Judge of the U.S. Court and the Justice of the Canadian Court, having heard any such application, shall be entitled to communicate with each other after the hearing on such application, without counsel present, for the purpose of determining whether consistent rulings can be made by both Courts, and coordinating the terms upon which such rulings shall be made, as well as to address any other procedural or non-substantive matter relating to such applications.

14. Notwithstanding the terms of the preceding paragraph, the Protocol recognizes that the U.S. Court and the Canadian Court are independent courts. Accordingly, although the Courts will seek to cooperate and coordinate with each other in good faith, each of the Courts shall be entitled at all times to exercise its independent jurisdiction and authority with respect to:

(a) the conduct of the parties appearing in matters presented to such Court; and

(b) matters presented to such Court, including without limitation, the right to determine if matters are properly before such Court.

15. In the interest of cooperation and coordination of these proceedings, each Court shall recognize and consider all privileges applicable to communications between counsel and parties, including those contemplated by the common interest doctrine or like privileges, which would be applicable in each respective Court. Such privileges in connection with communications shall be applicable in both Courts with respect to all parties to these proceedings having any requisite common interest.

16. Where one Court has jurisdiction over a matter which requires the application of the law of the jurisdiction of the other Court in order to determine an issue before it, the Court with jurisdiction over such matter may, among other things, hear expert evidence or seek the

advice and direction of the other Court in respect of the foreign law to be applied, subject to paragraph 38 herein.

E. Retention and Compensation of Estate Representatives and Professionals

17. The Monitor, its officers, directors, employees, counsel, agents, and any other professionals related therefor, wherever located (collectively, the "Monitor Parties") and any other estate representatives in the Canadian Proceedings (collectively with the Monitor Parties, the "Canadian Representatives") shall all be subject to the sole and exclusive jurisdiction of the Canadian Court with respect to all matters, including:

(a) the Canadian Representatives' appointment and tenure in office;

(b) the retention and compensation of the Canadian Representatives;

(c) the Canadian Representatives' liability, if any, to any person or entity, including the Canadian Debtors and any third parties, in connection with the Insolvency Proceedings; and

(d) the hearing and determination of any matters relating to the Canadian Representatives arising in the Canadian Proceedings under the CCAA or other applicable Canadian law.

18. Additionally, the Canadian Representatives:

(a) shall be compensated for their services solely in accordance with the CCAA and other applicable Canadian law or orders of the Canadian Court; and

(b) shall not be required to seek approval of their compensation in the U.S. Court.

19. The Monitor Parties shall be entitled to the same protections and immunities in the U.S. as those granted to them under the CCAA and the CCAA Order. In particular, except as otherwise provided in any subsequent order entered in the Canadian Proceedings, the Monitor Parties shall incur no liability or obligations as a result of the appointment of the Monitor, the carrying out of its duties or the provisions of the CCAA and the CCAA Order by the Monitor Parties, except any such liability arising from actions of the Monitor Parties constituting gross negligence or willful misconduct.

20. Any estate representative appointed in the U.S. Proceedings, including without limitation, the U.S. Creditors' Committee and any examiner or trustee appointed pursuant to section 1104 of the Bankruptcy Code (collectively, the "U.S. Representatives"), shall be subject to the sole and exclusive jurisdiction of the U.S. Court with respect to all matters, including:

(a) the U.S. Representatives' tenure in office;

(b) the U.S. Representatives' retention and compensation;

(c) the U.S. Representatives' liability, if any, to any person or entity, including the U.S. Debtors and any third parties, in connection with the Insolvency Proceedings; and

(d) the hearing and determination of any other matters relating to the U.S. Representatives arising in the U.S. Proceedings under the Bankruptcy Code or other applicable laws of the U.S.

21. Nothing in this Protocol creates any fiduciary duty, duty of care or other duty owed by the U.S. Representatives to the stakeholders in the Canadian Proceedings or by the Canadian Representatives to the stakeholders in the U.S. Proceedings that they would not otherwise have in the absence of this Protocol.

22. The U.S. Representatives shall not be required to seek approval of their retention in the Canadian Court. Additionally, the U.S. Representatives:

(a) shall be compensated for their services solely in accordance with the Bankruptcy Code and other applicable laws of the United States or orders of the U.S. Court; and

(b) shall not be required to seek approval of their compensation in the Canadian Court.

23. Any professionals retained by or with the approval of the Canadian Debtors for activities performed in Canada or in connection with the Canadian Proceeding, including, in each case, counsel, financial advisors, accountants, consultants and experts (collectively, the "Canadian Professionals") shall be subject to the sole and exclusive jurisdiction of the Canadian Court. Accordingly, the Canadian Professionals: (a) shall be subject to the procedures and standards for retention and compensation applicable in the Canadian Court under the CCAA, the CCAA Order any other applicable Canadian law or orders of the Canadian Court; and (b) shall not be required to seek approval of their retention or compensation in the U.S. Court. The Debtors will include the identity and the amount of payments with respect to the Canadian Professionals in the Debtors' monthly operating reports.

24. Any professionals retained by or with approval of the Debtors for activities performed in the U.S. or in connection with the U.S. Proceedings, including, in each case, counsel, financial advisors, accountants, consultants and experts (collectively, the "U.S. Professionals") shall be subject to the sole and exclusive jurisdiction of the U.S. Court. Accordingly, the U.S. Professionals: (a) shall be subject to the procedures and standards for retention and compensation applicable in the U.S. Court under the Bankruptcy Code and any other applicable laws of the U.S. or orders of the U.S. Court; and (b) shall not be required to seek approval of their retention of compensation in the Canadian Court.

25. Any professionals retained by the U.S. Creditors' Committee, including, in each case, counsel and financial advisors (collectively, the "Committee Professionals") shall be subject to the sole and exclusive jurisdiction of the U.S. Court. Accordingly, the Committee Professionals: (a) shall be subject to the procedures and standards for retention and compensation applicable in the U.S. Court under the Bankruptcy Code and any other applicable laws of the

U.S. or orders of the U.S. Court; and (b) shall not be required to seek approval of their retention of compensation in the Canadian Court.

F. Rights to Appear and Be Heard

26. Each of the Debtors, their creditors and other interested parties in the Insolvency Proceedings, including the Canadian Representatives and the U.S. Representatives, shall have the right and standing to:

(a) appear and be heard in either the U.S. Court or the Canadian Court in the Insolvency Proceedings to the same extent as a creditor and other interested party domiciled in the forum country, but solely to the extent such party is a creditor or other interested party in the subject forum, subject to any local rules or regulations generally applicable to all parties appearing in the forum; and

(b) subject to 26(a) above, file notices of appearance or other papers with the Clerk of the U.S. Court or the Canadian Court in the Insolvency Proceedings; provided, however, that any appearance or filing may subject a creditor or interested party to the jurisdiction of the Court in which the appearance or filing occurs; provided further, that appearance by the U.S. Creditors' Committee in the Canadian Proceedings shall not form a basis for personal jurisdiction in Canada over the members of the U.S. Committee or vice versa. Notwithstanding the foregoing, and in accordance with the policies set forth above:

(i) the Canadian Court shall have jurisdiction over the U.S. Representatives and the U.S. Trustee solely with respect to the particular matters as to which the U.S. Representatives or the U.S. Trustee appear before the Canadian Court; and

(ii) the U.S. Court shall have jurisdiction over the Canadian Representatives solely with respect to the particular matters as to which the Canadian Representatives appear before the U.S. Court.

27. Solely with respect to consensual due diligence the U.S. Creditors' Committee will execute confidentiality agreements in the form to be agreed to by the Canadian Debtors and the U.S. Creditors' Committee.

G. Notice

28. Notice of any motion, application or other pleading or paper filed in one or both of the Insolvency Proceedings relating to matters addressed by this Protocol and notice of any related hearings or other proceedings shall be given by appropriate means (including, where circumstances warrant, by courier or electronic forms of communication) to the following:

(a) all creditors and other interested parties in accordance with the practice of the jurisdiction where the papers are filed or the proceedings are to occur; and

(b) to the extent not otherwise entitled to receive notice under subpart (a) of this paragraph, to:

(i) Counsel to the U.S. Debtors, Willkie Farr & Gallagher LLP, 787 Seventh Avenue, New York, New York, U.S., 10019, (Attn: Paul V. Shalhoub, Esq., Robin Spigel, Esq. and Debra C. McElligott, Esq.);

(ii) Counsel to the Canadian Debtors, Stikeman Elliott LLP, 5300 Commerce Court West, 199 Bay Street, Toronto, Ontario, M5L 1B9, Canada, (Attn: Ashley John Taylor, Maria Konyukhova and Kathryn Esaw);

(iii) Counsel to Deerfield Partners, L.P., Deerfield Private Design Fund III, L.P., Katten Muchin Rosenman LLP, 525 Monroe Street, Chicago, Illinois 60661 (Attn: Peter A. Siddiqui, Esq.), and Katten Muchin Rosenman LLP, 575 Madison Ave, New York, NY 10022 (Attn: Steven J. Reisman, Esq.);

(iv) the Monitor, Richter Advisory Group, 3320 Bay Wellington Tower, 181 Bay Street, Toronto, Ontario M5J 2T3 (Attn: Paul Van Eyk), and its counsel, Torys LLP, 3000 TD South Tower, 79 Wellington Street West, Toronto, Ontario M5K 1N2 (Attn: David Bish);

(v) counsel to any statutory committee or any other official appointed in the U.S. Proceedings or the Canadian Proceedings;

(vi) the Office of the United States Trustee for Region 2, 201 Varick Street, Suite 1006, New York, New York, 10014 (Attn: Andrea B. Schwartz, Esq.);

(vii) and such other parties as may be designated by either Court from time to time.

29. Notice in accordance with this paragraph may be designated by either of the Courts from time to time. Notice in accordance with this paragraph shall be given by the party otherwise responsible for effecting notice in the jurisdiction where the underlying papers are filed or the proceedings are to occur. In addition to the foregoing, upon request, the U.S. Debtors or the Canadian Debtors shall provide the U.S. Court or the Canadian Court, as the case may be, with copies of any orders, decisions, opinions or similar papers issued by the other Court in the Insolvency Proceedings.

30. When any cross-border issues or matters addressed by this Protocol are to be addressed before a Court, notices shall be provided in the manner and to the parties referred to in paragraph 28 above.

H. Recognition of Stays of Proceedings

31. The Canadian Court hereby recognizes the validity of the stay of proceedings and actions against or respecting the U.S. Debtors and their property under section 362 of the Bankruptcy Code (the "U.S. Stay"). In implementing the terms of this paragraph, the Canadian Court may consult with the U.S. Court regarding the interpretation, extent, scope and applicability of the U.S. Stay, and any orders of this U.S. Court modifying or granting relief from the U.S. Stay.

32. The U.S. Court hereby recognizes the validity of the stay of proceedings and actions against or respecting the Canadian Debtors, its property and the current and former directors and officers of the Canadian Debtors under the CCAA and the Initial Order (the "Canadian Stay"). In implementing the terms of this paragraph, the U.S. Court may consult with the Canadian Court regarding the interpretation, extent, scope and applicability of the Canadian Stay, and any orders of the Canadian Court modifying or granting relief from the Canadian Stay.

33. Nothing contained herein shall affect or limit the Debtors or other parties' rights to assert the applicability or non-applicability of the U.S. Stay or the Canadian Stay to any particular proceeding, property, asset, activity or other matter, wherever pending or located. Subject to the terms hereof: (a) any motion with respect to the application of the stay of proceedings issued by the Canadian Court in the CCAA Proceeding shall be heard and determined by the Canadian Court and (b) any motion with respect to the application of the stay under section 362 of the Bankruptcy Code shall be heard and determined by the U.S. Court.

I. Effectiveness; Modification

34. This Protocol shall become effective only upon its approval by both the U.S. Court and the Canadian Court.

35. This Protocol may not be supplemented, modified, terminated or replaced in any manner except by the U.S. Court and the Canadian Court after notice and a hearing. Notice of any legal proceeding to supplement, modify, terminate or replace this Protocol shall be given in accordance with the notice provision contained in this Protocol.

J. Procedure for Resolving Disputes Under the Protocol

36. Disputes relating to the terms, intent or application of this Protocol may be addressed by interested parties to either the U.S. Court, the Canadian Court or both Courts upon notice as set forth in paragraph 28 above. In rendering a determination in any such dispute, the Court to which the issue is addressed:

(a) shall consult with the other Court; and

(b) may, in its sole discretion, either:

(i) render a binding decision after such consultation;

(ii) defer to the determination of the other Court by transferring the matter, in whole or in part, to the other Court; or

(iii) seek a joint hearing of both Courts.

37. Notwithstanding the foregoing, each Court in making a determination shall have regard to the independence, comity or inherent jurisdiction of the other Court established under existing law.

38. In implementing the terms of the Protocol, the U.S. Court and the Canadian Court may, in their sole, respective discretion, provide advice or guidance to each other with respect to legal issues in accordance with the following procedures:

(a) The U.S. Court or the Canadian Court, as applicable, may determine that such advice or guidance is appropriate under the circumstances;

(b) The Court issuing such advice or guidance shall provide it to the non-issuing Court in writing;

(c) Copies of such written advice or guidance shall be served by the applicable Court in accordance with paragraph 28 hereof; and

(d) The Courts may jointly decide to invite the Debtors, the Estate Representatives, the U.S. Trustee, the Monitor and any other affected or interested party to make submissions to the appropriate Court in response to or in connection with any written advice or guidance received from the other Court.

39. For clarity, the provisions of paragraph 38 shall not be construed to restrict the ability of the U.S. Court or the Canadian Court to confer, as provided above, whenever they deem it appropriate to do so.

K. Preservation of Rights

40. Except as specifically provided herein, neither the terms of this Protocol nor any actions taken under the terms of this Protocol shall (a) prejudice or affect the powers, rights, claims and defenses of the Debtors and their estates, the Estate Representatives, the U.S. Trustee, the Monitor or any of the Debtors' creditors under applicable law, including the Bankruptcy Code, the CCAA and the Orders of the Courts or (b) preclude or prejudice the rights of any person to assert or pursue such person's substantive rights against any other person under the applicable laws of the United States or Canada.

41. The question of the degree of standing of the U.S. Creditors' Committee in the Canadian Court remains an open issue. This protocol is without prejudice to the question one way or the other.

SCHEDULE A

GUIDELINES FOR COMMUNICATION AND COOPERATION BETWEEN COURTS IN CROSS-BORDER INSOLVENCY MATTERS[2]

INTRODUCTION

A The overarching objective of these Guidelines is to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction ("Parallel Proceedings") by enhancing coordination and cooperation among courts under whose supervision such proceedings are being conducted. These Guidelines represent best practice for dealing with Parallel Proceedings.

B In all Parallel Proceedings, these Guidelines should be considered at the earliest practicable opportunity.

C In particular, these Guidelines aim to promote:

(i) the efficient and timely coordination and administration of Parallel Proceedings;

(ii) the administration of Parallel Proceedings with a view to ensuring relevant stakeholders' interests are respected;

(iii) the identification, preservation, and maximization of the value of the debtor's assets, including the debtor's business;

(iv) the management of the debtor's estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors, and the number of jurisdictions involved in Parallel Proceedings;

(v) the sharing of information in order to reduce costs; and

(vi) the avoidance or minimization of litigation, costs, and inconvenience to the parties[3] in Parallel Proceedings.

D These Guidelines should be implemented in each jurisdiction in such manner as the jurisdiction deems fit.[4]

E These Guidelines are not intended to be exhaustive and in each case consideration ought to be given to the special requirements in that case.

F Courts should consider in all cases involving Parallel Proceedings whether and how to implement these Guidelines. Courts should encourage and where necessary direct, if they have the power to do so, the parties to make the necessary applications to the court to

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[2] These Guidelines are distilled in large part from the ALI/ABA/III Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases.

[3] The term "parties" when used in these Guidelines shall be interpreted broadly.

[4] Possible means for the implementation of these Guidelines include practice directions and commercial guides.

facilitate such implementation by a protocol or order derived from these Guidelines, and encourage them to act so as to promote the objectives and aims of these Guidelines wherever possible.

ADOPTION AND INTERPRETATION

Guideline 1: In furtherance of paragraph F above, the courts should encourage administrators in Parallel Proceedings to cooperate in all aspects of the case, including the necessity of notifying the courts at the earliest practicable opportunity of issues present and potential that may (a) affect those proceedings; and (b) benefit from communication and coordination between the courts. For the purpose of these Guidelines, "administrator" includes a liquidator, trustee, judicial manager, administrator in administration proceedings, debtor-in-possession in a reorganization or scheme of arrangement, or any fiduciary of the estate or person appointed by the court.

Guideline 2: Where a court intends to apply these Guidelines (whether in whole or in part and with or without modification) in particular Parallel Proceedings, it will need to do so by a protocol or an order,[5] following an application by the parties or pursuant to a direction of the court if the court has the power to do so.

Guideline 3: Such protocol or order should promote the efficient and timely administration of Parallel Proceedings. It should address the coordination of requests for court approvals of related decisions and actions when required and communication with creditors and other parties. To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings.

Guideline 4: These Guidelines when implemented are not intended to:

(i) interfere with or derogate from the jurisdiction or the exercise of jurisdiction by a court in any proceedings including its authority or supervision over an administrator in those proceedings;

(ii) interfere with or derogate from the rules or ethical principles by which an administrator is bound according to any applicable law and professional rules;

(iii) prevent a court from refusing to take an action that would be manifestly contrary to the public policy of the jurisdiction or which would not sufficiently protect the interests of the creditors and other interested entities, including the debtor; or

(iv) confer or change jurisdiction, alter substantive rights, interfere with any function or duty arising out of any applicable law, or encroach upon any applicable law.

[5] In the normal case, the parties will agree on a protocol derived from these Guidelines and obtain the approval of each court in which the protocol is to apply. Pending such approval, or in Parallel Proceedings where there is no protocol, administrators and other parties are expected to comply with these Guidelines.

Guideline 5: For the avoidance of doubt, a protocol or order under these Guidelines is procedural in nature. It should not constitute a limitation on or waiver by the court of any powers, responsibilities, or authority or a substantive determination of any matter in controversy before the court or before the other court or a waiver by any of the parties of any of their substantive rights and claims, except to the extent specifically provided in such protocol or order as permitted by applicable law.

Guideline 6: In the interpretation of these Guidelines or any protocol or order approved under these Guidelines, due regard shall be given to their international origin and to the need to promote good faith and uniformity in their application.

COMMUNICATION BETWEEN COURTS[6]

Guideline 7: A court may receive communications from a foreign court and may respond directly to them. Such communications may occur for the purpose of the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to any joint hearing where Annex A is applicable. Such communications may take place through the following methods or such other method as may be agreed by the two courts in a specific case:

(i) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings or other documents directly to the other court and providing advance notice to counsel for affected parties in such manner as the court considers appropriate.

(ii) Directing counsel to transmit or deliver copies of documents, pleadings, affidavits, briefs or other documents that are filed or to be filed with the court to the other court, or other appropriate person, in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the court considers appropriate.

(iii) Participating in two-way communications with the other court, including by telephone, video conference call, or other electronic means, in which case Guideline 8 should be considered.

Guideline 8: In the event of communications between courts, other than on procedural matters, unless otherwise directed by any court involved in the communications whether on an *ex parte* basis or otherwise, or permitted by a protocol or order, the following shall apply:

(i) In the normal case, parties may be present.

(ii) If the parties are entitled to be present, advance notice of the communications shall be given to all parties in accordance with the rules of procedure applicable in each of the courts to be involved in the communications, and the communications between the courts shall be

[6] Communications between administrators are also expected under and to be consistent with these Guidelines.

recorded and may be transcribed. A written transcript may be prepared from a recording of the communications that, with the approval of each court involved in the communications, may be treated as the official transcript of the communications.

(iii) Copies of any recording of the communications, of any transcript of the communications prepared pursuant to any direction of any court involved in the communications, and of any official transcript prepared from a recording may be filed as part of the record in the proceedings and made available to the parties and subject to such directions as to confidentiality as any court may consider appropriate.

(iv) The time and place for communications between the courts shall be as directed by the courts. Personnel other than judges in each court may communicate with each other to establish appropriate arrangements for the communications without the presence of the parties.

Guideline 9: A court may direct that notice of its proceedings be given to parties in proceedings in another jurisdiction. All notices, applications, motions, and other materials served for purposes of the proceedings before the court may be ordered to be provided to such other parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the court in accordance with the procedures applicable in the court.

APPEARANCE IN COURT

Guideline 10: A court may authorize a party, or an appropriate person, to appear before and be heard by a foreign court, subject to approval of the foreign court to such appearance.

Guideline 11: If permitted by its law and otherwise appropriate, a court may authorize a party to a foreign proceeding, or an appropriate person, to appear and be heard on a specific matter by it without thereby becoming subject to its jurisdiction for any purpose other than the specific matter on which the party is appearing.

CONSEQUENTIAL PROVISIONS

Guideline 12: A court shall, except on proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in other jurisdictions without further proof. For the avoidance of doubt, such recognition and acceptance does not constitute recognition or acceptance of their legal effect or implications.

Guideline 13: A court shall, except upon proper objection on valid grounds and then only to the extent of such objection, accept that orders made in the proceedings in other jurisdictions were duly and properly made or entered on their respective dates and accept that such orders require no further proof for purposes of the proceedings before it, subject to its law and all such proper reservations as in the opinion of the court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such orders. Notice of any

amendments, modifications, extensions, or appellate decisions with respect to such orders shall be made to the other court(s) involved in Parallel Proceedings, as soon as it is practicable to do so.

Guideline 14: A protocol or order made by a court under these Guidelines is subject to such amendments, modifications, and extensions as may be considered appropriate by the court consistent with these Guidelines, and to reflect the changes and developments from time to time in any Parallel Proceedings. Notice of such amendments, modifications, or extensions shall be made to the other court(s) involved in Parallel Proceedings, as soon as it is practicable to do so.

ANNEX A (JOINT HEARINGS)

Annex A to these Guidelines relates to guidelines on the conduct of joint hearings. Annex A shall be applicable to, and shall form a part of these Guidelines, with respect to courts that may signify their assent to Annex A from time to time. Parties are encouraged to address the matters set out in Annex A in a protocol or order.

ANNEX A: JOINT HEARINGS

A court may conduct a joint hearing with another court. In connection with any such joint hearing, the following shall apply, or where relevant, be considered for inclusion in a protocol or order:

(i) The implementation of this Annex shall not divest nor diminish any court's respective independent jurisdiction over the subject matter of proceedings. By implementing this Annex, neither a court nor any party shall be deemed to have approved or engaged in any infringement on the sovereignty of the other jurisdiction.

(ii) Each court shall have sole and exclusive jurisdiction and power over the conduct of its own proceedings and the hearing and determination of matters arising in its proceedings.

(iii) Each court should be able simultaneously to hear the proceedings in the other court. Consideration should be given as to how to provide the best audio-visual access possible.

(iv) Consideration should be given to coordination of the process and format for submissions and evidence filed or to be filed in each court.

(v) A court may make an order permitting foreign counsel or any party in another jurisdiction to appear and be heard by it. If such an order is made, consideration needs to be given as to whether foreign counsel or any party would be submitting to the jurisdiction of the relevant court and/or its professional regulations.

(vi) A court should be entitled to communicate with the other court in advance of a joint hearing, with or without counsel being present, to establish the procedures for the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to the joint hearing.

(vii) A court, subsequent to the joint hearing, should be entitled to communicate with the other court, with or without counsel present, for the purpose of determining outstanding issues. Consideration should be given as to whether the issues include procedural and/or substantive matters. Consideration should also be given as to whether some or all of such communications should be recorded and preserved.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC.

Court File No: CV-18-603054-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

ORDER
(RE CROSS-BORDER PROTOCOL)

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Lawyers for the Applicants

TAB "5"

Citation: 7451190 Manitoba Ltd v CWB Maxium Financial Inc et al, 2019 MBCA 95

Date: 20190919
Docket: AI19-30-09213

IN THE COURT OF APPEAL OF MANITOBA

IN THE MATTER OF: ***A Final Order for the Appointment of MNP Ltd. as Receiver and Manager***

B E T W E E N:

CWB MAXIUM FINANCIAL INC.	)	***J. L. Sinclair***
	)	*for the Appellant*
	)	
(Applicant) Respondent	)	***C. E. Howden*** *and*
	)	***E. N. Blouw***
- and -	)	*for the Respondent*
	)	*CWB Maxium Financial*
6934235 MANITOBA LTD. carrying on business as WHITE CROSS PHARMACY WOLSELEY and 7085797 MANITOBA INC.	)	*Inc.*
	)	
	)	***No appearance***
	)	*for the Respondents*
	)	*6934235 Manitoba Ltd.*
(Respondents) Respondents	)	*c.o.b. as White Cross*
	)	*Pharmacy Wolseley and*
- and -	)	*7085797 Manitoba Inc.*
	)	
7451190 MANITOBA LTD.	)	*Chambers motion heard:*
	)	***August 6, 2019***
	)	
(Respondent) Appellant	)	*Decision pronounced:*
	)	***September 19, 2019***

MAINELLA JA

Introduction

[1] 7451190 Manitoba Ltd. (the company) seeks to challenge an order made pursuant to section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the *BIA*) and section 55 of *The Court of Queen's Bench Act*,

CCSM c C280, appointing a receiver/manager over the assets, undertakings and properties of it and the other respondents. The receivership order was entered on the same day it was pronounced, December 20, 2018.

[2] An appeal of the receivership order was commenced on January 14, 2019. In chambers proceedings before me, the applicant raised several objections with the appeal:

> (1) the company did not have an appeal as of right, rather, it requires leave to appeal that should be refused;
>
> (2) the appeal was statute barred as it was not filed within 10 days of the order or decision appealed from; and
>
> (3) the company could not be represented in this Court by its director who is not licenced to practice law in Manitoba.

[3] Previously, I decided that the company could not be represented by its director (see *7451190 Manitoba Ltd v CWB Maxium Financial Inc et al*, 2019 MBCA 28). The company has now retained legal counsel to represent it on the proceedings related to the appeal.

[4] The remaining questions for me to decide are:

> (1) whether the nature of the company's appeal of the receivership order requires leave or is of right pursuant to section 193 of the *BIA*;
>
> (2) if the company requires leave to appeal, should leave to appeal be granted; and

(3) whether the company should be granted an extension of time to file its notice of appeal and, if leave is required, its application for leave to appeal.

[5] For the following reasons, I conclude that the company's appeal of the receivership order is not of right and, given the circumstances, leave to appeal should be denied. Accordingly, it is unnecessary to address the request for an extension of time.

Background

[6] In my previous decision, I set out the following relevant background (at paras 5-8):

> The applicant is the secured creditor of the company and the two other corporate respondents carrying on business as a Winnipeg pharmacy. Based on a default of various loan agreements by all three of the respondents the applicant made an application in the Court of Queen's Bench for the appointment of MNP Ltd. as receiver and manager, without security, of all of the assets, undertakings and properties of the company and the two other corporate respondents. The total indebtedness claimed by the applicant from the three respondents as of November 2, 2018, was $2,153,863.07.
>
> The receivership application was heard on December 20, 2018. At that time, Daren Lee Jorgenson was the manager of the pharmacy. He is a non-lawyer and was permitted to represent the company on the receivership application. His son, Eaton Jorgenson, was the sole officer and director of the company at the time. The other corporate respondents did not appear on the receivership application or otherwise oppose it. The officers and directors of the other corporate respondents are not family members of Mr. D. Jorgenson.
>
> Mr. D. Jorgenson admitted at the hearing of the receivership application that no payments on the loans owed to the applicant

> had deliberately been made after October 15, 2018, because of a dispute between him and the applicant as to an advance of $206,000 to the company in June 2018. Mr. D. Jorgenson alleges that an officer of the applicant colluded with former directors and shareholders of the company to allow them to misappropriate that advance once the company received it, and therefore it should not form any part of the indebtedness claimed by the applicant. Mr. D. Jorgenson advised that he has reported the alleged theft to police and other authorities. The applicant denies the allegation.
>
> Mr. D. Jorgenson advised the judge that no payments would be made to the applicant from the operation of the pharmacy on the loan agreements until the $206,000 dispute was resolved. He asked for an adjournment of the receivership application. The judge refused the request and granted the receivership order because he was "not persuaded that the adjournment (would) serve any useful end." He stated that it was just and convenient to appoint a receiver to "preserve and protect the property pending a judicial resolution of any issues."

[7] Under the loan agreements, the applicant had the contractual right to appoint a private receiver in a case of default. Instead, it sought a court-appointed receiver.

[8] At the application for the appointment of a receiver, Mr. D. Jorgenson advised of several reasons to adjourn the application. He said the matter was complicated as there was a possible misappropriation of funds that had only recently been brought to the attention of the police. He said there was no urgency to the application as the pharmacy was still operating and rent and salaries were being paid. In addition, the default on the loans was a technical one based on a disagreement between him and the applicant over the $206,000 advance and not the other loans. Next, the company had only been served two days prior to the hearing and wanted 20 days to file affidavit material in opposition to the application. Finally, the

company wanted the assistance of the Court's case management process because it did not have a lawyer to represent it.

[9] Mr. D. Jorgenson also advised the Court that the company might be prepared to agree to a court-appointed receiver with limited oversight powers to ensure the pharmacy was being properly operated but nothing more.

[10] After the receivership order was granted, the company did not seek a stay of it.

[11] The receivership order contained a "comeback clause" which states as follows:

> THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

[12] The nature and purpose of a "comeback clause" in an insolvency proceeding was described this way by Farley J in *United Air Lines Inc, Re*, 2003 CarswellOnt 2786 (Sup Ct J) (at para 3):

> I would note the presence of a comeback clause in the order. That is a safety device to ensure that anyone who is affected by this order and who has not had a meaningful opportunity to make timely representations (if they deem that necessary) are able to re-attend in this Court to ask for relief - with the onus remaining on the applicant United to demonstrate that the original relief obtained by it remains appropriate in the circumstances prevailing. In other words any affected party is not put at any disadvantage. I would note the Ontario Court of Appeal's views in *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) as to the appropriate use of the comeback clause.

[13] In addition to the comeback clause, a judge of the Court of Queen's Bench has the following authority under section 187(5) of the *BIA* which states:

> **Court may review, etc.**
> **187(5)** Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

See *Elias v Hutchinson*, 1981 ABCA 31 at paras 30-31; and *HOJ National Leasing Corp (Re)*, 2008 ONCA 390 at paras 26-30.

[14] Since appointed, the receiver has filed two reports with the Court of Queen's Bench, informing of inquiries undertaken and decisions made, and has sought approval of various activities. The company has not filed any motion challenging the actions taken by the receiver.

Discussion and Conclusion

[15] The parts of section 193 of the *BIA* relevant to this matter dealing with appeal rights provide as follows:

> **Court of Appeal**
> **193** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> . . .
>
> **(c)** if the property involved in the appeal exceeds in value ten thousand dollars;
>
> . . .
>
> **(e)** in any other case by leave of a judge of the Court of Appeal.

Is Leave to Appeal Required?

[16] By necessary implication of the operation of the *BIA*, a judge of this Court sitting in chambers has jurisdiction to decide the threshold question of a party's right of appeal under section 193 of the *BIA* and whether leave to appeal is required (see *PricewaterhouseCoopers Inc v Ramdath*, 2018 MBCA 41 at para 20 (*Ramdath #1*)).

[17] The company relies on section 193(c) of the *BIA*, arguing that it has an automatic right of appeal because the value of its property is well in excess of $10,000. In my view, this submission must fail.

[18] The appointment of a receiver does not bring into play the value of the "property involved" for the purposes of section 193(c) of the *BIA*. As Blair JA explained in *Business Development Bank of Canada v Pine Tree Resorts Inc*, 2013 ONCA 282, "an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval" (at para 17) (see also *Farm Credit Canada v Gidda*, 2014 BCCA 501 at paras 21-22; and *2403177 Ontario Inc v Bending Lake Iron Group Limited*, 2016 ONCA 225 at para 59).

[19] For section 193(c) of the *BIA* to apply, the "appeal must directly involve property exceeding $10,000 in value" (*Enroute Imports Inc (Re)*, 2016 ONCA 247 at para 5). The direct involvement of property occurs when the evidentiary record provides a basis that the order being challenged has "some element of a final determination of the economic interests of a claimant in the debtor" (*2403177 Ontario Inc* at paras 61-62; *Downing Street Financial Inc v Harmony Village-Sheppard Inc*, 2017 ONCA 611 at

paras 23-27; and *Forjay Management Ltd v Peeverconn Properties Inc*, 2018 BCCA 188 at paras 52-54). That is not the situation here. The company suffered no loss by the appointment of the receiver, nor has any other party had a gain.

[20] Accordingly, the company's challenge to the receivership order requires leave to appeal being granted in accordance with section 193(e) of the *BIA*.

Should Leave to Appeal be Granted?

[21] The parties agree, as do I, that the test for leave to appeal being granted under section 193(e) of the *BIA* was discussed thoroughly by Cameron JA in *PricewaterhouseCoopers Inc v Ramdath*, 2018 MBCA 71 at paras 14-24 (*Ramdath #2*). The criteria to consider in deciding whether to grant leave to appeal under section 193(e) of the *BIA* are:

1. The proposed appeal raises an issue of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole.

2. The issue raised is of significance to the action itself.

3. The proposed appeal is prima facie meritorious.

4. Whether the proposed appeal will unduly hinder the progress of the bankruptcy/insolvency proceeding.

[22] Notwithstanding these criteria, the Court retains a residual discretion to grant leave to appeal where the refusal to do so would result in an injustice.

[23] The company's proposed appeal turns on the issues of the necessity of making the receivership order and doing so on short notice. The company says that the remedy of the appointment of a receiver was unnecessary; the pharmacy is a healthy business. Rather, the applicant triggered the receivership for a tactical purpose simply because it did not want to resolve the dispute over the $206,000 advance with Mr. D. Jorgenson. Further, the judge erred by not giving the company proper time to resist the appointment of a receiver or to use the case management process of the Court.

[24] I am not persuaded by the company's arguments in favour of leave to appeal being granted.

[25] The proposed appeal does not raise an issue of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole. As was the situation in *Ramdath #2* and, in large part, *Pine Tree Resorts Inc*, there is no precedential significance to this case that will affect others or the law generally. In his succinct reasons, the judge simply applied well-settled law as to the appointment of a receiver and the granting of an adjournment to the distinct facts of this case.

[26] In terms of the second criteria (significance of the issue to the action itself), as was explained in *Pine Tree Resorts Inc*, this factor often will be of "lesser assistance" (at para 30) in deciding the question of leave. In this case, while the company says the issues it raises are of significance to

the action itself, the fact of the matter is that the loan agreements gave the applicant the contractual right to appoint a private receiver once default occurred, which the company admits was deliberate and for reasons other than insolvency. The extraordinary nature of a receivership order being granted becomes of less concern in a situation, such as here, where the creditor has a contractual right to the remedy of a private receiver upon default and the occurrence of a default is unchallenged (see *Bank of Nova Scotia v Freure Village on Clair Creek*, 1996 CarswellOnt 2328 at para 13 (Ct J (Gen Div))).

[27] If anything, a court-appointed receiver is to the company's benefit, as opposed to a private receiver, as the process is more transparent and a court-appointed receiver is a fiduciary acting as an officer of the court (see *Gidda* at para 16). In my view, the issues raised by the company are of no significance to the action itself.

[28] On the question of the arguable merit of the company's proposed appeal, it is important to begin by recognising that the appointment of a receiver is a matter of discretion (see *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 47). Such a decision will therefore be afforded significant deference on appeal, absent a misdirection in law or fact, or a decision that is so clearly wrong as to amount to an injustice (see *Homestead Properties (Canada) Ltd v Sekhri et al*, 2007 MBCA 61 at para 13; and *BG International Limited v Canadian Superior Energy Inc*, 2009 ABCA 127 at para 6). Similar deference will be afforded to a decision whether to adjourn a matter (see *Viterra Inc v McIvor*, 2019 MBCA 22 at para 4).

[29] Promptness and timeliness are considerations on an application for the appointment of a receiver (see *Lemare Lake Logging Ltd* at paras 45, 75). Appeal courts must be sensitive to the reality that time is a luxury that a judge, considering whether to appoint a receiver, does not typically have.

[30] The record before the judge highlighted the importance of his acting quickly. It was undisputed that all of the respondents were in default of the loan agreements and that nothing would be paid to the applicant until the dispute over the $206,000 advance was resolved. That was a conscious choice of Mr. D. Jorgenson; not, as previously mentioned, because of insolvency, but because of his complaint as to the conduct of the applicant and former officers and directors of the company. He was not hiding the fact he was attempting to leverage the total indebtedness to resolve the dispute over the $206,000 advance which was only approximately 10 per cent of what was owed to the applicant.

[31] None of the reasons Mr. D. Jorgenson proposed to the judge to delay deciding whether to appoint a receiver bears on the uncontested facts. There is nothing before me that satisfies me that there is prima facie merit that the judge erred in law or fact or reached an unjust result in refusing the adjournment, or that he should not have appointed a receiver to preserve and protect the property when there was, as he put it, clearly a "serious breakdown" in the relationship between the parties.

[32] Finally, on the last consideration, it strikes me that the uncertainty and delay of the proposed appeal will unduly hinder the progress of the bankruptcy/insolvency proceeding. Insolvency litigation is fluid. It is well recognised that delays can prejudice the ability of the receiver to carry out

the realisation process (see *2403177 Ontario Inc* at para 64). While the dispute over the $206,000 advance has not been resolved, the pharmacy is now operating in accordance with the loan obligations owed to the applicant. The receiver is carrying out its mandate without objection of the parties. If leave to appeal is granted, the receivership process will be halted because of the automatic statutory stay (see section 195 of the *BIA*). The status quo should not be upset in my view, particularly given the weakness of the case the company has put forward in seeking leave to appeal.

[33] When I consider the relevant criteria as a whole, taking into account the entire context, I am not satisfied that it is appropriate to grant the company leave to appeal the receivership order.

[34] In the circumstances, I do not see that result as an unjust one. The company had a legal, and far more proportional, alternative to challenge the disputed indebtedness than the brinksmanship Mr. D. Jorgenson engaged in. The company could have sued the applicant over the $206,000 advance as opposed to walking away from all of its loan obligations. If it had done so, the receivership would not have occurred and the costs to all of the parties would have been reduced.

[35] Also, while, to date, no unfairness has arisen because of the appointment of a receiver, I am mindful of the fact that the termination of any possible appeal by the company of the appointment of the receiver by my order will not leave it without remedies should there be a fundamental change of circumstances going forward. The wording of the comeback clause and the jurisprudence surrounding the applicability of section 187(5)

of the *BIA* provide the company with remedies depending on what may occur.

[36] In summary, I have not been convinced that there is appropriate reason for me to exercise my residual discretion to grant leave to appeal in a situation that otherwise does not meet the relevant criteria for granting leave under section 193(e) of the *BIA*.

Disposition

[37] The company requires leave to appeal the receivership order pronounced and entered on December 20, 2018.

[38] Leave to appeal is denied, with costs.

_____ JA

TAB "6"

CED Bankruptcy and Insolvency VII.2.(b)

Canadian Encyclopedic Digest

Bankruptcy and Insolvency
VII — **Receivers**, Interim **Receivers** and **Receiver**-Managers
2 — **Receivers** and Secured Creditors
(b) — Notice of Intention

VII.2.(b)

See Canadian Abridgment: BKY.IV.3 Bankruptcy and insolvency — **Receivers** — Powers, duties and liabilities

§404 A secured creditor that serves notice of its intention to enforce a security on all or substantially all of the inventory, accounts **receivable**, or other property of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person must send the notice and wait ten days before it can move to enforce its security, unless the insolvent person consents to an earlier enforcement of the security. [1]

§405 There is a distinction between the duties and obligations of a **receiver**-manager **privately appointed** under the provisions of a security document and those of a **receiver**-manager **appointed** by **court** order. A **privately appointed receiver**-manager is not acting in a fiduciary capacity: it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. A **court-appointed receiver**-manager, on the other hand, is an officer of the court and acts in a fiduciary capacity with respect to all interested parties. [2]

Footnotes

1 *Bankruptcy and Insolvency Act* [title re-en. 1992, c. 27, s. 2], R.S.C. 1985, c. B-3, s. 244(1), (2) [both en. 1992, c. 27, s. 89(1)] (s. 244 does not apply, or ceases to apply, in respect of a secured creditor (a) whose right to realize or otherwise deal with his security is protected by s. 69.1(5) or (6); or (b) in respect of whom a stay under ss. 69-69.2 has been lifted pursuant to s. 69.4; and does not apply where there is a **receiver** in respect of the insolvent person); *Montreal Trust Co. v. 569653 Alberta Ltd.* (1995), 34 C.B.R. (3d) 183 (Alta. Master) (mortgagee not required to give second notice under s. 244 of *Bankruptcy and Insolvency Act*); *Metropolitan Trust Co. of Canada v. Novastar Development Corp.* (1993), 19 C.B.R. (3d) 140 (B.C. S.C.) (s. 244(1) of *BIA*); *London Life Insurance Co. v. Air Atlantic Ltd.* (1994), 27 C.B.R. (3d) 66 (N.S. S.C.) (under s. 244(1) of *BIA*, creditor only required to give notice of intention to enforce security if security covering "all or substantially all" of debtor's property; since security agreement covering only one of debtor's 15 airplanes, creditor not having been required to give notice to enforce its security; however, creditor not allowed to use fact of no notice to bring itself within exception in s. 69(2)(b); creditor stayed from enforcing security).

2 *Ostrander v. Niagara Helicopters Ltd.* (1973), 19 C.B.R. (N.S.) 5 (Ont. H.C.); *Coast Capital Savings Credit Union v. 482451 B.C. Ltd.* (2004), 1 C.B.R. (5th) 1 (B.C. S.C.).

Tab “7”

COURT OF APPEAL FOR ONTARIO

CITATION: Akagi v. Synergy Group (2000) Inc., 2015 ONCA 368
DATE: 20150522
DOCKET: C57582, C59494, C59496, C59497, C59498, C59499, C59500, C59508, C59509, C59510, C59511

Simmons, Blair and Juriansz JJ.A.

BETWEEN

Trent Akagi

Applicant
(Respondent)

and

Synergy Group (2000) Inc. (aka Synergy Group Inc., Synergy Group 2000 Inc., The Synergy Group 2000 Inc., The Synergy Group, Inc., (2000), The Synergy Group Incorporated, The Synergy Group 2000 Incorporated) and Integrated Business Concepts Inc.

Respondents
(Appellants)

J. Lisus and J. Renihan, for the appellants, Student Housing Canada and R.V. Inc.

J. Spotswood and W. McDowell, for the appellants, Integrated Business Concepts Inc. and Vincent Villanti

D. Magisano and S. Puddister, for the appellant, Ravendra Chaudhary

M. Katzman, for the appellants, Synergy Group (2000) Inc., Shane Smith, Nadine Theresa Smith, David Prentice, and Jean Lucien Breau and 1893700 Ontario Limited.

J. Leon and R. Promislow, for the respondent, J.P. Graci & Associates (the court appointed receiver)

T. Corsianos, for the respondent, Trent Akagi

Heard: December 12, 2014

On appeal from the orders of Justice Colin Campbell of the Superior Court of Justice, dated June 14, 2013, June 24, 2013, June 28, 2013, August 2, 2013, and September 16, 2013.

R.A. Blair J.A.:

OVERVIEW

[1] The appointment of a receiver in a civil proceeding is not tantamount to a criminal investigation or a public inquiry. Regrettably, those responsible for obtaining the appointment in this case thought that it was. As a result, the receivership proceeded on an entirely misguided course.

[2] Mr. Akagi contributed funds to a tax program, marketed and sold by the Synergy Group. It was supposed to generate tax loss allocations for him, but did not. He sued Synergy Group (2000) Inc. ("Synergy") and certain individuals associated with it for fraud and obtained default judgment in the amount of approximately $137,000. On June 14, 2013, Mr. Akagi applied for, and obtained, an ex *parte* order appointing a receiver over all assets, undertakings and property of Synergy and an additional company, Integrated Business Concepts Inc. ("IBC").

[3] The primary evidence in support of the application consisted of a three-page affidavit sworn by Mr. Akagi and copies of three affidavits from representatives of the Canadian Revenue Agency (the "CRA"). The representatives' affidavits

outlined the details of a CRA investigation into the tax loss allocation scheme and indicated that, besides Mr. Akagi, there may be as many as 3800 other investors who were defrauded. The materials did not disclose that the CRA investigation had been terminated in February 2013 – some four months before Mr. Agaki brought the *ex parte* application.

[4] Subsequently, through a series of further *ex parte* applications, the receivership order morphed into a wide-ranging "investigative receivership", freezing and otherwise reaching the assets of 43 additional individuals and entities (including authorizing the registration of certificates of pending litigation against their properties). None of the additional targets was a party to the receivership proceeding, only three had any connection to the underlying Akagi action, and only two were actually judgment debtors.

[5] On September 16, 2013, the appellants moved before the application judge in a "come-back proceeding" to set aside the receivership orders. Their application was dismissed. They now appeal from the September 16 order and the previous *ex parte* orders.

[6] All of the receivership orders were sought and obtained pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which gives the court broad powers to make such an order "where it appears to a judge of the court to be just or convenient to do so." Accordingly, the appeal does not involve issues that

may arise in connection with the appointment of a receiver under the numerous other statutes that contain such powers, or by way of a private appointment by a secured creditor under a security document. Nor does the appeal concern a class proceeding or other form of representative action.

[7] Mr. Akagi is an unsecured judgment creditor. However, it is apparent from the record that the relief sought was intended to reach far beyond his interests in that capacity. It was intended to empower the Receiver to root out the details of the broader tax allocation scheme as it affected a large number of other investors beyond Mr. Akagi – although to what end is unclear, as there is no pending or intended proceeding on behalf of those investors.

[8] For the reasons that follow, I would allow the appeal and set aside all of the contested orders.

FACTUAL BACKGROUND

The Tax Loss Allocation Scheme

[9] Mr. Akagi invested more than $100,000 through Synergy in what he understood were small businesses managed by IBC that would generate legitimate business losses. Synergy's "Tax Reduction Strategy" program was misrepresented to him as a means of achieving substantial tax savings through the allocation to him of his proportionate share of those losses.

[10] Mr. Akagi made an initial investment of $20,000 in November 2006. He received documentary confirmation: that he and Synergy agreed "to explore alternative income tax strategies by purchasing units in small to medium businesses"; that Synergy, as Transfer Agent, was to act as liaison between Mr. Akagi and IBC "to facilitate the placement of capital into...small and medium sized, privately owned businesses"; and that "IBC agree[ed] to execute the purchase on behalf of the Purchaser, provide complete documentation to support the purchase and any related tax benefit and provide all necessary follow-up documentation and service in the event that [the CRA] requests substantiating proof of Purchaser's Participation and any resulting Income Tax Deduction Claims."

[11] In March 2007, Mr. Akagi received a documentary package from Synergy for the purposes of preparing his 2006 tax returns. The business entity in which he had purportedly invested was said to have suffered a total loss of $164,500, of which his proportionate share was $104,000. Mr. Akagi deducted that amount and received a tax credit of $27,262.10.

[12] Having received that benefit, Mr. Akagi invested a further $90,000 with Synergy for the purposes of his 2007 taxation year. He received the same type of documentary confirmation. At the end of February 2008, he received a letter from an entity known as the International Business Consultants Association

("IBCA") enclosing a cheque in the amount of $248.78, purportedly representing his share of IBCA's profits for the 2007 year.

[13] The honeymoon was short-lived, however. On March 19, 2008, Mr. Akagi received a letter from the CRA stating that an audit was being conducted on IBC with respect to the 2006 taxation year. A few days later, Synergy sent a letter advising Mr. Akagi that the CRA did not "approve of [Synergy's] Profit and Loss Business Development Program", and that Synergy would not be issuing tax forms for the 2007 tax year until it had cleared matters with the CRA. Mr. Akagi was given the option of filling in and returning a form to obtain a refund of his investment for 2007. Although he did so, his $90,000 investment was not returned.

[14] In December 2008, the CRA advised Mr. Akagi that it was questioning his loss claim for 2006 and that it was the position of CRA that the IBCA loss arrangement "constitutes a sham or sham transactions." In May 2009, Mr. Agaki received a Notice of Re-Assessment for the 2006 taxation year, completely disallowing his claimed business losses of $104,000. In the end, the CRA waived some penalties and interest, and Mr. Akagi repaid $54,842.58.

The Underlying Proceedings: The Akagi Action

[15] In August 2009, Mr. Akagi commenced an action against Synergy and four individuals connected with it – Shane Smith, David Prentice, Sandra Delahaye,

and Jean Lucien Breau (the "Akagi action"). Smith acted and held himself out as the president of Synergy. Prentice acted and held himself out as its vice-president. Delahaye, a chartered accountant, was the salesperson who sold the investment to Mr. Akagi. Breau, according to the corporate records, was the sole shareholder and director of Synergy.

[16] In the action, Mr. Akagi claimed $116,575.98 in damages, representing the monetary losses he had sustained as a result of what he alleged to be an unlawful conspiracy to defraud him. He also claimed punitive damages. The defendants were noted in default (except for Breau, who was never served), and Mr. Akagi moved, without further notice, for default judgment. In May 2010, Cullity J. granted default judgment, awarding Mr. Akagi the claimed compensatory damages plus $25,000 in punitive damages. He dismissed Mr. Agaki's claim for equitable tracing because he had failed to identify any fund or property in the pleadings to which the funds could be traced.

[17] Immediately upon learning of the default judgment, the defendants moved to set it aside. Justice Whitaker did so on September 3, 2010. His order was upheld on appeal, subject to the following conditions: (i) the defendants were to pay Mr. Akagi $15,000 in costs thrown away, plus $7,000 for his costs on appeal; and (ii) the defendants were to pay $60,000 to the credit of the action pending the outcome of the proceedings.

[18] The defendants complied with these conditions.

[19] Mr. Akagi subsequently moved for summary judgment against Synergy and the defendants Smith and Prentice.[1] On May 14, 2012, McEwen J. granted summary judgment in the amount of $90,000, representing Mr. Akagi's outstanding 2007 investment. However, McEwen J. declined to grant summary judgment on the claims for fraud and conspiracy to defraud on the basis that the defendants' materials raised triable issues on those claims. By agreement of the parties, the $60,000 earlier paid into court to the credit of the action remained in court and was not be applied to the $90,000 judgment.

[20] The saga continued, however. Mr. Akagi moved once again to strike the statements of defence of Synergy, Smith and Prentice, and for an order directing that the $60,000 be paid out to him in partial satisfaction of his $90,000 partial summary judgment. On October 5, 2012, Roberts J. granted that relief. On January 18, 2013, Roberts J. made a further order: (i) directing the Registrar to note Synergy, Smith and Prentice in default; and (ii) directing Mr. Akagi to proceed to trial to determine the issues left to be tried by McEwen J.

[21] Justice Chiappetta heard the undefended trial of the remaining issues and, on April 24, 2013 – on the basis of the fraud and conspiracy to defraud claims in the Akagi action – awarded Mr. Akagi $116,575.98 in compensatory damages,

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[1] The defendant Breau was never served with the proceedings, and by the time of the summary judgment motion, the defendant Delahaye had made an assignment in bankruptcy.

$30,000 in punitive damages, and $17,000 in costs. On January 23, 2015, a different panel of this court dismissed the appeal from this judgment.

[22] I note here that the $90,000 sum awarded by McEwen J. is a component of the $116,575.98 compensatory damages awarded by Chiappeta J. In the end, Mr. Akagi's outstanding claim against Synergy, Smith and Prentice is approximately $182,000, consisting of: (i) $116,575.98 in compensatory damages; (ii) $30,000 in punitive damages; and (iii) $36,000 in costs. From this must be subtracted the $60,000 already paid, leaving a balance of approximately $122,000.

[23] It is this claim that spawned the sprawling receivership outlined below.

The Initial *Ex Parte* Receivership Application

[24] No steps appear to have been taken to effect recovery on the judgment. Nevertheless, on June 14, 2013 – less than two months after the judgment was granted – Mr. Akagi brought an *ex parte* application before the Commercial List in Toronto, seeking the appointment of J.P. Graci & Associates as Receiver of the assets, property and undertakings of Synergy and IBC (IBC had not been made a defendant in the Akagi action).

[25] In support of the initial application, Mr. Akagi filed a three-page affidavit characterizing himself as a victim of fraud perpetrated by Synergy, Smith and Prentice (as set out in the summary judgment materials before McEwen J.), and

as a judgment creditor of Synergy, Smith and Prentice (the "Debtors") as a result of Chiappetta J.'s judgment awarding him compensatory and punitive damages.

[26] In addition, without swearing as to his belief in the truth of their contents, Mr. Akagi attached three documents relating to an investigation by the CRA into the affairs of Synergy and IBC: (i) a copy of an Information to Obtain Production Order, presented by a CRA officer, Andrew Suga, to a judge five years earlier (in July 2008); (ii) a copy of an affidavit sworn three years earlier (on June 25, 2010) by a CRA officer, Sophie Carswell; and (iii) a copy of a second affidavit sworn by Ms. Carswell on March 2, 2012. Also attached, again without swearing as to his belief in the truth of their contents, were copies of three newspaper articles regarding the execution of search warrants by the RCMP on June 6, 2013 (in a matter unrelated to Mr. Akagi, but purporting to relate to Synergy and Smith).

[27] The thrust of the information contained in the CRA documents was that, at the time the documents were executed, the CRA was conducting a criminal investigation relating to Synergy and IBC's tax allocation program. In particular, CRA officials were investigating the affairs of Synergy, IBC, Smith, Prentice and Breau, as well as those of the appellants Vincent Villanti (the president of IBC) and Ravendra Chaudhary (a chartered accountant working with IBC and Villanti) and various other persons. The tax scheme (defined by Ms. Carswell as the "Tax Plan") was described as follows:

In the Tax Plan, arm's length individuals who purchased "units" as part of the Tax Plan have deducted certain losses in their 2004, 2005 and 2006 T1 individual income Tax Returns ("T1 Returns"), which they were led to believe were partnership losses validly deductible against other income. These losses purportedly originated from the operations of struggling small and medium sized enterprises ("Joint Venture Partners" or "JVPs" hereinafter) who contributed them to a pool of losses by way of signing Joint Venture Partnership Agreements with the Independent Business Consulting Association (hereinafter "IBCA"). No such losses are deductible in the T1 Returns of the Unit Purchasers.

The net result of the Alleged Offenders' activities is that:

a) Purchasers of units in the Tax Plan (hereinafter "Unit Purchasers") were defrauded of the money they had paid to the Allege Offenders, because what they received for the money paid was not deductible in their Income Tax Returns, contrary to what they were led to believe.

b) The Unit Purchasers claimed losses in their respective T1 Returns for the calendar years 2004, 2005 and 2006, resulting in the understatement of their income taxes payable to the Crown, and

c) The Alleged Offenders understated their income from their participation in the promotion and sale of the Tax Plan, thus understating the taxable income and consequent income tax thereon in their own respective income tax returns (corporate and individual) for the taxation years 2004, 2005 and 2006.

As a result of its findings in the investigation to date, the essence of the CRA's theory of the offences currently is that the individuals cited above as Alleged Offenders ... acting personally or through corporations or entities which they controlled, participated in the promotion and sale of the Tax Plan which the Affiant believes to be fraudulent because the overwhelming majority of JVPs' losses as shown on their financial statements were

> fraudulently inflated in arriving at the loss figures shown on the T2124 Statements of Business Activities issued by the Alleged Offenders to the Unit Purchases as part of the Tax Plan.

[28] The Suga Information to Obtain, referred to above, described a similar tax scheme, although in much greater detail.

[29] As noted, Mr. Akagi did not say what, if any, knowledge he had of the information contained in the Carswell and Suga material or that he believed in the truth of their contents. Nor did he or the Receiver – then or at any time during the subsequent *ex parte* applications discussed below – disclose that the CRA had terminated its investigation in February 2013, four months before the receivership application (albeit, as it later turned out, the RCMP was, at the same time, conducting a continuing investigation into the same alleged scheme).

[30] On the basis of this record, on June 14, 2013, the application judge granted the receivership order sought, stating in a brief four-line endorsement that he was "satisfied that the grounds for relief sought have been made out and that a Receiving Order [should] issue in the form filed." The Order was made pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. I shall refer to this Order as the "Initial Order".

[31] Mr. Akagi submits that "the application judge appointed the receiver for the purpose of investigating the Synergy Alternative Tax Investment Program *on behalf of all investors therein*, and not just on behalf of Mr. Akagi" (emphasis

added). However, the Initial Order makes no mention of the Synergy Alternative Tax Investment Program, much less of the power to investigate any such program. That said, the Receiver appears to have treated the Initial Order as entitling it to embark on such an inquiry, and at some point in the evolution of the receivership the application judge appears to have accepted that he had put an "investigative receivership" into place.

[32] What follows is a brief description of how the receivership evolved.

The Subsequent *Ex Parte* Expansions of the Receiver's Powers

June 24, 2013

[33] Just ten days after the Initial Order, the Receiver applied *ex parte* for expanded powers. It sought authorization to direct financial institutions to disclose information and documentation regarding payments and transfers of funds not only by Synergy and IBC (the only entities subject to the Initial Order), but also by or at the direction of an expanded list of targets: Independent Business Consulting Association, Independent Business Consultants Association, Integrated Business Consultants Association, 565819 Ontario Ltd., Vincent Villanti, Jean Breau, Larry Haliday, Joe Loshiavo, Shane Smith, David Prentice, Ravendra Kumar Chaudhary and Nadine Smith.

[34] The Receiver did not file a notice of motion, notice of application or a factum. The only additional material filed beyond that which informed the Initial Order

was the Receiver's First Report. In another brief endorsement, the application judge granted the order sought.

[35] As I shall explain later, it is at this point that the receivership truly began to embark on its impermissible voyage. The expanded order was sought on the premise that "[t]he Receivership concerns a tax scheme...described by Canada Revenue Agency", as set out in the excerpt from Ms. Carswell's affidavit, set out above. Based on CRA's documents, the "scheme" was described as involving 3,815 "victims", and the list of "Alleged Offenders" in Ms. Carswell's affidavit became the expanded target list outlined above.

June 28, 2013

[36] Still, the Receiver was not content.

[37] Four days later, on June 28, the matter was back before the application judge, again *ex parte* with no notice of motion or application, no further evidence and no factum. This time, there was not even an additional Receiver's Report. The Receiver sought a further expansion of its powers, authorizing it, amongst other things, to examine the financial account statements and related records in the hands of any financial institutions of the Debtors and IBC, as well as the others on the expanded target list. The enlarged authority was granted. In another brief endorsement the application judge stated that "[h]aving heard from

counsel [he was] satisfied the relief sought is in the circumstances [was] appropriate and so approved in terms of the draft order signed."

August 2, 2013

[38] On August 2, 2013 the Receiver obtained what can only be described as a breathtakingly broad extension of the Initial Order. Recall that the only judgment debtors of Mr. Akagi were – and are – Synergy, Smith and Prentice. The only respondents on the initial application – and the only entities made subject to the Initial Order – were Synergy and IBC. IBC is not, and never has been, a debtor of Mr. Akagi.

[39] Here is what happened leading up to August 2.

[40] On July 30, 2013, the Receiver e-mailed the application judge with a copy of its Second Report, dated that same date. On July 31, counsel for the Receiver appeared before the application judge, but there is nothing in the court file to indicate what submissions were made. On August 1, counsel for the Receiver e-mailed the application judge again, attaching a draft order that would become the August 2 Order. In the e-mail, counsel offered to make themselves available if the judge "would like a call to discuss the draft order." There is no record of any such discussion. On August 2, the application judge sent an e-mail to counsel for the Receiver, stating: "I hereby authorize the attached order to issue." No reasons were provided.

[41] Again, this order was sought and obtained *ex parte*, without any formal notice of motion or application, and without any evidence other than the filing of the Receiver's Second Report.

[42] The Second Report summarized the results of the Receiver's investigations after serving the June 24 and June 28 "Disclosure Orders" on various financial institutions. The information received included bank statements of a large number of individuals and corporations named in the earlier orders or in some way associated or affiliated with them. The Receiver's conclusion was "that the alleged offenders have set up a complex matrix of companies and bank accounts". It also identified certain properties said to be associated with the appellant Chaudhary and others, and certain information obtained from the appellants Smith and Prentice at their examinations in aid of execution held on July 26, 2013.

[43] What makes the reach of the August 2 Order breathtakingly broad is the following:

- It extended the Receiver's powers to include and apply to: a list of 43 additional individuals and entities identified in Schedule "A" to the Order; any affiliates of those individuals or entities (as defined in the *Ontario Business Corporations Act* ("OBCA")); any corporations or other entities directly or indirectly controlled by the individuals listed or of which they

were directors or officers; any corporation in respect of which the listed individuals were entitled to conduct financial transactions; and finally, any entity with a registered head office at the premises occupied by Synergy and IBC.

- The Schedule "A" list was inaccurately defined as comprising "Additional Debtors". Of those on the list, only Synergy, Smith and Prentice were debtors to Mr. Akagi.
- The Order contained sweeping injunctive provisions – operating on a worldwide scale – enjoining all of the 45 listed individuals and entities from dealing with their assets, property or undertakings, wherever located, in any way, and freezing their accounts by enjoining any financial institution served with the order from "disbursing, transferring or dealing with any funds or assets deposited in all [their] accounts".
- The Order authorized the Receiver to register certificates of pending litigation against the properties of not only the Debtors and IBC, but the 41 "Additional Debtors" listed in Schedule "A", despite no action or application having been commenced seeking such relief.[2] The Court's attention was not drawn to *s.* 103 of the *Courts of Justice Act*, which requires the

[2] The Receiver now concedes that an error was made in granting this authorization, but argues that the lands should remain encumbered in some other fashion.

commencement of an action claiming an interest in land as a condition to issuing a certificate of pending litigation.

- Not only did the Order freeze the accounts of the Debtors and the "Additional Debtors", it granted the Receiver a $500,000 borrowing charge against the frozen funds to fund the Receiver's activities.

[44] All of this evolved out of a receivership that could only have been granted in aid of execution of Mr. Akagi's outstanding judgment of, at most, approximately $122,000, against the three judgment Debtors – Synergy, Smith and Prentice. As noted above, Smith and Prentice were not even subject to the Initial Order, nor were they examined in aid of execution until July 26, 2013, more than a month *after* the Initial Order was made. Nor was there any evidence before the application judge on the initial application – or thereafter for that matter – indicating that Mr. Akagi had taken any steps to enforce his judgment or that his recovery was likely to be in any jeopardy. As far as the record shows, none of the Debtors or "Additional Debtors" is insolvent.

[45] I shall refer to the *ex parte* Orders of June 24, June 28 and August 2, 2013, as the "Subsequent Orders".

The September 16, 2013 "Come-back Hearing"

[46] Sometime after the August 2 Order was granted, the various appellants were notified of the Initial and Subsequent Orders. On August 14, 2013, they

applied to the application judge to have the orders set aside. On September 16, 2013, their requests were dealt with by way of a "come-back hearing", and dismissed for written reasons delivered that day. I shall refer to this Order as the "Come-Back Hearing Order".

[47] At the come-back hearing, the Receiver filed its Third, Fourth and Fifth Reports dated August 15, September 8 and September 16, 2013. Mr. Akagi filed a responding motion record, as did the appellants.

[48] The application judge dismissed the complaint that the Receiver had breached its obligations to the court and to the parties to make full disclosure, by failing to disclose the fact that the CRA had terminated its investigation several months before the application for the initial order. He was satisfied there was no lack of full disclosure. There was evidence on the June 14 application that the RCMP was investigating the matter and, while there was no specific evidence that the CRA had referred the matter to the RCMP, this was implicit in the reference to recent search warrant executions by the RCMP. The application judge concluded that there was "no suggestion that CRA [had] discontinued to pursue what is its concern, namely fraudulent activity in the sale of tax losses to investors which lacked reality."

[49] Secondly, the application judge rejected the appellants' argument that the materials filed did not satisfy the test for injunctive relief (as applied to interim

receivers) set out in *RJR-MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311, at paras. 47-48. He concluded:

> The second ground for setting aside namely, that the *RJR MacDonald* test was not met, does not in my view succeed on this material. It is conceded that there is a serious issue of fraud alleged and given the large number of investors (over 3800) of relatively small sums ($10-15,000) I conclude it was appropriate that there be an investigative Receiving Order issued. Otherwise many investors would not know of the potential fraud. The irreparable harm on the material clearly extends beyond Mr. Akagi and does extend to a great number of other investors who have not the resources to pursue to judgment as has Mr. Akagi who remains an unsatisfied judgment debtor.

[50] Thirdly, the application judge rejected the argument that the Initial and Subsequent Orders constituted execution before judgment, analogous to a *Mareva* injunction. In his view, the relief sought was simply a "freezing subject to further order in support of an ongoing investigation."

[51] Finally, after recognizing the "powerful and important intrusion" of a receivership order under s. 101 of the *Courts of Justice Act*, and acknowledging that the test for the appointment of a receiver was "comparable" to the test for interlocutory injunctive relief, the application judge concluded:

> Comparable does not mean precisely. This is a case where some 3800 investors on their own would not be able to adequately investigate the activities of their agent (Synergy) in dealing on their behalf with CRA. A Receiver under s. 101 provides an equitable remedy and in circumstances where, as here, its purpose is investigative. For that reason as in *Loblaws Brands*

> *Limited v. Thornton* (CV-09-373422) a Receiver may be appointed to investigate when other means are not available to answer the legitimate concerns of investors.

FINAL OR INTERLOCUTORY ORDER

[52] Counsel for Mr. Akagi advanced two arguments that he submits undermine this Court's jurisdiction to hear the current appeal.

[53] First, he argued that the orders under attack are interlocutory and therefore this Court does not have jurisdiction to deal with them. In the circumstances here, I disagree.

[54] The Initial Order was obtained on application. No relief was claimed other than the appointment of a receiver. There was nothing more to be disposed of once that relief was granted. In the context of the proceedings, it was not intended to be interim or interlocutory in nature pending the outcome of a proceeding involving Mr. Akagi or anyone else.

[55] Although Mr. Akagi's counsel refers to the orders as "separate receivership orders", the character of the Subsequent Orders is unclear because the Receiver did not file a notice of motion, notice of application or any formal record on any of the subsequent *ex parte* proceedings.

[56] In any event, they are subsumed in the September 16, 2013 Come-Back Hearing Order, which is a final order. It finally disposes of the receivership

issues between the parties to the Initial Order and between the Receiver and the numerous non-parties caught by the Subsequent Orders. There is no action or application in which any further rights will be determined. There will be no pleadings defining the issues and giving the appellants the opportunity to defend. This conclusion is consistent with decisions of this court, faced with similar circumstances, holding that a receivership order obtained by way of application is a final order from which an appeal lies directly to this Court: see e.g., *Illidge (Trustee of) v. St. James Securities* (2002), 60 O.R. (3d) 155 (C.A.); *Ontario v. Shehrazad Non Profit Housing Inc.*, 2007 ONCA 267, 85 O.R. (3d) 81.

[57] Secondly, counsel for Mr. Akagi argued that a direct appeal to this court from the Initial and Subsequent Orders is inappropriate because the *Rules of Civil Procedure* provide for the steps to be taken to set aside an *ex parte* order. Again, I disagree. This argument overlooks the fact that the come-back hearing effectively provided that very procedure.

[58] For these reasons, an appeal lies to this Court from the Come-Back Hearing Order.

DISCUSSION AND ANALYSIS

[59] It will be apparent from the foregoing narration that, in my view, the receivership orders must be set aside. They stand on a fundamentally flawed premise and are unjustifiably overreaching in the powers they grant.

Procedurally, they call for at least a word of caution as well, although it is not necessary to dispose of the appeal on this basis in view of the more substantive issues raised by the orders. The procedural concerns arise out of the *ex parte* nature of this developing set of extraordinary orders, the somewhat casual manner in which they were processed, and the failure to make full disclosure.

[60] I will return momentarily to these issues, and to the particulars of this case. First, however, it may be useful (i) to revisit the framework of this proceeding, and (ii) to comment briefly on the relatively new notion of an "investigative receiver" – so named for the powers the receiver is granted – as it begins to stride across the commercial law landscape.

The Framework of This Proceeding

[61] The Initial Order and Subsequent Orders were sought and obtained by relying on s. 101 of the *Courts of Justice Act*. Mr. Akagi is an unsecured judgment creditor with a judgment based on fraud.

[62] This is not the case of a secured creditor requesting the appointment of a receiver under its security instrument by court order rather than by private appointment. Nor is it a case involving the appointment of a receiver under insolvency legislation, such as the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), or under the *Securities Act*, R.S.O. 1990, c. S.5 (where the court has the power to appoint a receiver to protect investors in certain circumstances).

As noted earlier, it is not a class proceeding or other form of representative action.

[63] This is a case where a judgment creditor seeks to use an unsatisfied judgment as an entrée to obtain a receivership in order to freeze the assets and investigate the affairs of not only the debtors, but also of a complex mix of related and not-so related entities and individuals. And to do so not to protect his own interests, but those of some 3800 other investors who may have been victims of a similar fraud, but who have not sought to assert a similar claim.

[64] This is made clear in the initial notice of application, both in the outline of the factual grounds for the receivership and in the summary of why Mr. Akagi said it was in the interests of justice that the Receiver be appointed. Ground 10 in the notice of application states:

> It is in the interests of justice that a Receiver be appointed over Synergy and IBC:
>
> (a) Judicial process will ensure that an independent court officer will control the process and address competing claims.
>
> (b) The Court appointed Receiver can investigate and work with authorities to locate and realize upon assets for the benefit of all creditors.
>
> (c) The complex business structure would make litigation by individuals untenable. The Court appointed Receiver can deal with such complexities on behalf of all victims.

> (d) The Court appointed Receiver can prevent further wasting of assets and help to preserve assets for the benefit of all victims/creditors.

"Investigative" or "Investigatory" Receiverships

[65] The idea of appointing a receiver or monitor with investigative powers – and sometimes, with only those powers – has emerged in recent years. This Court has not previously been asked to consider whether, or in what circumstances, a s. 101 receiver may be empowered in this fashion. For the purposes of this appeal, it is not necessary that the contours of such an appointment be traced in a detailed manner. Suffice it to say that the idea of appointing a receiver to investigate into the affairs of a debtor is not itself unsound. Rather, it is the runaway nature of the use to which the concept has been put in this case that gives rise to the problem.

[66] Indeed, whether it is labelled an "investigative" receivership or not, there is much to be said in favour of such a tool, in my view – when it is utilized in appropriate circumstances and with appropriate restraints. Clearly, there are situations where the appointment of a receiver to investigate the affairs of a debtor or to review certain transactions – including even, in proper circumstances, the affairs of and transactions concerning related non-parties – will be a proper exercise of the court's "just and convenient" authority under s. 101 of the *Courts of Justice Act*. See, for example, *Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1376 (Gen. Div.), aff'd [1995] O.J. No. 1949

(Div.Ct.); *Udayan Pandya v. Courtney Wallis Simpson* (17 November 2005), Toronto, 05-CL-6159 (S.C.); *Century Services Inc. v. New World Engineering Corp.* (28 July 2006), Toronto, 06-CL-6558 (S.C.); *Loblaw Brands Ltd. v. Thornton*, [2009] O.J. No. 1228 (S.C.); *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living*, 2011 ONSC 4136 (S.C.), aff'd 2011 ONSC 4704 (Div. Ct.); *DeGroote v. DC Entertainment Corp.*, 2013 ONSC 7101; *East Guardian SPC v. Mazur*, 2014 ONSC 6403; *236523 Ontario Inc. v. Nowack*, 2013 ONSC 7479 (relief denied); *Romspen Investment Corp. Hargate Properties Inc.*, 2011 ABQB 759.

[67] It goes without saying that the root principles governing the appointment of any receiver remain in play in this context, however, and in this respect, two "bookend" considerations, are particularly germane. On the one hand, the authority of the court to appoint a receiver under s. 101 of the *Courts of Justice Act* "where it appears...just or convenient to do so" is undoubtedly broad and must be shaped by the circumstances of individual cases. At the same time, however, the appointment of a receiver is an extraordinary and intrusive remedy and one that should be granted only after a careful balancing of the effect of such an order on all of the parties and others who may be affected by the order. In the case of a receivership in aid of execution, at least, the appointment requires evidence that the creditor's right to recovery is in serious jeopardy. It is the

tension between these two considerations that defines the parameters of receivership orders in aid of execution.

[68] A review of some of the authorities referred to above will illustrate how these tensions have been resolved in the particular context of a receivership clothed with investigative powers.

Stroh v. Millers Cove Resources Inc.

[69] The first is *Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1376 (Gen. Div.), aff'd [1995] O.J. No. 1949 (Div.Ct.). Because it involved an oppression remedy claim, the appointment of an inspector under the *OBCA* was an available option.[3] Justice Farley appointed a receiver to take control of the assets of a company and to investigate and conduct an independent review of certain self-dealing transactions by the company's majority shareholder, of which the company's directors were unaware. In affirming his decision, the Divisional Court

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[3] Legislation governing the affairs of corporations provides for the appointment of an "an inspector" to carry out "an investigation" into the business and affairs of a corporation or its affiliates: see the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"), ss. 229-230; the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA"), s. 161. In general, this relief is available at the instance of a shareholder where it is apparent that the corporation's books and records are not properly kept or are inaccurate, or where there has been some deceit or oppressive conduct practiced against the shareholders: *Re Baker and Paddock Inn Peterborough Ltd.* (1977), 16 O.R. (2d) 38 (H.C.), at p. 39. Its purpose is to ensure that a corporation discharges its core obligation to provide shareholders with an accurate picture of its financial position: *Pandora Select Partners, LP. v. Strategy Real Estate Investments*, [2007] O.J. No. 993 (S.C.), at para. 13. The court has broad powers to make any order it thinks fit, but, in particular, is empowered to appoint an inspector to conduct an investigation and to authorize the inspector to enter any premises in which the court is satisfied there might be relevant information, to examine anything and to make copies of any document or record found on the premises, and to require any persons to produce documents or records to the inspector. While this case does not concern this corporate statutory framework, the notion of a receiver with investigative powers appears to have been born in that context. Nothing in these reasons is meant to suggest that an investigative receiver is intended to supplant the appointment of an inspector under the relevant legislation.

underlined that "the main thrust" of the order was to ensure that the company's assets and arrangements "[could] be fully examined and considered so that future actions [could] then be planned": para. 7.

[70] It is important to note that in *Stroh* the defendant corporation was not an operating company and that Farley J. only granted the receivership remedy after giving counsel the opportunity to re-attend before him and make further submissions about whether the officer to be appointed should be a receiver/manager, a monitor, an inspector or something else. He ultimately concluded that the only way the investigation stood any chance of success (because of the secrecy of the majority shareholder and the power it exercised) was to appoint a receiver with the authority he granted.

[71] In other words, Farley J. carefully fashioned the remedy to meet the needs of the oppression remedy claimants in the proceeding.

Udayan Pandya v. Courtney Wallis Simpson and Century Services v. New World Engineering Corporation

[72] A decade later, Ground J. made a similar order in *Udayan Pandya v. Courtney Wallis Simpson* (17 November 2005), Toronto, 05-CL-6159 (S.C.), as did Morawetz J. in *Century Services Inc. v. New World Engineering Corporation* (28 July 2006), Toronto, 06-CL-6558 (S.C.). Both cases involved the appointment of a receiver for the primary purpose of monitoring and investigating the assets and affairs of defendants.

[73] As Morawetz J. reasoned in *Century Services,* the appointment of a receiver was "necessary to monitor the affairs of the defendants so that a more fulsome investigation [could] be undertaken." No power was given to seize or freeze assets and the order was very specific that the receiver "shall not operate or unduly interfere with the business of the corporate defendants."

[74] In short, the focus was on investigating the affairs of *the defendants* in order to protect the rights of *the plaintiff.* That is, the relief granted was carefully designed to meet the needs of the particular proceeding itself (unlike here, where the investigative receivership reached numerous non-party "alleged offenders" unrelated to the underlying proceedings to protect the interests of thousands of unrelated, non-party "victims").

Loblaw Brands Ltd. v. Thornton and General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living

[75] It appears to have been D.M. Brown J. (as he then was) who adopted the terminology of an "investigative" or, as he called it, an "investigatory" receiver. As far as I can determine from the Canadian, American, British and other common law jurisprudence, his decisions in *Loblaw Brands Ltd. v. Thornton*, [2009] O.J. No. 1228 (S.C.), and *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living*, 2011 ONSC 4136 (S.C.), aff'd 2011 ONSC 4704 (Div. Ct.), are the first to have recognized such a receiver as, in effect, a

specific class of receiver. Neither of these authorities assists the respondent in justifying the receivership as it evolved here, however.

[76] *Loblaw Brands* – a decision upon which the application judge relied – is not this case at all. It involved a fraud perpetrated against Loblaw by an employee (Thornton) who diverted about $4.2 million in supplier rebate payments from Loblaw to his own company (IBL).

[77] Prior to the appointment of the "investigatory receiver", Brown J. had granted a *Norwich Pharmacal*[4] order followed by a *Mareva* injunction against the assets of Thornton and IBL. Based on the investigation following those orders, Loblaw learned that IBL's bank account contained less than $44,000 and Thornton's less than $6,000. On the other hand, the accounts revealed outgoing transfers of over $900,000 for payments to various car dealerships, the purchase of a cottage, mortgage payments, home improvements and cash transfers to Thornton's son.

[78] Based on these facts, Brown J. appointed a receiver "to locate, investigate, and monitor" the property of Thornton and IBL and "to secure access for the Receiver to such books, record, documents and information the Receiver considers necessary to conduct an investigation of transfers of funds by or from

[4] That is, an order providing for discovery of a non-party prior to trial.

Paul Thornton or IBL, or their banks or trust accounts, to the other defendants or other persons": para. 17.

[79] In one sense, this was quite a broad order. However, *Loblaw Brands* is markedly different from the present case in a number of ways.

[80] First, the *Loblaw* receivership was grounded in necessity in relation to the collection of the defrauded funds by the claimant Loblaw: given the huge disparity between the amount of money diverted from Loblaw to IBL ($4.2 million) and the value of Thornton and IBL's known assets (approximately $50,000), Brown J. concluded that "without the appointment of a receiver the plaintiff's right to recovery could be seriously jeopardized": para. 16. These circumstances do not apply here. Mr. Akagi is owed approximately $122,000. There is no evidence of any dramatic disparity between the assets of Synergy, Smith and Prentice (much less IBC) and the amount of the outstanding judgment. Nor is there any evidence that Mr. Akagi's right to recover on the judgment is in jeopardy.

[81] Secondly, the *Loblaw* receivership was very carefully tailored to preserve Loblaw's right to recover without providing the Receiver with overreaching powers to interfere with the rights of others. The *Loblaw* Receiver's mandate was "to locate, investigate and monitor" (para. 17); it was not empowered to seize and freeze, as was the Receiver here. Nor were the targeted individuals and entities whose assets were encumbered and affairs interfered with anywhere

nearly as wide-spread or tangentially associated with the parties to the proceeding as is the case here.

[82] Finally, the *Loblaw* receivership was also very carefully crafted to protect the interests of Loblaw alone. Here, however, the receivership is more concerned – if not entirely concerned – with protecting the interests of the 3800 other investors who are said to have been defrauded in the tax allocation scheme. The assets being chased in this receivership are not those needed to protect Mr. Akagi's interests at all; they relate to the interests of those 3800 unrelated, non-party individuals who may or may not find themselves in the same situation as Mr. Akagi.

[83] Nor does Brown J.'s decision in *General Electric* – a bankruptcy proceeding – provide a basis for justifying the orders here.

[84] *General Electric* involved four bankrupt companies and two related non-bankrupt companies that were part of a group of companies called the Liberty Group. The Liberty Group owned and operated a number of retirement homes. Prior to their bankruptcies, the four bankrupt companies defaulted on their secured obligations to General Electric. The Receiver subsequently assigned the companies into bankruptcy and became the trustee in bankruptcy under the BIA.

[85] In the course of the bankruptcy proceeding, it became apparent that, during the bankrupt companies' period of insolvency, there had been a series of

intercompany payments from them to the two related but solvent corporations under the Liberty Group umbrella: Liberty Assisted Living Inc. ("Liberty") and 729285 Ontario Limited ("729285"). Liberty had been the manager of the retirement homes and 729285 was a shareholder of the company that held all of the shares of the bankrupt companies. In addition, three retirement residences had been sold in the face of court orders prohibiting such sales.

[86] The trustee tried to obtain financial information regarding these transactions from the bankrupt companies and from Liberty and 729285. In spite of court orders requiring disclosure of the information and requiring the companies' officers to attend for examinations under s. 163 of the BIA, the information was either not provided or, if provided, was inconsistent, unreliable and misleading. Faced with this stonewalling, the trustee sought the appointment of an "investigative receiver" to investigate the affairs of Liberty and 729285.

[87] Justice Brown granted the order with respect to 729285, but declined to do so with respect to Liberty. He concluded there was a strong case that the bankrupt companies had made preference payments to 729285 while insolvent. Because the companies had provided unreliable and inconsistent information on their s. 163 examinations and had compounded that problem by making misrepresentations to the court about the true state of the transferred proceeds, he was satisfied, at para. 103, that:

> Those factors point[ed] to the need to allow an independent third party (a) to look into the transactions which took place between the Bankrupt Companies and 729285, (b) to ascertain the true state of 729185's interest in any of the [funds] – whether they were in trust for others or whether the company enjoyed a beneficial interest in them – and, (c) to figure out the true state of the affairs regarding those to whom the [funds] were paid.

[88] With respect to Liberty, however, Brown declined to grant such an order. Since Liberty had managed the bankrupt companies, there were contract-based reasons for payments to and from the companies and there was no evidence that the proffered explanations were unreliable.

[89] Again, then, *General Electric* is a case where the investigative powers granted to the Receiver were carefully weighed and carefully tailored to protect the rights of the applicant in relation to the affairs of companies closely related to the bankrupt companies.

[90] Some consistent themes emerge from these authorities:

- The appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to recovery: *Loblaw Brands*, at paras. 10, 14 and 16.
- The primary objective of investigative receivers is to gather information and "ascertain the true state of affairs" concerning the financial dealings and assets of a debtor, or of a debtor and a related network of individuals or corporations: *General Electric* (Div. Ct.), at para. 15. One authority

characterized the investigative receiver as a tool to equalize the "informational imbalance" between debtors and creditors with respect to the debtor's financial dealings: *East Guardian SPC v. Mazur*, 2014 ONSC 6403, at para. 75.

- Generally, the investigative receiver does not control the debtor's assets or operate its business, leaving the debtor to continue to carry on its business in a manner consistent with the preservation of its business and property: see e.g., *Loblaw Brands*, at para. 17; *Century Services*.
- Finally, in all cases the investigative receivership must be carefully tailored to what is required to assist in the recovery of the claimant's judgment while at the same time protecting the defendant's interests, and to go no further than necessary to achieve these ends.

[91] An additional theme that is reflected in the authorities relates to the application of the three-part test set out by the Supreme Court of Canada in *RJR-MacDonald*, at paras. 47-48. The *RJR-MacDonald* test requires the applicant to demonstrate: (i) that there is a serious issue to be tried;[5] (ii) that the creditor will suffer irreparable harm if the relief is not granted; and (iii) that the balance of convenience favours the creditor. The test is often applied where the receivership

[5] It is not necessary to comment here on the debate in the authorities as to whether it is necessary for a creditor seeking the appointment of an investigative receiver to demonstrate fraud. It is accepted in this case that there has been fraud; Mr. Akagi's judgment is based on that finding.

order is purely interlocutory and ancillary to the pursuit of other relief claimed – where it is, in effect, execution before judgment.

[92] Although the application judge applied the test at the time of the Comeback Hearing – concluding that it had been met here – I need not dwell on whether that was so, or on the role of *RJR-MacDonald* in the receivership context generally, for the purposes of this appeal. The Initial Order, Subsequent Orders, and Come-Back Hearing Order must be set aside in any event, in my view, for the reasons that follow.

The Investigative Receivership in This Case

[93] In spite of the positive features of investigative receivers, as set out above, there are risks as well. This appeal provides a case in point. The Receiver, in particular, took a useful concept and ran too far with it. In addition, a number of procedural safeguards were at least obscured in the dust of the chase.

The Procedural Issues

[94] Because of the substantive frailties undermining the receivership, it is not necessary to determine this appeal based on the procedural issues raised.[6] It bears noting, however, that if the matter had not proceeded through the numerous steps on an *ex parte* basis, as it did, it would have been less likely to have gone astray, as it did. The same may be said of the somewhat relaxed

[6] I will deal with the issues surrounding the authorization of certificates of pending litigation separately.

procedural approach taken to the proceedings. Had the normally salutary processes of the Commercial List – carefully designed to permit the parties to get to the merits of a dispute and resolve them in "real time" without trampling their procedural rights – not been permitted to become overly casual, as they did, the galloping nature of the receivership may well have been reined in.

[95] *Ex parte* proceedings are to be taken sparingly, and only then on full disclosure and in circumstances where it is demonstrated that notice to other parties would undermine the purpose of the proceeding. As Penny J. noted recently in *Re CanaSea PetroGas Group Holdings Ltd.*, 2014 ONSC 6116, at para. 28, applicants are under "high obligations of candor and disclosure on an *ex parte* application."

[96] At best, the steps taken in pursuit of the orders here sailed very close to this line. There is a reason for requiring a proper record of steps taken, including a notice of motion or application, a motion or application record, a proper evidentiary foundation and adequate judicial reasons: it is otherwise impossible to determine subsequently what was at issue and the basis for the order made. This is particularly so where the relief sought involves the extraordinary, *Mareva*-like nature of a receivership order, much less a receivership order of the sweep that emerged from these proceedings.

[97] Beyond the Receiver's failure to prepare any of the above-listed documents, the appellants place considerable emphasis on the Receiver's failure to disclose, during the *ex parte* steps in the proceeding, that the CRA had discontinued its investigation – on the particulars of which the applicant relied – in February 2013, several months before the initial receivership application was made. It was not until almost two weeks *after* the August 2 Order that the termination of the CRA investigation was first brought to the Court's attention, and even then, it was raised indirectly: in its Third Report, dated August 15, 2013, the Receiver confirmed that the CRA had referred its investigation to the RCMP.

[98] There was some indication in the materials filed when the Initial Order was sought, however, that the RCMP was also investigating the matter. Based on this – despite the absence of evidence that the CRA had referred the matter to the RCMP or that the CRA had itself discontinued its investigation – the application judge "was satisfied there was no lack of full disclosure."

[99] The application judge was well-positioned to determine whether he had been misled by any material non-disclosure, and his decision in that regard is entitled to deference. That said, in my view, the failure to disclose that the very investigation upon which the *ex parte* receivership application was founded had been discontinued, at the very least, sailed close to the line of failing to make full and fair disclosure.

The Substantive Issues

The "Roving Receivership"

[100] The fundamental flaw underlying the Initial and Subsequent Orders is the faulty premise that the Receiver could be appointed in these circumstances to carry out a broad, stand-alone, investigative inquiry – the civil equivalent of a criminal investigation or public inquiry – for the purposes of determining whether wrongs were suffered by an unidentified hodgepodge of non-party persons who were not represented by anyone in the proceedings, who had expressed no interest in becoming parties or in having their rights protected in the proceedings, and whose interests did not need to be protected to preserve the interests of the appointing creditor. This flawed premise is compounded by the overreaching nature of the relief granted, namely, the authority to both: (i) investigate, without notice, the private financial affairs of a myriad of targets only indirectly, if at all, related to the defendants, as well as further potential targets far beyond the actual debtors and the need to protect Mr. Akagi's interests; and (ii) tie up and freeze the assets and property of those targets, again without notice, pending the termination of the receivership.

[101] Mr. Akagi sought the appointment of a receiver because he had an unsatisfied judgment against Synergy, Smith and Prentice for approximately $122,000. The purpose of appointing a receiver in aid of execution under s. 101 of the *Courts of Justice Act* is to protect the interests of the claimant seeking the

order where there is a real risk that its recovery would otherwise be in "serious jeopardy": *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd (Trustee of)*, [1987] O.J. No. 2315 (H.C.), at para 6.

[102] Put simply, the reach of the Subsequent Orders granting the Receiver enhanced powers is beyond the scope of what could be justified in a single-creditor receivership involving an outstanding claim of, at most, perhaps $122,000. To the extent the Initial Order was granted for the same roving purpose – as the Receiver submits it was – that Order must also be vacated.

[103] That the receivership was intended from the beginning to be – and certainly became – an investigation of the affairs of those involved in the broad tax scheme (and of others even beyond that) on behalf of 3800 non-party investors is apparent from both the position taken by the Receiver and the application judge's following comment from his September 16 reasons:

> This is a case where some 3800 investors on their own would not be able to adequately investigate the activities of their agent (Synergy) in dealing on their behalf with CRA. A Receiver under s. 101 provides an equitable remedy and in circumstances where, as here, its purpose is investigative. For that reason as in *Loblaw Brands Limited v. Thornton* (CV-09-373422) a Receiver may be appointed to investigate when other means are not available to answer legitimate concerns of investors.

[104] As explained above, *Loblaw Brands* is distinguishable from the present case. While I agree that s. 101 provides an equitable remedy for the appointment of an investigative receiver in appropriate circumstances, the type of

receivership envisaged and put into place by the application judge goes beyond what is authorized by that provision.

The Initial Order of June 14, 2013

[105] Even if the Initial Order was not granted for the "roving" purpose discussed above, but only to aid the execution of Mr. Akagi's judgment (the only legal or equitable basis upon which it could have been granted pursuant to s. 101 of the *Courts of Justice Act*), it must still be set aside.

[106] It is true that the judgment against Synergy, Smith and Prentice was based on fraud. However, this is insufficient, by itself, to support such an order, in my view. In this context, Mr. Akagi is a judgment creditor. He was required to show that a receivership order freezing and otherwise interfering with the debtors' assets – and, in this case, not only the debtors' assets but the assets of others as well – was needed to protect his ability to recover on the debt.

[107] However, the record reflects no evidence of any attempt by Mr. Akagi to collect on the judgment in any fashion other than to apply for the appointment of the Receiver. Nor was there any evidence that Synergy or the other defendants had insufficient assets to satisfy the judgment, much less that it was necessary to reach the assets of IBC (which was not a party to the Akagi action) in order to protect Mr. Akagi's interests. Finally, with respect to the *ex parte* nature of the application, there was no evidence of urgency or of any reason to believe that, if

given notice, Synergy or IBC (or Smith or Prentice, for that matter) would take steps to frustrate the legal process or undermine Mr. Akagi's prospects of recovery.

[108] The Initial Order must be set aside on this basis as well.

The Certificates of Pending Litigation

[109] The final Subsequent Order, granted *ex parte* on August 2, 2013, authorized the Receiver to register certificates of pending litigation not only against the property of Synergy and IBC (the original targets of the receivership application) but also against the property of the 43 "Additional Debtors" sought to be added to the receivership, only two of which were debtors to the underlying Akagi action.

[110] There are at least two problems with this aspect of the Order.

[111] First, no action or application has been commenced by Mr. Akagi, or anyone else, asserting a claim to an interest in land or requesting a certificate of pending litigation. Pursuant to s. 103 of the *Courts of Justice Act* and rule 42.01(2), these requirements are mandatory before an order authorizing the issuance of a certificate of pending litigation can be made: *Chilian v. Augdome Corp.* (1991), 78 D.L.R. (4th) 129, 2 O.R. (3d) 696 (C.A.), at p. 714; *Re Erdman*, 2012 ONSC 3268, at para. 65. Nor was it asserted before this Court that Mr. Akagi, or anyone else, intended to commence such an action.

[112] Secondly, there is no indication that either Mr. Akagi's claim or the claims sought to be protected on behalf of the 3800 unnamed investors give rise to any claims to an interest in land. The thrust of the claim is that they were all victims of a fraudulent tax allocation scheme, not a fraudulent land investment scheme. While there may be other ways of immobilizing the lands of targeted entities – such as the "freezing" orders otherwise attacked in these proceedings – a certificate of pending litigation cannot be issued in the air against unknown and undescribed lands regarding which no claim is, or could be, asserted.

[113] For these reasons, the August 12 Order authorizing the issuance of certificates of pending litigation must be set aside.

DISPOSITION

[114] For the foregoing reasons, I would set aside the Initial Order dated June 24, 2013, the Subsequent Orders dated June 24, 2013, June 28, 2013 and August 2, 2013, and the Come-Back Hearing Order dated September 16, 2013.

[115] If the parties cannot agree on costs, they may make brief written submissions, not to exceed 8 pages in length, within 30 days of the release of these reasons.

Released: "R.A.B." May 22, 2015

"R.A. Blair J.A."
"I agree Janet Simmons J.A."
"I agree R.G. Juriansz J.A."