# ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

BETWEEN:

#### CANADIAN IMPERIAL BANK OF COMMERCE

**Applicant** 

- and -

# URBANCORP (LESLIEVILLE) DEVELOPMENTS INC., URBANCORP (RIVERDALE) DEVELOPMENTS INC., & URBANCORP (THE BEACH) DEVELOPMENTS INC.,

Respondents

APPLICATION UNDER section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, section 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30, and under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43

# **BOOK OF AUTHORITIES OF THE CERTAIN CURZON PURCHASERS**

June 6, 2019

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# Gemterra Developments Corp. v. Toronto (City), [2017] O.J. No. 1378

**Ontario Judgments** 

Ontario Superior Court of Justice

P.M. Perell J.

Heard: March 2, 2017.

Judgment: March 20, 2017.

Court File No.: CV-15-534507

[2017] O.J. No. 1378 | 2017 ONSC 1776 | 2017 CarswellOnt 3846 | 277 A.C.W.S. (3d) 414 | 66 M.P.L.R. (5th) 102

Between Gemterra Developments Corporation, Applicant, and City of Toronto, Respondent

(72 paras.)

# **Case Summary**

Municipal law — Planning and development — Development charges and levies --Phased developments — Application by Gemterra Developments Corporation ("Gemterra") for repayment of \$408,400 for overpayment of park levies imposed under City of Toronto's ("City") Park Levy By-law dismissed — Gemterra owned 1.3 hectare-sized property in Toronto upon which it built apartments, townhouses, and amenities building — Gemterra developed property in two phases — Gemterra was obliged to pay park levies — For developments larger than 1 hectares, levy rate was 15 percent, which was what City charged Gemterra for both Phases 1 and 2 — For smaller development sites, levy rate was 10 percent — There never was more than one development site — Planning Act, s. 42.

Application by Gemterra Developments Corporation ("Gemterra") for repayment of \$408,400 for an overpayment of park levies imposed under the City of Toronto's (the "City") Park Levy By-law. Gemterra owned a 1.3 hectare-sized property in Toronto upon which it built apartments, townhouses, and an amenities building. Gemterra developed the property in two phases. Gemterra was obliged to pay park levies. For developments larger than 1.0 hectares, the levy rate was 15 percent, which was what the City charged Gemterra for both Phases 1 and 2. For smaller development sites, the levy rate was 10 percent, which was what Gemterra submitted it should have been charged for both Phases. Gemterra sought a refund with respect to the alleged overpayment for Phase 2.

HELD: Application dismissed.

The fact that separate building permits were obtained did not demarcate two development sites. The fact that different building permits were obtained for the apartment buildings and the several townhouse developments did not demarcate more than one development site. The Park Levy By-law required a fact-based determination of what was the development site in each particular case. There never was more than one development site and nothing changed by the sequencing of the construction or by the sequencing of the building permits. Other than being a factor in determining whether there was one or more than one development site, the circumstance of more than one building permit application was not determinative of what was the development site nor was it determinative of the size of the development site for which the permit or permits were granted.

# Statutes, Regulations and Rules Cited:

Building Code Act, 1992, S.O. 1992, c.23, s. 8, s. 25

Courts of Justice Act, R.S.O. 1990, c. 34,

Legislation Act, S.O. 2006, c. 21, Sched. F, s. 64(1)

Park Levy By-law, s. 42

Planning Act, <u>R.S.O. 1990, c. P.13, s. 41</u>(1), s. 42, s. 51.1

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 14

Toronto Municipal Code, s. 415, s. 492

#### Counsel

Mark Flowers and Kyle Gossen for the Applicant.

Brendan O'Callaghan and Tim Carre for the Respondent.

#### **REASONS FOR DECISION**

# P.M. PERELL J.

#### A. Introduction

- 1 In this application, Gemterra Developments Corporation ("Gemterra") sues the City of Toronto for repayment of \$408,400, which it says was an overpayment of park levies imposed under the City's Park Levy By-law. Gemterra also claims pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, *R.S.O.* 1990, c. C.43.
- **2** Gemterra owns a property near Sheppard Ave. East and Kennedy Road in the City, upon which it has built apartments, townhouses, and an amenities building. The size of the property is 1.3 hectares. Gemterra developed the property in two phases. Phase 1, which was completed in 2015, has a size of 0.74 hectares. Construction of Phase 2, which then began, has a size of 0.59 hectares.
- 3 In this application, the issue to be decided is whether the two Phases of construction constituted one or two "development sites." The number of development sites matters because Gemterra was obliged to pay park levies, and for developments larger than 1.0 hectares, the levy rate is 15%, which is what the City charged Gemterra for both Phases 1 and 2. For smaller development sites, the levy rate is 10%, which is what Gemterra submits it should have been charged for both Phases.
- 4 Gemterra brings this application for a declaration that the park levy charge should have been 10%. Because of the intervention of a limitation period, it seeks a refund only with respect to the alleged overpayment for Phase 2. It seeks a refund of \$408,400 plus pre and post-judgment interest under the *Courts of Justice Act*, R.S.O. 1990, c. 34.

5 For the reasons that follow, I dismiss Gemterra's application.

#### **B. Statutory Provisions**

- **6** The relevant statutory provisions from the *Planning Act*, <u>R.S.O. 1990, c. P.13</u> and the *Building Code Act*, 1992, <u>S.O. 1992, c.23</u> are set out in Schedule "A" to these Reasons for Decision.
- 7 The City of Toronto has a Park Levy By-law. More particular, the City enacted Article III of Chapter 415 of the *Toronto Municipal Code*, "Conveyance of Land for Park Purposes as a Condition of Development" under which it charges park levies pursuant to s. 42 of the *Planning Act*.
- 8 Section 42 of the *Planning Act* empowers a municipality, by by-law, to require a developer of land to convey a portion of lands for parks or to require the developer to require a payment in lieu of a conveyance. This payment is commonly referred to as a "park levy."
- 9 Under Toronto's Park Levy By-law, the amount of the levy is determined by applying a rate to the appraised value of the land. The By-law sets the rate for the park levy determined by the size of the "development site." For properties less than one hectare in size, the park levy rate is 10% of the appraised value of the land, whereas for properties 1 hectare to 5 hectares in size, the park levy is 15% of the appraised value of the land.
- 10 For present purposes, the relevant provisions of the Park Levy By-law (Article III of Chapter 415 of the *Toronto Municipal Code*) are set out below:

## ARTICLE III: Conveyance of Land for Park Purposes as a Condition of Development

(Adopted 2007-12-13 by By-law No. 1420-200713; amended 2010-08-27 by By-law No. 1020- 201014] s. 415-21. Definitions.

As used in this article, the following terms shall have the meanings indicated:

BUILDING PERMIT APPLICATION-An application submitted to and accepted by the Chief Building Official for an above grade building permit that complies with the applicable zoning by-law and with all technical requirements of the *Building Code Act*, 1992 including payment of all applicable fees.

#### **DEVELOPMENT**

- A. The construction, erection or placing of one or more buildings or structures on land.
- B. The making of an addition or alteration to a building or structure that has the effect of substantially increasing the size or usability of the building or structure.
- C. The redevelopment of land through the removal of one or more buildings or structures to permit such development.
- D. The laying out and establishing of a commercial parking lot.
- E. The conversion of a building or structure originally proposed for an exempted or nonresidential use, to another use.

s. 415-22. Conveyance of land for parks purposes.

As a condition of development of land the owner of the land shall convey or cause to be conveyed to the City, land for park or other public recreational purposes in the following manner:

A. For residential uses, land equal to 5 percent of the land to be developed.

- B. For non-residential uses, land equal to 2 percent of the land to be developed.
- C. Where the development of a single parcel of land is proposed for both residential uses and non-residential uses, the respective rates set out in ss. 415-22A, 415-22B and 415-23 will be allocated proportionally according to the floor space of the respective uses.

#### s. 415-23. Alternative rate.

Despite s. 415-22A, as a condition of development of land for residential use in a parkland acquisition priority area, the owner of the land shall convey or cause to be conveyed to the City, the greater of the amount set out in s. 415-22A, or land at a rate of 0.4 hectares for each 300 dwelling units proposed provided that:

- A. For sites less than one hectare in size, the parkland dedication will not exceed 10 percent of the development site, net of any conveyances for public road purposes.
- B. For sites one hectare to five hectares in size, the parkland dedication will not exceed 15 percent of the development site, net of any conveyances for public road purposes.
- C. For sites greater than five hectares in size, the parkland dedication will not exceed 20 percent of the development site, net of any conveyances for public road purposes.

#### s. 415-24. Cash-in-lieu of land dedication.

- A. Despite s. 415-22, where the size, shape or location of land proposed for parkland dedication is deemed by Council to be unsuitable for parks or public recreation purposes, Council may require payment of cash-in-lieu of land.
- B. Despite s. 415-23, where the size, shape or location of land proposed for parkland dedication in parkland acquisition priority area is deemed by Council to be unsuitable for parks or public recreation purposes, Council may require payment of cash-in-lieu of land, provided:
  - (1) that the value of the cash-in-lieu does not exceed:
    - (a) Ten percent of the value of the development site, net of any conveyances for public road purposes, for sites less than one hectare in size.
    - (b) Fifteen percent of the value of the development site, net of any conveyances for public road purposes, for sites one hectare to five hectares in size.
    - (c) Twenty percent of the value of the development site, net of any conveyances for public road purposes, for sites over five hectares in size.
  - (2) In no case, will the residential parkland dedication, cash-in-lieu or combination thereof, be less than 5 percent of the development site or the value of the development site, net of any conveyances for public road purposes.

#### s. 415-25. Cash-in-lieu; allocation.

A. Any payment of cash-in-lieu of land in accordance with s. 415-24A will be used for the acquisition of new parkland or the improvement of parks and recreational facilities in accordance with the following allocation and the cash-in-lieu allocation policy:

#### s. 415-27. Administrative authority.

...

The General Manager Parks, Forestry and Recreation is authorized to determine the specific combination of land and/or cash in lieu of land on a site specific basis in accordance with this article and the City's Official Plan policies.

s. 415-28. Timing of conveyance or payment.

## Gemterra Developments Corp. v. Toronto (City), [2017] O.J. No. 1378

The conveyance of land or payments required to be made under this article shall be made prior to the issuance of the first above-ground building permit for the land to be developed.

- s. 415-29. Valuation of land.
- A. All appraisals of land value shall be carried out under the direction of the Executive Director, Facilities and Real Estate and shall be determined in accordance with generally accepted appraisal principles.
- B. The cost of any appraisal undertaken by the City shall be paid for by the owner.
- C. The value of the land shall be determined as of the day before the day of issuance of the first building permit in respect of the development.
- D. The conveyance of land or payment of cash in lieu of land shall be taken into consideration in determining an appropriate credit with respect to the amount of money or land which may be required in connection with the further development of the subject lands:
  - (1) Where land has been conveyed to the City for park or other public recreational purposes, exclusive of highways and floodplain lands;
  - (2) Where a payment of cash in lieu of such conveyance has been received by the City in accordance with this article; (3) Pursuant to the provisions of sections 42, 51.1 or 53 of the *Planning Act*.

#### C. Factual Background

- 11 In September 2010, Gemterra acquired a 1.3 hectare-sized parcel of land near the intersection of Sheppard Ave. East and Kennedy Road in the City of Toronto for the purposes of a residential construction project.
- **12** Gemterra decided to construct its project in two phases. Phase 1 has a site of 0.74 hectares in size. Phase 2, the site adjacent to the east, has a size of 0.59 hectares.
- 13 The development of Phase 1 was to be comprised of: a 20-storey 282-unit apartment building, 14 townhouse units, and an amenities building. The development of Phase 2 was to be comprised of: a 21-storey 262-unit apartment building and 20 townhouse units. Phases 1 and 2 share the amenities building constructed on Phase 1. They also share a common driveway and a common underground parking garage.
- 14 On May 5, 2011, Gemterra applied for minor variances in respect of the Phase 1 and Phase 2 sites.
- **15** On May 12, 2011, Gemterra applied for site plan approval for Phases 1 and 2. The covering letter to the application noted, however, that the City would be issuing site plan approvals for the two Phases separately.
- 16 On November 28, 2011, Gemterra applied for a zoning by-law amendment for the Phase 1 and 2 lands and for adjacent lands to the south, known as the Agincourt Mall lands. During the zoning by-law amendment process, Gemterra asked to be relieved of park levies but the City's lawyer advised that he would only support the requested amendment with a park levy based on a 15% cap. Throughout the zoning amendment process both Gemterra and the City treated Gemterra's project as a single development of a 1.3 hectare-sized site with construction to proceed in phases.
- 17 On February 3, 2012, the Ontario Municipal Board ("OMB") approved the minor variances.
- 18 On July 13, 2012, the zoning by-law amendment was approved by City Council.
- 19 On January 15, 2013, pursuant to s. 8 of the *Building Code Act*, Gemterra applied for a building permit for Phase 1.

- 20 On January 17, 2013, the City's Planning Department wrote to Gemterra advising that the City had approved the site plan for Phase 1.
- 21 In response to the Phase 1 building permit application, the City's Building Division requested the City's Real Estate Services Division to appraise Phase 1 to determine the amount of the the park levy, and GSI Real Estate & Planning Advisors Inc. was retained to prepare an appraisal. It is the practice of the City to appraise the property based on the size of the improvements. With respect to a residential apartment this means the property is appraised based on square footage of the building being constructed on the land. In other words, the size of the land itself is not a direct factor in the appraisal.
- 22 On January 21, 2013, Brian Varner, Manager, Policy & Appraisal Services in the City's Real Estate Services Division, wrote Gemterra and requested payment of \$1,104,750 for the Phase 1 park levy. The levy was calculated based on the Phase 1 area of 0.74 hectares and "an assumed total development site area" of 1.3 hectares. The levy was calculated using a 15% rate plus an appraisal fee and HST.
- 23 On January 30, 2013, the City issued a conditional building permit for Phase 1, which allowed construction to get underway. The conditional permit agreement between Gemterra and the City used the legal description for the 1.3-hectare parcel of land. Gemterra paid the \$1,104,750.00 park levy for Phase 1.
- 24 On March 12, 2013, Gemterra and the City signed a Site Plan Agreement for Phase 1.
- 25 On November 6, 2014, the City issued a final building permit for Phase 1 and construction was completed.
- **26** On December 9, 2014, Gemterra applied for a building permit for Phase 2. At the time of this second permit application, Gemterra continued to be the owner of the 1.3 hectare-sized property.
- 27 In response to the building permit application for Phase 2, the City required Gemterra to submit separate applications for each of the three municipal addresses that comprised Phase 2; namely: 195 Bonis Ave. (the apartment building); 205 Bonis Ave. (a townhouse block); and, 215 Bonis Ave. (a townhouse block).
- 28 The City's Building Division sent the City's Real Estate Services Division three separate appraisal requests for 195 Bonis Ave., 205 Bonis Ave., and 215 Bonis Ave. respectively.
- 29 On February 12, 2015, Mr. Varner wrote Gemterra and requested the payment of park levies of \$889,350 for 195 Bonis Ave., \$136,200 for 205 Bonis Ave., and \$199,650 for 215 Bonis Ave.
- **30** The Phase 2 appraisals were based on the value of the three segments of Phase 2 as of 2015, as opposed to the value as of the day before the first building permit was issued for Phase 1 on January 30, 2013. The levies were calculated using a 15% rate plus an appraisal fee and HST.
- 31 On May 26, 2015, a Condominium Plan for Phase 1 was registered in the Land Registry Office.
- **32** On July 28, 2015, the City issued a conditional building permit for Phase 2, and Gemterra paid \$1,238,163.24 on account of park levies. The payment was accompanied by a letter stating that the levies were being paid without prejudice to Gemterra's position that it overpaid by \$408,400.
- **33** On July 30, 2015, the City's Planning Department wrote to Gemterra that the City had approved the site plan for Phase 2.
- **34** On January 22, 2016, Gemterra signed a Site Plan Agreement with the City for Phase 2. The conditional permit agreement between Gemterra and the City used the legal description for the 1.3-hectare parcel of land.

35 It may be noted that the various planning approvals in the case at bar involved different sized landholdings. The zoning by-law amendment applied to Gemterra's land and the adjacent Agincourt Mall lands, which is approximately 12.4 hectares in size. The minor variances were for all of Gemterra's land but the site plan approvals were for the Phase 1 and Phase 2 lands discretely as were the building permit applications. In this regard, it may be noted that Gemterra applied for a consolidated site plan approval but the City granted the site plans separately.

#### D. Discussion and Analysis

#### 1. The City's Jurisdictional Argument

- 36 The City makes a jurisdictional argument, which I need not and will not resolve to determine this application.
- **37** As I understand the City's jurisdictional argument, the essence of it is that the application before the Court, which is made pursuant to rule 14 of the *Rules of Civil Procedure*, *R.R.O. 1990*, *Reg. 194*, for the interpretation of a by-law, should be treated as an appeal of a decision of the Chief Building Officer under s. 25 of the *Building Code Act*, which states:

#### Appeal to court

25. (1) A person who considers themself aggrieved by an order or decision made by the chief building official, a registered code agency or an inspector under this Act (except a decision under subsection 8 (3) not to issue a conditional permit) may appeal the order or decision to the Superior Court of Justice within 20 days after the order or decision is made.

#### Extension of time

- 2. A judge to whom an appeal is made may, upon such conditions as the judge considers appropriate, extend the time for making the appeal before or after the time set out in subsection (1), if the judge is satisfied that there is reasonable grounds for the appeal and for applying for the extension.
- 38 If the application is treated as an appeal under s. 25 of the *Building Code Act*, then, according to the City, as a matter of the standard of appellate review, the court is obliged to show deference to the specialized expertise of the Chief Building Officer in making the necessary mixed determinations of fact and law required to interpret and to apply the City's Park Levy By-law. The City submits, therefore, that the Chief Building Officer's decision was both reasonable and correct and, therefore, Gemterra's application should be dismissed.
- 39 Gemterra submits that s. 25 of the *Building Code Act* does not apply to the present situation because the application does not concern "an order or decision made by the chief building official, a registered code agency or an inspector," and, rather, the application simply seeks "the interpretation of a ... municipal by-law" under rule 14.05(3)(d) of the *Rules of Civil Procedure*. It submits that it is the City, not the Chief Building Officer, that interpreted its Park Levy By-law and the City's interpretation and application of the By-law was legally incorrect. In the alternative, Gemterra submits that if this application is treated as an appeal from the Chief Building Officer, the result of the appeal is the same as the outcome of the application because a reviewable error was made by the Chief Building Officer, whose decision was incorrect, and the City should be ordered to refund the overpayment for the park levies for Phase 2.
- **40** For the purposes of deciding this application, I need not resolve the jurisdictional argument. I rather assume, without deciding, that the application simply seeks an interpretation of the City's Park Levy By-law. I shall consider Gemterra's arguments about interpretation on their merits and I shall ignore the City's jurisdictional argument.

#### 2. Gemterra's Argument

41 Gemterra's substantive argument is that "development site" is not defined in the Park Levy By-law, but that term should be defined to correspond with the word "development" which is defined in the By-law to include, among

other things, "the construction, erection or placing of one or more buildings or structures on land." Gemterra submits, therefore, that the requirement to pay a park levy is triggered by the "construction, erection or placing of one or more buildings or structures on land," which, in turn, is triggered by the issuance of a building permit.

- 42 Gemterra observes that none of the other development approvals; i.e., official plans, zoning by-laws, minor variances, subdivisions, site plans, etc., actually allow construction, but a building permit allows a site to be constructed with one or more buildings, and, thus, the idea of a development site must be connected to the building permit process. Therefore, Gemterra submits that it is the size of the land for which a building permit is issued that determines the size of the development site.
- 43 Gemterra submits that this interpretation is confirmed by the provisions of the Park Levy By-law that address the appraisal of the land for the development site. With respect to cash-in-lieu payments under the By-law, the word "value" is used specifically in reference to the "development site," and the By-law states that "the value of the land shall be determined as of the day before the day of issuance of the first building permit in respect of the development." Thus, Gemterra submits that the "first building permit in respect of the development" defines the "development site", as opposed to some other site, and the City must determine the value of the entire "development site" as of the day before it issues the first building permit in respect of the development on that development site.
- 44 Gemterra submits that its interpretation of the By-law is consistent with some but not all of the conduct of the City in interpreting and applying its Park Levy By-law. Gemterra notes that the City charges the park levy when a building permit is issued and it appraises the land as of the date of the issuance of the building permit, which is what the City did for Phases 1 and 2. This conduct is consistent with the idea that the building permit defines what a development site is. Gemterra notes, however, that proceeding as it did, which was to treat the two Phases as separate development sites for the purposes of the issuance of the building permit and for the purposes of appraising the land, the City breached its obligation to have the land appraised as of the time of the issuance of the first building permit. In other words, if the City viewed the Phase 1 and Phase 2 Development Sites as a single "development site," it was required, by the Park Levy By-law, to determine the value of both the Phase 1 and the Phase 2 lands as of January 29, 2013, when the first building permit was issued for the development site.
- **45** Gemterra submits that if the City had intended that the term "development site" was not to encompass phases, it could have easily stated this in the Park Levy By-law. For example, the City could have used language similar to that found in s. 492-2 of Chapter 492 of the City's *Municipal Code*, which concerns green roofs:
  - ... no person shall construct a green roof or cause a green roof to be constructed unless a permit therefor has been issued by the Chief Building Official. Notwithstanding the foregoing, where a development consists of two or more buildings under a Complete Site Plan Application and the buildings are to be constructed on a phased basis, the first phase of the development shall comply with the Green Roof requirements of this chapter for the building permit being issued and any Green Roof area provided in excess of the minimum Green Roof area required may be applied to subsequent phases of the development.
- **46** Relying on *L.D.C.M. Investments Ltd. v. Newcastle (Town)*, 1975 CarswellOnt 392 (Div. Ct.) at para. 33; Thunder Bay (City) v. Potts, 1982 CarswellOnt 820 (H.C.J.) at paras. 21-22; Seguin (Township) v. Grin, 2004 CarswellOnt 2895 (S.C.J.) at para. 36, rev'd on other grounds 2005 CarswellOnt 1459 (C.A.), Gemterra submits that where the provisions of a by-law "are of doubtful meaning in their application to the lands in question, that doubt must be resolved in favour of the owner."
- 47 Further noting that a park levy is a form of tax, relying on OMERS Realty Management Corp. v. Peel (Regional Municipality), 2000 CarswellOnt 3138 (S.C.J.) at para. 41, aff'd 2001 CarswellOnt 2503 (C.A.); Ontario Cancer Treatment & Research Foundation v. Ottawa (City), 1998 CarswellOnt 495 (C.A.) at para. 96; Ontario Property Assessment Corp. v. Praxair Canada Inc., 2002 CarswellOnt 75 (Div. Ct.) at para. 30; Ambler v. Municipal Property Assessment Corp., Region No. 07, 2006 CarswellOnt 3258 (S.C.J.) at para. 14, Gemterra submits that where there

is a lack of clarity in the interpretation of the provisions of a taxing statute, the statute is to be interpreted in favour of the taxpayer.

#### 3. The Principles of Statutory Interpretation

- **48** The case at bar is a case of statutory interpretation, and in this section of my Reasons for Decision, I shall set out the principles of statutory interpretation that I shall apply to the analysis below.
- 49 When a court is called upon to interpret a statute, its task is to discover the intention of the legislator as expressed in the language of the statute: *R. v. Dubois*, [1935] S.C.R. 378 at p. 381; Goldman v. The Queen, [1980] 1 S.C.R. 976. Legislation shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects: Legislation Act, S.O. 2006, c. 21, Sched. F, s. 64 (1).
- 50 The approach to interpretation is teleological or purposeful and to interpret a statute, the words of the statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute, and the intention of the legislator: Re Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27 at paras. 18-23; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559.
- 51 To interpret a statute, the court should look at the *Act* as a whole and attempt to find an interpretation that is in harmony with the entire legislative scheme including the regulations and forms: *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550 at p. 559; *Mavi v. Canada (Attorney General)* (2009), 98 O.R. (3d) 1 (C.A.) at paras. 92-96; *Re Can. Western Natural Gas Co. Ltd. and Shell Canada Resources Ltd.* (1980), 118 D.L.R. (3d) 607 (Alta. C.A.).
- 52 To interpret a statute, the court must, in every case, undertake a contextual and purposive analysis to determine whether real ambiguity exists; i.e., whether the language is reasonably capable of more than one meaning: Bell ExpressVu Limited Partnership v. Rex, supra at para. 30; York (Regional Municipality) v. Winlow (2009), 99 O.R. (3d) 337 (C.A.) at paras. 42-43.
- 53 If the words of the statute, when read in their context including the purpose and objective of the statute, are precise and unambiguous, then the words should be given their natural and ordinary sense: *Grey v. Pearson* (1857), 6 H.L.C. 61; *Sussex Peerage Case* (1844), 11 Cl. & F. 85. The court's role is to interpret the statute not enact it; if the sense of the words of the statute is clear and unambiguous, the court must interpret the words literally and in accordance with their plain meaning even if the consequences are absurd or unjust: *R. v. McIntosh*, [1995] 1 S.C.R. 686 at p. 704; *R. v. Huggins*, 2010 ONCA 746 at paras. 17-18; Victoria (City) v. Bishop of Vancouver Island, supra.
- 54 A genuine or real ambiguity in a statute means that after considering the words of the statute in their entire context, they are reasonably capable of having more than one meaning in which case the court may resort to external interpretive aids and other principles of interpretation to resolve the ambiguity: Bell ExpressVu Ltd. Partnership v. Rex, supra at paras. 28-29; Canadian Oxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743 at para. 14; Zacharias v. Zurich Insurance Co., 2013 ONCA 482 at para. 40; Westminster Bank Ltd. v. Zang, [1966] A.C. 182 at p. 222 (H.L.).
- 55 To interpret a statute, the words of the stature are interpreted in their ordinary grammatical sense unless there is something to show that the Legislature intended to use the words in a special sense: Victoria City v. Bishop of Vancouver Island (1921), 59 D.L.R. 399 (P.C.) at p. 402; Xerox of Canada Ltd. v. Regional Assessment Commissioner, Region No. 10, [1981] 2 S.C.R. 137.
- 56 The ordinary grammatical sense of a word, as understood by a competent reader, is used to interpret the word, in the absence of a reason to qualify or reject the ordinary meaning. Reasons to reject the ordinary meaning include the legislator defining or declaring the meaning to be given to the word. There is a presumption in favour of ordinary meaning rather that a technical meaning: *Pfizer Co. v. Deputy Minister of National Revenue (Customs & Excise)*, [1984] 2 S.C.R. 232.

- 57 When a statute is addressed to a specialized audience about a technical subject, the ordinary grammatical sense of its words may give way to the technical meaning of the words: *Unwin v. Hanson*, [1891] 2 Q.B. 115 (C.A.) at p. 119; *Great Western Railway Co. v. Carpalla United Clay Co. Ltd.*, [1909] 1 Ch. 218 at p. 236.
- The principles that should guide the courts in interpreting tax legislation are as follows: (1) the interpretation of tax legislation is subject to the ordinary rules of statutory instruction; (2) a legislative provision should be given a strict or liberal interpretation depending on the purpose underlying it, and that purpose must be identified in light of the context of the statute, its objective and the legislative intent; (3) this teleological approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions, which formerly strictly construed taxing provisions thus favouring the taxpayer and which strictly construed exemptions thus favouring the tax department; (4) substance should be given over form to the extent that this is consistent with the wording and objective of the statute; (5) only a reasonable doubt, not resolved by the ordinary rules of interpretation will be settled by recourse to the residual presumption in favour of the taxpayer: Québec (Communauté Urbaine) v. Corp. Notre-Dame de Bon-Secours, [1994] 3 S.C.R. 3; Buanderie Central de Montréal Inc. v. Montreal (City), [1994] 3 S.C.R. 29; Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536; Bronfman Trust v. The Queen, [1987] 1 S.C.R. 32; Schwartz v. Canada, [1996] 1 S.C.R. 299.

#### 4. The Interpretation of Development Site in the Park Levy By-law

- 59 In my opinion, the interpretation of "development site" is straightforward, unambiguous, not technical, and not tied to the size of lands for which improvements are to be made pursuant to a building permit.
- 60 In accordance with the above principles of statutory interpretation, the words "development site" can be interpreted in their ordinary grammatical sense, and the words have the ordinary meaning "of the place where development occurs", which, in the context of the City's Park Levy By-law, more expansively means "the place where the owner of the land (the developer) constructs, erects, or places one or more buildings or structures, makes a substantial addition or alteration to a building or structure, removes one or more buildings or structures in order to develop the land, establishes a commercial parking lot, or converts a building or structure from an exempted or non-residential use to another use.
- 61 This everyday meaning of the words reads the words of the Park Levy By-law in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute, and the intention of the legislator and yields no absurdity or ambiguity. There is no reason to employ any presumptions about the interpretation of municipal by-laws or about the interpretation of revenue raising statutes to reach the straightforward meaning that development site is the place where development occurs.
- **62** In circumstances where development occurs in phases, as it did in the case at bar, the common, every day, literal meaning of "development site" as meaning "the place where development occurs" simply begs the question of whether each phase is a separate development site or whether each phase is the development of a single development site where development occurs progressively.
- **63** The circumstance that separate building permits are applied for the phases of a development project does not answer but rather continues to beg the answer to the question of whether there was just one development site or whether there was more than one development site. The genuine question is whether phased construction differentiates or demarcates different development sites.
- **64** In other words, where construction occurs in phases, the determination of what is one or more development sites is a fact-based determination considering such factors as: the singularity or changes of ownership of the land; the singularity or the severance of the land holding (subdivision control); the nature of the project, the nature and progress of the development approvals; the lapsing of development approvals; changes and revisions in the project; changes in the development approvals; the timing of the construction work; changes in the timing of the construction; and changes in circumstances, including changes in the economics of the project.

- **65** In the case at bar, the factual background establishes that the location for Gemterra's construction project was a 1.3-hectare parcel of land that was to be developed in two phases but the phases did not demarcate two development sites. The fact that separate building permits were obtained did not demarcate two development sites. The fact that different building permits were obtained for the apartment buildings and the several townhouse developments did not demarcate more than one development site.
- 66 The circumstance that a fact-based determination is required to determine what is a "development site" does not make the Park Levy By-law ambiguous, and the fact-based determination of what is a development site does not entail that there is more than one meaning of development site to choose from. Development site means the place where development occurs, which will be readily apparent in most cases, although where development is staged in phases, it may be necessary to make a factual determination whether the development is to occur at two separate or distinct places or sites.
- 67 There is no ambiguity in the Park Levy By-law but the By-law requires a fact-based determination of what is the development site in each particular case. In the immediate case, there never was more than one development site and nothing changed by the sequencing of the construction or by the sequencing of the building permits. Other than being a factor in determining whether there is one or more than one development site, the circumstance of more than one building permit application is not determinative of what is the development site nor is it determinative of the size of the development site for which the permit or permits are granted.
- 68 I can envision factual scenarios where the 1.3-hectare sized parcel of land near the intersection of Sheppard Ave. East and Kennedy Road in the City of Toronto might have yielded more than one development site. Visualize the scenario that it is purchased by Gemterra and then severed into two separate landholdings, one of which is conveyed along with rights of way to a different owner that holds the severed lands for future development while Gemterra applies only for a building permit for its remnant landholding. This, scenario, is not what occurred in the immediate case, and, in my opinion, it was appropriate for the City to regard Gemterra's two-phased project as the development of a site larger than 1.0 hectare in size.
- 69 It may be that in correctly determining that there was only one development site on Gemterra's lands that the City erred in appraising the Phase 2 lands as of the date of the building permit application for the Phase 2 lands rather than as of the day before the day of issuance of the first building permit in respect of the development site, but I need not decide that issue for the purposes of deciding whether or not the City correctly regarded Gemterra's lands as one development site.
- 70 I simply note that proceeding to do appraisals in the way that it did would make no difference to the City or to the developer unless there was a marked change in the value of the lands in the interim, but, even then, the developer would have the benefit of not having to pay park levies in advance of putting a shovel into the lands being developed.

#### **E. CONCLUSION**

- 71 For the above reasons, I dismiss Gemterra's application.
- 72 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the City's submissions within 20 days from the release of these Reasons for Decision followed by Gemterra's submissions within a further 20 days.

P.M. PERELL J.

Schedule "A" --

#### **Statutory Provisions**

### Planning Act, R.S.O. 1990, c. P.13, s. 41(1), 42 and 51.1 - [Pre-Bill 73 / pre-December 3, 2015]

Site plan control area

41. (1) In this section,

"development" means the construction, erection or placing of one or more buildings or structures on land or the making of an addition or alteration to a building or structure that has the effect of substantially increasing the size or usability thereof, or the laying out and establishment of a commercial parking lot or of sites for the location of three or more trailers as defined in subsection 164 (4) of the *Municipal Act, 2001* or subsection 3 (1) of the City of *Toronto Act, 2006*, as the case may be, or of sites for the location of three or more mobile homes as defined in subsection 46 (1) of this Act or of sites for the construction, erection or location of three or more land lease community homes as defined in subsection 46 (1) of this Act.

Conveyance of land for park purposes

42. (1) As a condition of development or redevelopment of land, the council of a local municipality may, by by-law applicable to the whole municipality or to any defined area or areas thereof, require that land in an amount not exceeding, in the case of land proposed for development or redevelopment for commercial or industrial purposes, 2 per cent and in all other cases 5 per cent of the land be conveyed to the municipality for park or other public recreational purposes.

#### Definition

(2) For the purposes of subsection (3),

"dwelling unit" means any property that is used or designed for use as a domestic establishment in which one or more persons may sleep and prepare and serve meals.

#### Alternative requirement

(3) Subject to subsection (4), as an alternative to requiring the conveyance provided for in subsection (1), in the case of land proposed for development or redevelopment for residential purposes, the by-law may require that land be conveyed to the municipality for park or other public recreational purposes at a rate of one hectare for each 300 dwelling units proposed or at such lesser rate as may be specified in the by-law.

#### Payment instead of conveyance

(6) The council of a local municipality may require the payment of money to the value of the land otherwise required to be conveyed under this section in lieu of the conveyance.

#### No building without payment

(6.1) If a payment is required under subsection (6), no person shall construct a building on the land proposed for development or redevelopment unless the payment has been made or arrangements for the payment that are satisfactory to the council have been made.

#### Determination of value

(6.4) For the purposes of subsections (6) and (6.2), the value of the land shall be determined as of the day before the day the building permit is issued in respect of the development or redevelopment or, if more than one building permit is required for the development or redevelopment, as of the day before the day the first permit is issued. •••

#### Disputes

(10) In the event of a dispute between a municipality and an owner of land on the value of land determined under subsection (6.4), either party may apply to the Municipal Board to have the value determined and the Board shall, in accordance as nearly as may be with the *Expropriations Act*, determine the value of the land and, if a payment has been made under protest under subsection (12), the Board may order that a refund be made to the owner.

#### Same

(11) In the event of a dispute between a municipality and an owner of land as to the amount of land or payment of money that may be required under subsection (9), either party may apply to the Municipal Board and the Board shall make a final determination of the matter.

#### Payment under protest

(12) If there is a dispute between a municipality and the owner of land under subsection (10), the owner may pay the amount required by the municipality under protest and shall make an application to the Municipal Board under subsection (10) within 30 days of the payment of the amount.

...

#### Parkland

51.1 (1) The approval authority may impose as a condition to the approval of a plan of subdivision that land in an amount not exceeding, in the case of a subdivision proposed for commercial or industrial purposes, 2 per cent and in all other cases 5 per cent of the land included in the plan shall be conveyed to the local municipality for park or other public recreational purposes or, if the land is not in a municipality, shall be dedicated for park or other public recreational purposes.

#### Other criteria

(2) If the approval authority has imposed a condition under subsection (1) requiring land to be conveyed to the municipality and if the municipality has an official plan that contains specific policies relating to the provision of lands for park or other public recreational purposes, the municipality, in the case of a subdivision proposed for residential purposes, may, in lieu of such conveyance, require that land included in the plan be conveyed to the municipality for park or other public recreational purposes at a rate of one hectare for each 300 dwelling units proposed or at such lesser rate as may be determined by the municipality.

#### Payment in lieu

- (3) If the approval authority has imposed a condition under subsection (1) requiring land to be conveyed to the municipality, the municipality may, in lieu of accepting the conveyance, require the payment of money by the owner of the land,
  - (a) to the value of the land otherwise required to be conveyed; or
  - (b) where the municipality would be entitled to require a conveyance under subsection (2), to the value of the land that would otherwise be required to be so conveyed.

#### Determination of value

(4) For the purpose of determining the amount of any payment required under subsection (3), the value of the land shall be determined as of the day before the day of the approval of the draft plan of subdivision.

#### Application

(5) Subsections 42 (2), (5) and (12) to (16) apply with necessary modifications to a conveyance of land or a payment of money under this section.

#### Building Code Act, 1992, S.O. 1992, c.23

#### CONSTRUCTION AND DEMOLITION

8 (1) No person shall construct or demolish a building or cause a building to be constructed or demolished unless a permit has been issued therefor by the chief building official.

#### Application for permit

8(2) An application for a permit to construct or demolish a building may be made by a person specified by regulation and the prescribed form or the form approved by the Minister must be used and be accompanied by the documents and information specified by regulation.

#### Issuance of permits

- 8 (3) The chief building official shall issue a permit referred to in subsection (1) unless,
  - (a) the proposed building, construction or demolition will contravene this Act, the building code or any other applicable law;

#### Conditional permit

- (3) Even though all requirements have not been met to obtain a permit under subsection (2), the chief building official may issue a conditional permit for any stage of construction if,
  - (a) compliance with by-laws passed under sections 34 and 38 of the *Planning Act* and with such other applicable law as may be set out in the building code has been achieved in respect of the proposed building or construction;
  - (b) the chief building official is of the opinion that unreasonable delays in the construction would occur if a conditional permit is not granted; and
  - (c) the applicant and such other person as the chief building official determines agree in writing with the municipality, upper-tier municipality, board of health, planning board, conservation authority or the Crown in right of Ontario to,
    - (i) assume all risk in commencing the construction,
    - (ii) obtain all necessary approvals in the time set out in the agreement or, if none, as soon as practicable,
    - (iii) file plans and specifications of the complete building in the time set out in the agreement,
    - (iv) at the applicant's own expense, remove the building and restore the site in the manner specified in the agreement if approvals are not obtained or plans filed in the time set out in the agreement, and
    - (v) comply with such other conditions as the chief building official considers necessary, including the provision of security for compliance with subclause (iv).

#### Appeal to court

25. (1) A person who considers themself aggrieved by an order or decision made by the chief building official, a registered code agency or an inspector under this Act (except a decision under subsection 8 (3) not to issue a conditional permit) may appeal the order or decision to the Superior Court of Justice within 20 days after the order or decision is made.

#### Extension of time

(3) A judge to whom an appeal is made may, upon such conditions as the judge considers appropriate, extend the time for making the appeal before or after the time set out in subsection (1), if the judge is satisfied that there is reasonable grounds for the appeal and for applying for the extension.

#### Effect of appeal

(3) If an appeal is made under this section in respect of a matter in which a question is pending before the Building Code Commission, the proceeding before the Commission is terminated.

### Powers of judge

(4) On an appeal, a judge may affirm or rescind the order or decision and take any other action that the judge considers the chief building official, registered code agency or inspector ought to take in accordance with this Act and the regulations and, for those purposes, the judge may substitute his or her opinion for that of the official, agency or inspector.

# **ONTARIO REGULATION 332/12 (BUILDING CODE)**

- 1.4.1.3. Definition of Applicable Law
  - (1) For the purposes of clause 8 (2) (a) of the Act, applicable law means,
  - (a) the statutory requirements in the following provisions with respect to the following matters:

(xxi.1) section 42 of the *Planning Act* with respect to the payment of money or making arrangements satisfactory to the council of a *municipality* for the payment of money, where the payment is required under subsection 42 (6) of that Act

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# Goldenwood Homes Ltd. v. MacDonald, [2003] A.J. No. 1494

Alberta Judgments

Alberta Court of Queen's Bench
Judicial District of Edmonton
Master Wacowich
Heard: November 18, 2003.
Judgment: December 3, 2003.
Docket No. 0303 12657

[2003] A.J. No. 1494 | 2003 ABQB 991 | 128 A.C.W.S. (3d) 402

Between Goldenwood Homes Ltd., applicant, and James Ian MacDonald and Lianne Marie MacDonald, respondents

(11 paras.)

#### Counsel

J.T. Schuck, for the applicant. M.J. Penny, for the respondent.

#### MEMORANDUM OF DECISION

# **MASTER WACOWICH**

- 1 The applicant, Goldenwood Homes Ltd. entered into an agreement of purchase and sale with the respondents James Ian MacDonald and Lianne Marie MacDonald for the construction of a home and a sale of a home and land. The closing sale transaction with respect to the property took place on December 19, 2002. In the statement of adjustments a clerical error was made which gave rise to a \$10,000 credit in favour of the respondents at closing. The error was not detected until February 14, 2003 when accountants of the applicant discovered the error. The respondents have refused to make any payment towards that amount although they acknowledge that there was a \$10,000 error.
- 2 The respondents take the position that the original date of possession of November 15, 2002 was not met and they did not take possession of the property until December 19, 2002. They submit they are entitled to interest of \$344.76 which accrued on their mortgage while they were not in the property, additional storage costs of \$625.90 and payment for deficiencies in the house constructed. There is a problem they allege with the carpeting and with a leaking pipe which allegedly caused staining on the ceiling within the house.
- 3 The applicant takes the position that any deficiencies are subject to the agreement and home warranty with the Respondents. In addition the respondents have not requested the repair work be done. The respondents take the

position that they are entitled to damages for the delay in getting in the property and having to spend some time with the respondent Lianne Marie MacDonald's mother for one week and three weeks in a hotel which was paid for by the RCMP who are the employer of the male respondent.

- 4 The applicant commenced the within action by originating notice on July 11, 2003. The relief sought is pursuant to Rule 410(a) as proceedings to recover possession of land. Rule 410(e) allows an action to be commenced by originating notice in proceedings for the determination of any question where there are no material facts in dispute and the rights of the parties depend upon the construction of a written instrument and for a declaration of the rights of persons interested. The applicant seeks a declaration that they have an unpaid vendor's lien which can be remedied through foreclosure proceedings. Additional remedies are sought including that if the matter cannot be decided on the facts the matter be set down for trial.
- 5 The applicant cites the case of Handsaeme v. Dyck and All-West Construction Ltd., (1982) <u>20 Alta. L.R. (2d) 279</u> (Alta. Q.B.). The case held that a mistake on adjustments on the closure of a property did not merge in the transfer or extinguish the purchasers obligation with respect to the purchase price. Merger only occurs where the evidence discloses that it was intended by the parties. In that case, there was an action for damages, not an unpaid vendor's lien and foreclosure. However, the merger principle applies equally here as in Handsaeme. There was no intent for the mistaken calculation to merge in the transfer or extinguish the purchasers' obligation with respect to the purchase price.
- **6** A caveat was filed on the property on the unpaid vendor's lien on March 4, 2003. This was well past the transfer date and after a mortgage was filed on the certificate of title. The fact that the caveat was filed late merely effects the priority of the unpaid vendor's lien to other encumbrances on the property. It still remains valid and effective.
- 7 The applicant choose to proceed on an in rem basis rather than on debt. There is nothing to suggest that this option is not available to them. One has to wonder why the parties are proceeding to the court to resolve what seems to be a relatively simple dispute. The parties indicate that it is because of acrimony between them which arose when the respondent found out that he had to pay a further \$10,000 when he thought all payments had been completed. Yet at the same time he does not dispute that the amount is owing and rather takes the position that he is entitled to set off certain amounts against the \$10,000 error. As the English proverb says: "the robes of lawyers are lined with the obstinacy of clients".
- 8 Only two cases were provided to the court. One was the Handsaeme case previously referred to. The other was Telford v. Holt, [1987] 2 R.C.S. 193 which the Respondent cites as authority for equitable set-off. The Respondent seeks an order directing assessment of the amount of their claim against Goldenwood to be set off against "Goldenwood's \$10,000 mistake". The Respondents may have a further cause of action against Goldenwood for certain claims arising out of the agreement for the construction of the home and sale of the land and home. But at this point there is nothing to set off.
- **9** I declare the amount of the unpaid vendor's lien to be \$10,000 less interest of \$344.76 which accrued on their mortgage while the respondents were delayed in their possession of the property. The issue of additional storage costs of \$625.90 will have to be dealt with through the trial of an issue to determine the factual background and whether the applicant was required to pay this amount pursuant to the contract between the parties. Similarly, the deficiencies will be dealt with by an action determining the agreement between the parties as will the interesting claim for damages for time spent with the respondent Lianne Marie MacDonald's mother and the three weeks in a hotel which was paid for by the RCMP. The interest on the amount owing shall be, as set out by the agreement between the parties, the prime lending rate of the Alberta Treasury Branch (at the time 4.25% per annum) plus 3% on an annual basis commencing on the date of the demand for payment being February 14, 2003.
- 10 If the amount owing pursuant to this declaration is not paid within six months from the date of granting of this order, on expiration of that six month redemption period, the applicant is granted leave to apply to the court on two days notice to have the lands listed for sale. Further the respondents shall permit access to the lands at reasonable

times for the purpose of obtaining any necessary appraisal. The remainder of the draft order provided by the applicant with its written submission is granted subject to section 6 and 7 which will not be granted being a preservation order and solicitor-client costs.

11 The applicant seeks solicitor and client costs but I was not referred to any agreement for this. Costs may be spoken to if required but otherwise will be granted to the applicant pursuant to schedule C.

MASTER WACOWICH

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# Handsaeme v. Dyck and All-West Construction Ltd., [1982] A.J. No. 1096

Alberta Judgments

Alberta Queen's Bench
McFadyen J.

Judgment: May 28, 1982 Calgary No. 8101-05579

[1982] A.J. No. 1096 | 20 Alta. L.R. (2d) 279 | 26 R.P.R. 9 | 15 A.C.W.S. (2d) 130

(15 paras.)

#### Counsel

J. A. Sutherland, for plaintiff.

I. R. MacDonald, for defendant.

# MCFADYEN J.

- 1 The plaintiff, the vendor of lands under an agreement for sale, brings this action for the recovery of the sum of \$149.81 which the defendant agrees is due and owing under an agreement for sale. While the defendant acknowledges that a mutual error was made in calculating the amounts payable under the agreement for sale, the defendant takes the position that the defendant's obligations with respect to the payment of the purchase price contained in the agreement for sale were merged and extinguished by the transfer and the subsequent issuance of title.
- 2 By an agreement dated 26th November 1980, the plaintiff agreed to sell and the defendant to purchase the lands specified therein. The agreement provided that taxes, rents and insurance would be adjusted as of 1st December 1980. While some delays were encountered in closing this transaction, the 1st December 1980 adjustment date was never amended. On 19th January 1981 solicitors for the plaintiff forwarded a statement of adjustments to the solicitors for the defendant together with an executed transfer. The statement of adjustments disclosed that the defendant was required to pay the sum of \$29,596.66. The defendant paid this amount. The transfer was subsequently registered and a new title issued.
- 3 Several days later the solicitors for the vendors discovered that an error totalling \$140.81 had been made in calculating the tax adjustments and that another \$9 error had been made in the amount of a credit due to the vendor for a 1st January 1981 payment. The solicitors for the plaintiff forwarded a new statement of adjustments to the solicitors for the defendant demanding payment of the additional sum of \$149.81.
- **4** A copy of the transfer document was not placed before me and I assume that it contains nothing relevant to the issues raised in this matter.

- 5 It is conceded on behalf of the defendant that a mutual error was made and that pursuant to the terms of the agreement for sale, the sum of \$149.81 is owing to the vendor. I am satisfied that neither the defendant nor his solicitor was aware of the error although the defendant's solicitor was in possession of information which would have disclosed the error had he made a careful verification of the amounts.
- **6** The defendant submits that the plaintiff cannot now recover the amount owing under the agreement for sale for the following reasons:
  - 1. That the agreement for sale was merged in and extinguished by the transfer, and
  - 2. That there was a binding settlement of the amounts due under the agreement for sale.
- 7 In support of this latter submission the defendant relies on the decision of Tavender D.C.J. in *Wu v. Campbell* (1977), <u>4 Alta. L.R. (2d) 392</u>, <u>8 A.R. 245</u> (D.C.). In that matter the parties had calculated the tax adjustments on the basis of the previous year's taxes, the current year's tax figures being unavailable. Tavender D.C.J. found that, while the agreement provided for adjustments on the basis of the current year's taxes, a valid and binding settlement of this obligation had been reached by the solicitors.
- 8 Tavender D.C.J. stated at p. 395:

In the present case the 1976 taxes were not known and the solicitors used the 1975 taxes as a base. It would appear that the purchaser's solicitors were satisfied with this as being a satisfactory and expeditious method of closing out the transaction. In my view the plaintiff-purchaser is bound by this action, he and his solicitors being one.

- **9** This decision is not applicable to the facts of the present case. Here, no compromise was reached by the solicitors as a satisfactory settlement of an adjustment problem. An error was simply made in the calculation of an adjustment. There was no intention to effect any settlement or compromise to expedite a transfer. The parties both believed that the statement of adjustments accurately reflected the amount due under the agreement for sale.
- 10 With respect to the applicability of the doctrine of merger in the circumstances of the present case, I have considered the following authorities which were cited to me: Knight Sugar Co. v. Alta. Rx. & Irrigation Co., [1938] 1 W.W.R. 234. [1938] 1 All E.R. 266, [1938] 1 D.L.R. 321 (P.C.); Fraser-Reid v. Droumtsekas, [1980] 1 S.C.R. 720, 9 R.P.R. 121. 103 D.L.R. (3d) 385, 29 N.R. 424: and Hashman v. Anjulin Farms Ltd., [1973] S.C.R. 268. [1973] 2 W.W.R. 361, 31 D.L.R. (3d) 490.
- 11 The following excerpt from the judgment of Martland J. in *Hashman v. Anjulin Farms Ltd.* contains a concise summary of the law (p. 277):

It appears, therefore, that it is not in every case, where an agreement for the sale of land is followed by the execution of a conveyance of the land, that the provisions of the agreement must, of necessity, be merged in the conveyance. What the Court must do, in the words of Bowen L.J., is to "endeavour to see what was the contract according to the true intention of the parties".

- 12 I have also considered other reported decisions dealing with the doctrine of merger, all of which appear to deal with the survival of collateral obligations of the vendor. I have found no authority for the proposition that there is any presumption that the purchaser's obligation to pay the full amount of the purchase price in the absence of evidence of a compromise or settlement is necessarily merged in the transfer. In fact, it appears that such a theory would be contrary to the continued existence of an unpaid vendor's lien after the transfer of title, unless a specific reservation were contained within the transfer.
- 13 Having considered the authorities dealing with the doctrine of merger, the existence of an unpaid vendor's lien

(DiCastri, Law of Vendor and Purchaser, 2nd ed. (1976), pp. 684-91, and the authorities cited therein), and the rectification of title on the basis of mutual mistake (*Brittain v. Gartner* (1963), 46 W.W.R. 112, 42 D.L.R. (2d) 516 (Alta. S.C.); *Tatarchuk v. Sidor*, [1950] 2 W.W.R. 953, affirmed 1 W.W.R. 435 (Alta. C.A.); *Schmit v. Montreal Trust Co.* (1969), 69 W.W.R. 521 (Sask. Q.B.)), I am of the view that a transfer merges or extinguishes the obligations of a purchaser under an agreement for sale with respect to the purchase price only where the evidence discloses that this was intended by the parties.

- 14 Where it is established that as a result of a mutual mistake, the full amount of the purchase price was not paid to the vendor, the vendor is entitled to maintain an action for the recovery of the balance of the purchase price.
- **15** The plaintiff is therefore entitled to judgment in the amount of \$149.81. In the circumstances of this matter ! will not award costs to either party.

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# King Line Investments Inc. v. 973976 Ontario Ltd., [2009] O.J. No. 2747

Ontario Judgments

Ontario Superior Court of Justice E.P. Belobaba J. Heard: June 22-24, 2009.

Judgment: July 2, 2009.

Court File No. 06-CV-318805PD1

[2009] O.J. No. 2747

RE: King Line Investments Inc., Plaintiff, and 973976 Ontario Limited et al., Defendants

(28 paras.)

# Case Summary

Contracts — Interpretation — General principles — Ordinary meaning — Action by the vendor against the defendant purchaser for a \$432,926 adjustment in its favour following the closing of a \$12 million real estate transaction, allowed — Transaction was originally scheduled to close at a higher purchaser price but eventually closed at a lower purchase price — Purchaser was entitled to a credit based on the purchase price and adjustment arose because the higher credit was applied to the lower purchase price — Based on the Court's interpretation of minutes of settlement entered into to allow the transaction to close, the vendor was entitled to the adjustment because the purchaser was only entitled to the lower credit — Minutes did not entitle the purchaser to the higher credit.

Real property law — Sale of land — Agreement of purchase and sale — Interpretation — Action by the vendor against the defendant purchaser for a \$432,926 adjustment in its favour following the closing of a \$12 million real estate transaction, allowed — Transaction was originally scheduled to close at a higher purchaser price but eventually closed at a lower purchase price — Purchaser was entitled to a credit based on the purchase price and adjustment arose because the higher credit was applied to the lower purchase price — Based on the Court's interpretation of minutes of settlement entered into to allow the transaction to close, the vendor was entitled to the adjustment because the purchaser was only entitled to the lower credit — Minutes did not entitle the purchaser to the higher credit.

Action by the vendor King Line Investments against the defendant purchaser 973976 Ontario Limited for a \$432,926 adjustment following the closing of a \$12 million real estate transaction. King held land as a nominee under a co-tenancy agreement for 28 co-tenants. The agreement provided that when the land was sold the sale proceeds would be shared equally by the co-tenants. If a third party submitted an offer to purchase a co-tenant could submit a matching offer which would then take priority. If two co-tenants matched a third party's offer, each of the co-tenants would close on a half interest in the land paying half of the purchase price. In June 2004 a third party offered \$14 million for the land with a February 2005 closing. A group of six co-tenants, led by Cesan, submitted a matching offer. Another co-tenant, Recine, did the same. The upshot was that the Cesan and Recine offers were on track to close in February 2005, each for \$7 million. Cesan assigned its offer to 973976, which was a related company. Since the six purchasers in the Cesan group were also co-tenants they would receive 1/28 of the sale proceeds, or \$500,000 each. 973976 in the statement of adjustments for the February 2005 closing was allowed a \$3 million rollover credit on the overall sale price. There was also a \$370,000 adjustment

in its favour, on account of savings in real estate commissions. The Cesan and Recine offers did not close in February 2005. Litigation ensued. As the result of a settlement agreement, which was incorporated into minutes of settlement, 973976 agreed to complete the Cesan offer for \$7 million and to purchase the Recine portion for \$5 million. After the two transactions closed in July 2005 King discovered that the statement of adjustments contained an error in the calculation of the rollover credit. The credit was \$3 million, based on the \$14 million purchase price, when it should have been \$2.57 million, based on the \$12 million purchase price. The shortfall at closing was about \$430,000. 973976 claimed that based on the minutes there was no error at all and the parties were required to close the July deal on the basis of the same rollover credit numbers that were used in the aborted February transaction.

HELD: Action allowed.

The use of the February rollover credit, which was based on the higher purchase price, in the July transaction was not a term and condition of the Cesan substituted offer but was an error that required adjustment. The minutes were a fully negotiated commercial agreement. It contained defined terms. The Cesan substituted offer was specifically defined as an agreement of purchase and sale dated August 18, 2004. The minutes were not ambiguous but clearly provided that 973976 agreed to complete the Cesan substituted offer, without any abatement of the purchase price, on the same terms and conditions, as contained in that offer, except that the closing date would be in July 2005. There was nothing in the Cesan substituted offer about adjustments. These would only occur at closing. It was reasonable to assume that the July 2005 statement of adjustments would contain the commission reduction and a rollover credit that were in the earlier statement. The Court's literal, plain language interpretation of the minutes, was the most reasonable. It left room for adjustments at closing, as was normally the case, and it complied with the requirement of the co-tenancy agreement that all the co-tenants were to be treated equally. If 973976's submission was accepted the six co-tenants in its group would each receive \$500,000 while the other 22 co-tenants would each receive \$410,000. It was not the intent of the minutes for this result to occur, especially since most of the 22 co-tenants approved the minutes.

## Counsel

Howard Gerson for King Line Investments/Plaintiff.

Paul Pape for 973976 Ontario Limited/Defendant.

#### **ENDORSEMENT**

# E.P. BELOBABA J.

- 1 This is an action by the plaintiff-vendor, King Line Investments ("P") against the defendant-purchaser 973976 Ontario Limited ("D" or "973")) for a \$432,926.27 re-adjustment following the closing of a \$12 million real estate transaction. The transaction was completed pursuant to minutes of settlement ("MOS") that were executed by the parties to resolve litigation.
- 2 P's action against its solicitors, defendants Mark Cosman and Cosman Gray LLP has been settled. D's counterclaim against P has been abandoned.

#### **Brief Overview**

- 3 For many years, P held a large land parcel in Vaughan as a nominee under a co-tenancy agreement ("CTA") for twenty-eight co-tenants. The CTA provides that when the land is sold, the proceeds of sale will be shared equally by the co-tenants. If an offer to purchase is received from a third party, a co-tenant can submit a matching or "substituted offer" which will then take priority. If two co-tenants decide to match the third party's offer for, say, \$14 million, each of the co-tenants will close on a half-interest in the land parcel paying \$7 million.
- **4** That's what happened here. In June, 2004 a third party offered \$14 million for the land with a February, 2005 closing. A co-tenant group led by Cesan (and consisting of six co-tenants) submitted a matching offer. Another cotenant, Recine, did likewise. The upshot was the Cesan and Recine substituted offers were on track to close in February, 2005, each for \$7 million.¹ Cesan assigned its offer to a related company, the defendant 973.
- **5** Because the six purchasers in the Cesan group were also co-tenants, they would each receive under the CTA 1/28 of the \$14 million in sale proceeds or about \$500,000 each. At D's request, instead of the parties exchanging cheques, D was allowed a \$3 million rollover credit on the overall \$14 million sale price. This credit was set out in the February statement of adjustments ("SOA"). Recine did not request a rollover credit.<sup>2</sup>
- **6** The February SOA also provided a \$370,000 adjustment in D's favour reflecting the savings in real estate commissions, an item that was agreed to by P after considerable negotiation by counsel. The balance owing on the "Cesan Substituted Offer" after adjustments and deposits was about \$3.3 million.
- 7 The Cesan and Recine offers did not close. Litigation followed. P and D had a number of settlement meetings and a final meeting on May 30, 2005. In attendance were members of P's executive committee, Mr. Ferrara (the principal of 973) and the parties' solicitors, Cosman (P), Schwartz (D) and Julian Nawrocki (P's litigation counsel.) D agreed to complete the Cesan offer for \$7 million and purchase the Recine portion for \$5 million, the total purchase price for the entire land parcel being \$12 million. The parties executed an MOS in June, 2005 which, in essence, provided the following:
  - (i) D agreed to "complete the Cesan Substituted Offer without abatement, and on the same terms and conditions excepting only the later closing which shall now take place [in July, 2005] after the approval of the [King Line] co-tenants ..."
  - (ii) D agreed to purchase the Recine portion for \$5 million (consisting of a cash deposit of \$1.5 million and a VTB mortgage of \$3.5 million.)
  - (iii) The two purchases were linked. They had to close together or not at all.
  - (iv) D (and the six co-tenants) agreed to forego any claims or interest in P's continuing lawsuit with Recine, including the \$700,000 Recine deposit and the value of any judgment or settlement arising out of this litigation.
- 8 At a meeting held on July 14, 2005, a majority of the other 22 co-tenants approved the MOS. On July 19 and 20, 2005 the two transactions closed. A couple of days later, P's solicitor discovered that the July SOA that had been prepared by D's solicitor contained an error in the calculation of the rollover credit. Schwartz had used the rollover credit numbers from the February SOA that were based on a \$14 million purchase price and yielded a \$3 million credit (\$14 million/28 x 6). The credit should have been based on the \$12 million purchase price which would have yielded a rollover credit of about \$2.57 million. The shortfall at closing was therefore about \$430,000. D had signed an undertaking on July 18, 2005 that it would re-adjust the SOA after closing if it was found to contain "any errors or omissions." Cosman concluded that the use of the February credit numbers in the July SOA was an error that should be re-adjusted.

- **9** D submits that its use of the February credit numbers in the July SOA, despite the \$2 million difference in purchase price, was not an error at all -- that this was exactly what the parties had agreed to in the MOS.
- 10 If D is right and the MOS required the parties to close the July deal on the same rollover credit numbers that were used in the aborted February transaction, then there was no error and P's claim must be dismissed. The outcome of this trial therefore depends on the interpretation of the phrase "on the same terms and conditions" as set out in section 1 of the MOS.
- 11 In my view, for the reasons set out below, the use of the February rollover-credit (which was based on a \$14 million purchase price) in the July transaction (which had a \$12 million purchase price) was not a "term and condition" of the Cesan Substituted Offer but an error that requires re-adjustment. I find for the plaintiff.

#### **Analysis**

- 12 The MOS was a fully negotiated commercial agreement. Each side was represented by experienced counsel who prepared and/or reviewed six drafts before the final version was signed. The MOS contained defined terms. The Cesan Substituted Offer is specifically defined as the agreement of purchase and sale dated August 18, 2004. The intent and meaning of section 1, in my view, could not be plainer. There is no ambiguity.
- 13 I would paraphrase section 1 as follows:
  - 973 agrees to complete the Cesan Substituted Offer of August 18, 2004, without any abatement of the purchase price, on the same terms and conditions as contained in that offer except with a July, 2005 closing date.
- 14 There is nothing in the Cesan Substituted Offer of August 18, 2004 about adjustments. This is not surprising. Vendors and purchasers understand that the purchase price set out in the agreement of purchase and sale will be subject to appropriate adjustments at closing. In this case, the February SOA referred to a realty tax adjustment and two further adjustments: \$370,000 representing the savings in real estate commissions and \$3 million in rollover credit for the six co-tenants.
- 15 It was reasonable for the parties to assume that the July SOA would also include these two items -- a reduction for real estate commissions and a rollover credit. Indeed there is no dispute about the reduction for the real estate commissions. Nor about the idea of having a properly calculated rollover credit. The problem with the July SOA is that the rollover credit was incorrectly calculated. (As I have already noted, P's action against his solicitor, Cosman, for failing to review the July SOA before closing has been settled.)
- 16 The literal, plain language interpretation of section 1 of the MOS is also, in my view, the most reasonable in the circumstances. It leaves room for adjustments at closing as is normally the case and it complies with the requirement of the CTA that all co-tenants be treated equally and receive distributions on a pro-rata basis. If D's submission is accepted, this would result in a glaringly unequal distribution -- the six co-tenants in D's group would each receive \$500,000 while the other 22 co-tenants would get about \$410,000. One would think that if such a result was intended, then it would have been made clear in the MOS and, at least, would have merited some discussion at the May 30 settlement meeting and the July 14 co-tenants' approval meeting.
- 17 Yet both sides agree that there was no discussion whatsoever of rollover credits at either of the two meetings.
- **18** How then is D able to argue that the use of the larger February 2005 rollover numbers were understood and agreed to be a "term and condition" of the Cesan Substituted Offer? D makes two basic arguments.
- 19 First, that it was important for Mr. Ferrara, D's principal, to know exactly what he was paying for the Cesan portion in order to figure out what he could afford to pay for the Recine portion. In his evidence, however, Ferrara

admitted that he never once mentioned the rollover credit in meetings with the other side. He says that it was his solicitor, Schwartz, who did so at the two key meetings on May 30 and July 14. Schwartz, however, agreed with P's witnesses that rollover credits were never discussed at either meeting. In any event, Ferrara's point about the importance of being able to figure out the bottom line cash component in the July transaction is not persuasive. He could have determined that without difficulty. He already knew from his involvement in the aborted \$14 million transaction how the rollover credit would be calculated and he agreed at his discovery that the "same method of calculation" would be used on the \$12 million deal. By dividing \$12 million by 28 and then multiplying by 6, the correct rollover credit on the July transaction and the balance owing after deposits could have been easily ascertained. This first line of argument does not succeed.

20 D's second argument is that even if "rollover credits" were never discussed, it was made "crystal clear" to everyone at both the May 30 settlement meeting and again at the July 14 co-tenants meeting that the Cesan Substituted Offer would be completed on "the same documents and the same cash component" as in February. Schwartz was adamant in his evidence that everyone understood that the same documents would be used at the July closing, including the same SOA. Also, the same cash payment on closing, which could only make sense if there was the same \$3 million rollover credit.

#### 21 I have a number of concerns with the "same documents" argument:

- (i) Cosman denies ever having any discussion with Schwartz about using the same SOA for the July closing. On this point, as between Schwartz and Cosman, I find Cosman's recollection to be more credible. P would not have agreed to use the same SOA if it meant the same \$3 million rollover credit would be allowed on the second deal without at least some discussion and it is common ground that rollover credits were never discussed. Schwartz may well have mentioned using the same SOA but, in the circumstances, I am not satisfied that this would have been understood as meaning literally that every adjustment would stay the same including the larger (February) rollover credit.
- (ii) Schwartz himself is not consistent in his correspondence with Cosman. In his letter of July 18, 2005 he states that "we are in the process of preparing our closing documentation which is identical to the closing documentation previously used in the aborted transaction." Three days earlier, however, on July 15, 2005 Schwartz advises Cosman that "we are in the process of reviewing our closing documents for the aborted February 24, 2005 transaction and will consult with you in order that these documents be amended or updated as the case may be."
- (iii) In his July 18 letter, Schwartz himself recognizes that the documentation will not be identical because the February SOA will have to be "amended" to take into account the updated realty tax account: "we will revise the original adjustments ... and send them to you."
- (iv) It is interesting to note that D's letter of intent of May 24, 2005 setting out the offer to purchase the Recine portion for \$5 million concludes that, upon acceptance, the letter of intent shall be deemed to be an agreement of purchase and sale "on the same terms and conditions as provided in the Cesan Substituted Offer." Here, however, D would not suggest that the phrase "same terms and conditions as provided in the Cesan Substituted Offer" means that the Cesan February SOA will be used to close the \$5 million July purchase of the Recine portion. Any such suggestion would simply not make sense. Yet this is the approach and interpretation that is being proposed for the purchase of the Cesan portion.

#### 22 I also have several concerns about the "same cash component" argument:

(i) I am not satisfied on the evidence presented by Mr. Schwartz that either P and his counsel, or the other co-tenants at the July 14 approval meeting, understood and accepted that the "same cash component" would result in unequal treatment in contravention of the CTA and less money for the 22 co-tenants who were not part of the purchase group, None of the co-tenants who voted to approve the MOS at the July 14 meeting was called as a witness. In the absence of this evidence, I have a great deal of difficulty accepting Schwartz's proposition that simply saying "same cash component" is sufficient in the circumstances to support a finding that the co-tenants at the July 14 meeting understood and accepted that their approval of the MOS meant that the larger February credit would be used in the July SOA and they would receive a lot less than the six co-tenants in D's purchase group.

- (ii) If it was important to D that the balance owing on closing stay the same and that the larger and unequal rollover credit from the February SOA be used in the July SOA, it should have raised this point at both the May 30 and July 14 meetings.
- (iii) If it was important to D that the balance owing on closing stay the same and the larger and unequal rollover credit from the February SOA be used in the July SOA, this requirement should have been included in the MOS.
- 23 In sum, I am not satisfied on the evidence before me that "same documents" and "same cash component" was understood and accepted by P or by the other 22 co-tenants as meaning that there would be a \$430,000 shortfall in the proceeds of sale and an unequal distribution between the co-tenants. I am not persuaded on the evidence before me that it was agreed in section 1 of the MOS that the use of the February rollover credit would be a term and condition of the July transaction.
- 24 D's counsel argues that Cosman should have warned Schwartz if the July deal was not going to close with the same SOA or balance owing. I do not agree. Both parties were represented by experienced real estate solicitors. The MOS went through six versions before it was executed. The language agreed to in section 1 was plain and unambiguous. If it was important to D that the \$14 million-based rollover credit from February be used for the \$12 million closing in July, then D's solicitor should have made this clear to P and should have included this in the MOS.

#### Disposition

#### 25 The action to recover \$432,926.27 is allowed.

- 26 Given that a settlement has been reached with Mr. Cosman and his law firm, counsel should advise me about the form and content of the final order. Please provide your submissions in this regard when you forward your cost outlines.
- 27 The plaintiff, King Line Investments, is entitled to costs. If costs cannot be resolved by the parties, I will be pleased to receive brief written submissions within twenty days from King Line and within ten days thereafter from 973.
- 28 I am grateful to counsel for their assistance.
- E.P. BELOBABA J.
  - 1 For ease of reference, all monetary amounts are shown as rounded numbers.
  - 2 Julian Nawrocki, litigation counsel for P. explained the rollover credit as follows: "The roll-over credit was a tool by which the purchase price would be paid. In other words, you don't want to give us a cheque, you get a roll over credit and then you roll over your share into the purchase price."
  - 3 D did not try to argue that the use of the larger February credit in the July closing of the Cesan parcel was an agreed-to "sweetener" that persuaded Mr. Ferrara to offer \$5 million, rather than a lower amount, on the Recine parcel. Nor did it try to characterize this "sweetener" as a quid pro quo for giving up any further claims to the \$700,000 Recine deposit or

# King Line Investments Inc. v. 973976 Ontario Ltd., [2009] O.J. No. 2747

the outcome of the Recine litigation. I note that Mr. Schwartz did make this very point in his testimony but it was more by way of speculation than a serious submission that this is what was actually discussed and agreed to by the parties.

End of Document



# Turbo Logistics Canada Inc. v. HSBC Bank Canada, [2009] O.J. No. 4109

**Ontario Judgments** 

Ontario Superior Court of Justice

Commercial List

F.J.C. Newbould J.

Heard: October 1, 2009. Judgment: October 6, 2009.

Court File No. CV-0800007922-00CL

[2009] O.J. No. 4109 | 81 C.B.R. (5th) 169 | 2009 CanLII 55292 | 2009 CarswellOnt 5929 | 181 A.C.W.S. (3d) 177

RE: Turbo Logistics Canada Inc., 2163960 Ontario Inc., George Perlin, Alex Ber and 2192370 Ontario Limited, Plaintiffs, and HSBC Bank Canada, Defendant And between HSBC Bank of Canada, Plaintiff by Counterclaim, and George Perlin, Alex Ber, 2086611 Ontario Inc., Ari Yakobson, Vladimir Botvinnik and Boris Shteiman, Defendants to the Counterclaim And between 2086611 Inc., Plaintiff by Counterclaim, and HSBC Bank Canada and Deloitte and Touche Inc., Defendants to the Counterclaim

(26 paras.)

## Case Summary

Legal profession — Barristers and solicitors — Retention of counsel — Representation — Application for removal of counsel — Relationship with client — Conflict of interest — Lawyer acting for more than one party — Application by the individual plaintiffs to remove the lawyers for the defendant bank, due to conflict of interest, dismissed — Lawyers also represented the receiver of the two corporate plaintiffs — There was no conflict between the lawyers' duty to the bank and to the receiver that would require the lawyers' removal from representing the bank in the litigation.

Professional responsibility — Self-governing professions — Independence — Conflicts of interest — Professions — Legal — Barristers and solicitors — Application by the individual plaintiffs to remove the lawyers for the defendant bank, due to conflict of interest, dismissed — Lawyers also represented the receiver of the two corporate plaintiffs — There was no conflict between the lawyers' duty to the bank and to the receiver that would require the lawyers' removal from representing the bank in the litigation.

Application by the plaintiffs Perlin and Ber for an order to remove the law firm of Baker & McKenzie LLP as solicitors of record for the defendant HSBC Bank Canada. The two corporate plaintiffs were indebted to HSBC for a total of \$11 million. Perlin and Ber controlled the companies and guaranteed the debt. Baker was retained by HSBC to enforce the credit facilities against the two companies. The plaintiffs subsequently commenced this action against HSBC and sought, in part, declarations relieving Perlin and Ber of their guarantee obligations. HSBC counterclaimed against Perlin, Ber and others for fraud and conspiracy. After the action was commenced HSBC applied to appoint a receiver for the two companies. The receiver was appointed and it was allowed to retain Baker to advise it regarding any matter for which there was no conflict of interest. The plaintiffs claimed that as a result of Baker's refusal to produce documents of the receiver in the civil action, it should be removed as HSBC's solicitors in the action because there was a conflict in its obligations to HSBC and to the receiver. The

receiver and Baker each owed a duty of fairness to the plaintiffs, who were creditors of the companies, and were to be treated like other creditors were. It was alleged that this duty was breached.

HELD: Application dismissed.

There was no conflict between HSBC and the receiver of the two companies. The action of the two companies against HSBC was previously stayed when the receiver was appointed. No one sought leave to continue the action on their behalf. The litigation was essentially between HSBC and the guarantors of the loans. The receiver was not involved in the litigation and the issues related to matters that took place before the receiver was appointed. Thus, this was not a situation in which Baker had divided loyalties between HSBC and the receiver. It was also not a situation in which the interests of HSBC and the receiver's duties to the stakeholders of the companies were potentially adverse. Thus, there was no conflict between Baker's duty to HSBC and to the receiver that would require Baker's removal as HSBC's lawyer. Regarding the production of documents this was a tactical move and was done as part of the preparation for this removal application. Removal litigation to remove solicitors in order to gain a tactical advantage by delaying delivery of pleadings would not be permitted. The plaintiffs were directed to deliver their reply and defence to counterclaim within 30 days.

### Counsel

Melvyn L. Solmon and Cameron J. Wetmore, for the plaintiffs Turbo Logistics Canada Inc., George Perlin, Alex Ber and 2192370 Ontario Limited.

J. Brian Casey, for the defendant HSBC Bank Canada.

### **ENDORSEMENT**

# F.J.C. NEWBOULD J.

1 The plaintiffs¹ moved for an order removing the law firm of Baker & McKenzie LLP ("Baker") as solicitors of record in this matter for the defendant HSBC Bank Canada ("HSBC") and for an order extending the time of delivery of their reply and statement of defence to counterclaim. The motion was heard on October 1, 2009. At the conclusion of the motion I dismissed the motion to remove Baker as solicitors for HSBC for reasons to follow and ordered that the plaintiffs' reply to the statement of defence to the counterclaim be delivered within thirty days. These are my reasons.

#### **Factual Background**

- 2 The plaintiffs Turbo Logistics Canada Inc. ("Turbo") and 2163960 Ontario Inc. ("216") are companies previously controlled by the plaintiffs George Perlin and Alex Ber. HSBC is the secured creditor of Turbo and 216. Turbo is indebted to HSBC for approximately \$9 million and 216 is indebted to HSBC for approximately \$2 million. Messrs. Ber and Perlin are guarantors.
- 3 In November 2008 Baker was retained by HSBC to act in connection with the enforcement of the credit facilities

extended by HSBC to Turbo and 216. On December 22, 2008 the plaintiffs commenced this action against HSBC seeking, among other things, declarations relieving Messrs. Perlin and Ber of their guarantee obligations to HSBC for the loans of Turbo and 216. Subsequently HSBC counterclaimed against Messrs. Perlin and Ber and others for alleged fraud and conspiracy.

- **4** On December 24, 2009, shortly after the commencement of the action, HSBC brought an application to have Deloitte and Touche LLP appointed as receiver of Turbo and 216. Turbo and 216 opposed the application. On January 28, 2009 Cumming J. appointed Deloitte and Touche Inc. as receiver of Turbo and 216. Paragraph 5 of the receivership order provided that the receiver could retain Baker to represent and advise the receiver in respect of any matter where there is no conflict of interest.
- 5 The plaintiffs contend that as a result of what they say is a refusal by Baker to produce documents of the receiver in the civil action, Baker should be removed as solicitors for HSBC in the civil action on the grounds that there is a conflict in Baker's obligations to HSBC and to the receiver. The plaintiffs say that the receiver and Baker each owe a duty of fairness to the plaintiffs and to treat them like other creditors, which duty is said to have been breached. The plaintiffs have not moved to remove Baker from acting as solicitors for the receiver.

#### **Request for Documents**

- 6 On April 7, 2000 Mr. Solmon wrote on behalf of the plaintiffs to Baker and made a request to attend at Baker's office to review "all files (including without limitation all written or electronic documents) in the possession of [Baker] that are in anyway related to [Turbo] or [216] or relevant to the issues raised in the [civil action]." On April 16, 2009 Baker replied that Mr. Solmon's clients were not entitled to documentary discovery prior to the close of pleadings and that all documents produceable by HSBC which are relevant to the proceeding and not subject to claims of privilege would be produced in its affidavit of documents.
- 7 On March 15, 2009 Ari Yakobson, one of the defendants to the counterclaim, served a demand for particulars and request to inspect which requested copies of all documents that HSBC was relying on in the civil action in support of its allegations against the defendants to the counterclaim. On April 24, 2009 HSBC responded to the solicitors for Mr. Yakobson and stated that a CD with the requested documents would be sent, which it was. The letter was copied to other counsel, including Mr. Solmon, and stated that if other counsel would like a copy of the CD, it would be provided. The plaintiffs, represented by Mr. Solmon, did not request a copy of the CD's or the documents contained in it. The CD contained all of the documents relevant to the allegations made by HSBC in the counterclaim that were in the hands of HSBC or the receiver.
- 8 Mr. Solmon did not respond to the offer contained in the Baker letter of April 16, 2009 to provide the CD to other counsel. Instead, on May 12, 2009, Mr. Solmon on behalf of the plaintiffs brought a motion in the civil action for an order removing Baker as solicitors for HSBC or for the receiver, an order restraining Baker from acting for HSBC in the civil action, an order compelling Baker to provide access to a comprehensive list of various documents in its possession, power or control in any way related to Turbo or 216 or relevant to the issues raised in the civil action. Subsequently on May 22, 2009, Mr. Solmon delivered an amended notice of motion which removed the request for an order removing Baker from acting for the receiver and removed the request for an order that Baker produce the documents requested in the original notice of motion. Thus the amended notice of motion simply seeks an order removing Baker as solicitors for HSBC in the civil action and an order restraining Baker from acting for HSBC in that action.
- **9** On May 25 Baker wrote to Mr. Solmon and enquired whether his clients were prepared to restrict their request to all non-privileged information and to pay the costs of the receiver in assembling and preparing it. Baker pointed out that the plaintiffs' request was not limited to documents relevant to the civil action and that there were many documents s in the hands of the receiver that had not been provided to Baker or HSBC. Mr. Solmon did not respond to that letter.

10 On May 29, 2009 Baker wrote to Mr. Solmon and enclosed a copy of the CD that had previously been provided and offered to him.

#### Legal Principles

- 11 The general rule is that a lawyer may not represent one client whose interests are directly adverse to the immediate interest of another current client, even if the two mandates are unrelated, unless both clients consent after receiving full disclosure and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other. See R. v. Neil, [2002] 3 S.C.R. 631.
- 12 In determining the presence of a conflict of interest, a court must balance three factors, being i) the maintenance of the high standards of the legal profession and the integrity of the judicial system, ii) the right of litigants not to be deprived of their counsel without good cause and iii) the desirability of permitting reasonable mobility in the legal profession. See *Macdonald Estate v. Martin*, [1990] 3 S.C.R. 1235.
- 13 A court appointed receiver is an officer of the court and acts in a fiduciary capacity with respect to all parties interested in the assets under the control of the receiver. See Canadian Imperial of Commerce v. Isobord Enterprises Inc. (2002), 36 C.B.R. (4th) 19 (Man. C.A.); Ostrander v. Niagara Helicopters Ltd. (1993), 1 O.R. (2nd) 281; Royal Bank v. Vista Homes Ltd. (1984), 54 C.B.R. (N.S.) 124.
- **14** It is asserted on behalf of the plaintiffs that the obligations of a court-appointed receiver to treat creditors equally is an obligation that applies equally to the solicitors for the receiver and relies upon the followings statements of Wilson J. in *Engels v. Richard Killen & Associates Ltd.* (2002), 60 O.R. (3rd), 572 at paras. 49 and 54:
  - [49] The trustee and his or her counsel must be neutral and evenhanded with all classes of creditors, and with the bankrupt.
  - [54] The duties and obligations of trustees in bankruptcy apply equally to their counsel. Counsel, too, are officers of the court. They are not ordinary counsel representing one litigant entitled to wage war with the bankrupt, or to prefer one creditor over another utilizing all of the artillery of the adversary system. They are obliged to act neutrally and fairly throughout, to all creditors and to the bankrupt.
- 15 In Re Dugas (2003), 41 C.B.R. (4th) 168 these statements of Wilson J. were adopted.
- 16 I cannot agree with the notion that counsel for a trustee in bankruptcy, or for a court-appointed receiver, normally owes any duty to the creditors of the bankrupt or debtor under a court-appointed receiver. The obligation of a solicitor is to his or her client. The fact that the solicitor is an officer of the court does not change that. It is the trustee in bankruptcy or the court-appointed receiver that owes a fiduciary duty to the creditors or other stakeholders. To suggest that the lawyer advising the trustee in bankruptcy or the court-appointed receiver owes a duty to those creditors or other stakeholders would, amongst other things, lay the solicitor open to actions at the hands of the creditors of the trustee in bankruptcy or court-appointed receiver for failure to properly carry out the lawyer's obligations to those creditors or stakeholders. This is not the law and would make no sense. A solicitor giving advice to a client, whether the client is a trustee in bankruptcy or court-appointed receiver or otherwise, is responsible to the client to give proper advice to the client. It is the client, and not the solicitor, that owes duties to creditors and other stakeholders in the case of a trustee in bankruptcy or court-appointed receiver.
- 17 With respect to the requirement to produce privileged documents, a court-appointed receiver is in no different position than any other person seeking legal advice and advice given by the solicitor to the receiver in confidence is entitled to solicitor and client privilege. The fact that a receiver has a fiduciary relationship with the creditors does not give the creditors the right to have access to all documents that come into the hands of a receiver manager. See Houlden & Morawetz, Bankruptcy and Insolvency Analysis, L[s]39; SLP Resources Inc. v. Sorrel Resources Ltd. (1987), 65 C.B.R. (N.S.) 288.

**18** The fact that a receiver owes fiduciary duties to the stakeholders does not entitle a stakeholder to go on a fishing expedition for documents. See *Re Battery Plus Inc.*, (2002), 31 C.B.R. (4th) 196 at para. 21.

### **Analysis**

- 19 I do not see any conflict between HSBC and the receiver of Turbo and 216. The action by Turbo and 216 was stayed in the order of Cumming J. of January 28, 2009 appointing the receiver, and no one has moved to seek leave to continue the action on their behalf. The litigation is essentially amongst HSBC and the guarantors of the loans made by HSBC and others who are alleged to have engaged in fraudulent activities harming HSBC. The receiver is not involved in the civil action and the issues involved in the action relate to matters that took place prior to the appointment of the receiver. Thus this is not a situation in which Baker has divided loyalties between HSBC and the receiver in relation to the civil action, nor is it a situation in which the interests of HSBC and the receiver's duties to the stakeholders of Turbo and 216 are potentially adverse.
- 20 It seems to me, moreover, that even if there were a conflict between the positions of HSBC and the receiver, the appropriate step would be to remove Baker from acting for the receiver in connection with that conflict. The plaintiff's assertion of a conflict between HSBC and the receiver is founded on the duty of a receiver to deal evenly with all creditors, which it says has been breached because of the failure of Baker to produce documents. If that assertion of a conflict were correct, the logical step, and one that would be consistent with the order of Cumming J. authorizing Baker to act for the receiver where there is no conflict of interest, would be to move to have Baker removed from acting for the receiver rather than for HSBC. A litigant is not to be deprived of the counsel of its choosing without good cause See Macdonald Estate v. Martin, supra.
- 21 With respect to the issue of the production of documents that has been raised by Mr. Solmon, his request for documents on behalf of Messrs. Perlin and Ber and 2192370 Ontario Ltd. was directed to Baker to produce all of the requested documents in the possession of Baker. The request appears to have been purely tactical. The request was not made to have the documents in the possession of the receiver produced. Ordinarily, if Mr. Solmon's clients were looking for documents relating to the litigation, a request would be made to HSBC's solicitors to have those documents produced by HSBC. Mr. Solmon asserted in his letter of request that his clients were creditors of Turbo and that Baker as solicitors for the receiver owed a fiduciary duty to them. Presumably that was stated to support the request for all written or electronic documents in the possession of Baker in any way related to Turbo or 216. One would have thought that if it was a request for documents in the possession of the receiver, the request would have been made to Baker to have the receiver produce such documents. It appears to me clear that Mr. Solmon was in the process of setting up a motion to remove Baker as solicitors and that this letter was the opening salvo. Removal litigation brought to remove solicitors in order to gain a tactical advantage by delaying delivery of pleadings should not be permitted.
- 22 In argument, Mr. Solmon contended that in response to his letter Baker should have responded by saying that as the solicitor for the receiver he was providing everything the receiver knows about HSBC's case against Mr. Solmon's clients. As a practical matter, Mr. Solmon has received those documents. He has been provided with all documents relevant in the civil litigation that were in the possession of HSBC or the receiver. Baker sent the CD containing these documents to Mr. Solmon on May 29, 2009 in the correspondence relating to production in the civil litigation. If Mr. Solmon's clients wanted to take the position that there were other documents that should be produced, or that for some reason privileged documents should be produced, the appropriate step would have been for a motion requiring their production. No such motion has been brought.
- 23 Mr. Solmon asserted in argument that the receiver has given privileged documents to Baker in Baker's capacity as solicitor for the receiver and that as Baker acts for HSBC, the privilege has been lost. Therefore he asserts such documents should be delivered by Baker to his clients. One problem with this argument is that Mr. Solmon readily acknowledges that he has no knowledge of what HSBC has received from the receiver. Another is that no motion for production of any documents has been made. Even if Mr. Solmon were right in his contention, his clients would

be able to move for documents in the possession of Baker even if Baker were removed as solicitors for HSBC. It would be no basis to remove Baker from acting for HSBC.

24 With respect to the broad request that Baker produce all of the documents in its possession relating to Turbo or 216, there is no principled reason provided as to why Messrs. Perlin and Ber and their company 2192370 Ontario Limited, even if they are creditors of Turbo or 216, would be entitled to all such documents. It appears to be a fishing expedition in the extreme. Baker acts for the receiver in connection with a number of matters typical in a receivership involving attempts by the receiver to obtain assets of various kinds. If there is any legitimate reason for creditors to have access to documents in the hands of a court-appointed receiver, one would expect a request to be made to the receiver and to identify what documents were being sought. I agree with the following statement of Greer J. in Re Battery Plus Inc. supra, that a creditor is not entitled to go on a fishing expedition with a receiver. She stated:

Further, in *SLP Resources Inc. v. Sorrel Resources Ltd.* (1987), 65 C.B.R. (N.S.) 288 (Alta. Q.B.), the Court pointed out that the fiduciary relationship created in such situation between the receiver-manager and with the people involved in the receivership:

... does not in my view automatically entitle creditors or people in the position of SLP Resources and Societe Generale access to all of the documents which come into the hands of the receiver-manager and, in particular, legal opinions relating to the receiver's position and the validity, or otherwise, of various securities.

To allow all people involved in this Interim Receivership to automatically be entitled to access to all of the documents which came into the Interim Receiver's hands could cause the interim receivership to waste untold hours for no purpose. I am satisfied that, while there is a right of an interested party to certain relevant documents, these documents must relate to a specific purpose. That right does not entitle Badr to go on a fishing expedition.

25 In summary, I find that there is no conflict between Baker's duty to HSBC and to the receiver that would require the removal of Baker from acting as solicitor for HSBC.

#### Extending time for delivery of pleading

26 In the plaintiffs' motion they requested an order extending the time for delivery of a reply and defence to counter-claim for 30 days after final determination of whether Baker should be removed as solicitors for HSBC. Neither in their factum nor in oral argument was any reason given why the pleading should be delayed until the motion to remove Baker was finally determined, nor is any reason apparent why that should be. In the circumstances I ordered at the conclusion of the motion that the pleading be delivered within 30 days.

F.J.C. NEWBOULD J.

1 The action by the plaintiffs Turbo Logistics Canada Inc. and 2163960 Ontario Inc. has been stayed by the receiving order of Cumming J. of January 28, 2009. My reference to the plaintiffs in these reasons is to the remaining plaintiffs George Perlin, Alex Ber and 2192370 Ontario Limited.

# <u>Sable Offshore Energy Inc. v. Ameron International Corp., [2013] S.C.J. No.</u> 37

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Heard: March 25, 2013; Judgment: June 21, 2013.

File No.: 34678.

 [2013] S.C.J. No. 37
 [2013] A.C.S. no 37
 2013 SCC 37
 [2013] 2 S.C.R. 623
 [2013] 2 R.C.S. 623

 332 N.S.R. (2d) 1
 2013EXP-2138
 J.E. 2013-1134
 EYB 2013-223434
 37 C.P.C. (7th) 225
 446

 N.R. 35
 359 D.L.R. (4th) 381
 228 A.C.W.S. (3d) 78
 22 C.L.R. (4th) 1
 2013 CarswellNS 429

Sable Offshore Energy Inc., as agent for and on behalf of the Working Interest Owners of the Sable Offshore Energy Project, ExxonMobil Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd., Pengrowth Corporation, ExxonMobil Canada Properties, as operator of the Sable Offshore Energy Project, Appellants; v. Ameron International Corporation, Ameron B.V., Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc., Respondents.

(31 paras.)

#### Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

# Case Summary

Civil litigation — Civil procedure — Settlements — Appeal by Sable from judgment reversing decision dismissing Ameron and Amercoat's application for disclosure of settlement amounts allowed — Settlement privilege covered settlement negotiations, whether or not a settlement was reached — Since the negotiated amount was a key component of the content of successful negotiations, reflecting the admissions, offers, and compromises made in the course of negotiations, it too was protected by the privilege — While protecting disclosure of settlement negotiations and their fruits had the demonstrable benefit of promoting settlement, there was little corresponding harm in denying disclosure of the settlement amounts in this case.

Civil litigation — Civil evidence — Privilege — Privileged relationships — Solicitor and client — Settlement negotiations — Appeal by Sable from a judgment of the Nova Scotia Court of Appeal reversing a decision dismissing Ameron and Amercoat's application for disclosure of settlement amounts allowed — Settlement privilege covered settlement negotiations, whether or not a settlement was reached — That meant that successful negotiations were entitled to no less protection than ones that yielded no settlement — While protecting disclosure of settlement negotiations and their fruits had the demonstrable benefit of promoting settlement, there was little corresponding harm in denying disclosure of the settlement amounts in this case.

Appeal by Sable Offshore Energy Inc. (Sable) from a judgment of the Nova Scotia Court of Appeal reversing a decision dismissing Ameron and Amercoat'a application for disclosure of settlement amounts. Sable sued a number of defendants. It settled with some of them. The remaining defendants wanted to know what amounts the parties settled for. The question before the Court was whether those negotiated amounts should be disclosed or whether they were protected by settlement privilege. Sable entered into three Pierringer Agreements with some of the defendants. A Pierringer Agreement allowed one or more defendants in a multi-party proceeding to settle with the plaintiff and withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused. As part of the terms of the Agreements, Sable agreed to amend its statement of claim against the non-settling defendants to pursue them only for their share of liability. Ameron and Amercoat did not settle. All the terms of the Pierringer Agreements were disclosed to them, except the amounts agreed. They applied for disclosure of the settlement amounts paid under the Pierringer Agreements. Sable's position was that the amounts were subject to settlement privilege. The motions judge dismissed Ameron and Amercoat's application for disclosure of the settlement amounts. She concluded that the public interest was best served by preserving settlement privilege and keeping the settlement amounts confidential. The Court of Appeal overturned that decision and ordered the amounts disclosed.

#### HELD: Appeal allowed.

Settlements allowed parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. Settlement privilege promoted settlements. It covered any settlement negotiations, whether or not a settlement was reached. That meant that successful negotiations were entitled to no less protection than ones that yielded no settlement. Since the negotiated amount was a key component of the content of successful negotiations, reflecting the admissions, offers, and compromises made in the course of negotiations, it too was protected by the privilege. In the present case, there was no tangible prejudice created by withholding the amounts of the settlements which could be said to outweigh the public interest in promoting settlements. The non-settling defendants had in fact received all the non-financial terms of the Pierringer Agreements. They had access to all the relevant documents and other evidence that was in the settling defendants' possession. They also had the assurance that they would not be held liable for more than their share of damages. While protecting disclosure of settlement negotiations and their fruits had the demonstrable benefit of promoting settlement, there was little corresponding harm in denying disclosure of the settlement amounts in this case.

# Statutes, Regulations and Rules Cited:

Nova Scotia Civil Procedure Rules, r. 20.02, r. 20.06

#### **Subsequent History:**

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

#### **Court Catchwords:**

Civil Procedure -- Access to justice -- Disclosure -- Privilege -- Promoting Settlement -- Settlement privilege -- Scope of protection offered by settlement privilege -- Appellants entering into Pierringer Agreements with some

defendants to multi-party litigation -- Non-settling defendants seeking disclosure of amount of settlements prior to trial -- Whether amounts of negotiated settlements protected by settlement privilege.

#### **Court Summary:**

Sable Offshore Energy Inc. sued a number of defendants who had supplied it with paint intended to prevent corrosion of Sable's offshore structures and onshore facilities. Sable also sued several contractors and applicators who had prepared surfaces and applied the paint. The paint allegedly failed to prevent corrosion. Sable entered into Pierringer Agreements with some of the defendants, allowing those defendants to withdraw from the litigation while permitting Sable's claims against the non-settling defendants to continue. Pierringer Agreements allow one or more defendants in a multi-party proceeding to settle with the plaintiff, leaving the remaining defendants responsible only for the loss they actually caused. All of the terms of those agreements were disclosed to the remaining defendants with the exception of the amounts the parties settled for. The remaining defendants sought disclosure of the settlement amounts.

The trial judge dismissed the application seeking disclosure of the settlement amounts, concluding they were covered by settlement privilege. The Court of Appeal overturned that decision and ordered the amounts disclosed.

Held: The appeal should be allowed.

The purpose of settlement privilege is to promote settlement. Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. Settlement privilege protects the efforts parties make to settle their disputes by ensuring that communications made in the course of those negotiations are inadmissible. The protection is for settlement negotiations, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement. Since the negotiated amount is a key component of the content of successful negotiations, reflecting the admissions, offers, and compromises made in the course of negotiations, it too is protected by the privilege.

As with other class privileges, there are exceptions. To come within those exceptions, a defendant must show that, on balance, a competing public interest outweighs the public interest in encouraging settlement.

The non-settling defendants have received all the non-financial terms of the Pierringer Agreements. They have access to all the relevant documents and other evidence that was in the settling defendants' possession. They also have the assurance that they will not be held liable for more than their share of damages. As for any concern that the non-settling defendants will be required to pay more than their share of damages, it is inherent in Pierringer Agreements that non-settling defendants can only be held liable for their share of the damages and are severally, and not jointly, liable with the settling defendants. The defendants remain fully aware of the claims they must defend themselves against and of the overall amount that Sable is seeking. There is therefore no tangible prejudice created by withholding the amounts of the settlements which can be said to outweigh the public interest in promoting settlements.

#### Cases Cited

Referred to: Pierringer v. Hoger, 124 N.W.2d 106 (1963); Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225; Kelvin Energy Ltd. v. Lee, [1992] 3 S.C.R. 235; Rush & Tompkins Ltd. v. Greater London Council, [1988] 3 All E.R. 737; Cutts v. Head, [1984] 1 All E.R. 597; Middelkamp v. Fraser Valley Real Estate Board (1992), 71 B.C.L.R. (2d) 276; Brown v. Cape Breton (Regional Municipality), 2011 NSCA 32, 302 N.S.R. (2d) 84; Amoco Canada Petroleum Co. v. Propak Systems Ltd., 2001 ABCA 110, 281 A.R. 185; Hudson Bay Mining and Smelting Co. v. Wright (1997), 120 Man. R. (2d) 214; Dos Santos Estate v. Sun Life Assurance Co. of Canada, 2005 BCCA 4, 207 B.C.A.C. 54; Unilever plc v. Procter & Gamble Co., [2001] 1 All E.R. 783; Underwood v. Cox (1912), 26 O.L.R. 303; Bioriginal

Food & Science Corp. v. Sascopack Inc., 2012 SKQB 469 (CanLII).

### **Statutes and Regulations Cited**

Nova Scotia Civil Procedure Rules, rr. 20.02, 20.06.

### **Authors Cited**

Bryant, Alan W., Sidney N. Lederman and Michelle K. Fuerst. *The Law of Evidence in Canada*, 3 ed. Markham, Ont.: LexisNexis, 2009.

Knapp, Peter B. "Keeping the *Pierringer* Promise: Fair Settlements and Fair Trials" (1994), 20 Wm. Mitchell L. Rev. 1.

Vaver, David. "'Without Prejudice' Communications -- Their Admissibility and Effect" (1974), 9 U.B.C. L. Rev. 85.

#### **History and Disposition:**

APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J.N.S. and Oland and Farrar JJ.A.), 2011 NSCA 121, 310 N.S.R. (2d) 382, 983 A.P.R. 382, 26 C.P.C. (7) 1, 346 D.L.R. (4) 68, 12 C.L.R. (4) 129, [2011] N.S.J. No. 687 (QL), 2011 CarswellNS 893, reversing a decision of Hood J., 2010 NSSC 473, 299 N.S.R. (2d) 216, 947 A.P.R. 216, [2010] N.S.J. No. 713 (QL), 2010 CarswellNS 907. Appeal allowed.

### Counsel

Robert Belliveau, Q.C., and Kevin Gibson, for the appellants.

John P. Merrick, Q.C., and Darlene Jamieson, Q.C., for the respondents Ameron International Corporation and Ameron B.V.

Terrence L. S. Teed, Q.C., and Ronald J. Savoy, for the respondents Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc.

The judgment of the Court was delivered by

### ABELLA J.

1 The justice system is on a constant quest for ameliorative strategies that reduce litigation's stubbornly endemic delays, expense and stress. In this evolving mission to confront barriers to access to justice, some strategies for

resolving disputes have proven to be more enduringly successful than others. Of these, few can claim the tradition of success rightfully attributed to settlements.

- 2 The purpose of settlement privilege is to promote settlement. The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.
- **3** Sable Offshore Energy Inc. sued a number of defendants. It settled with some of them. The remaining defendants want to know what amounts the parties settled for. The question before us is whether those negotiated amounts should be disclosed or whether they are protected by settlement privilege.

#### Background

- 4 Sable undertook the Sable Offshore Energy Project, whose purpose was the building of several offshore structures and onshore gas processing facilities in Nova Scotia. Ameron International Corporation and Ameron B.V. (Ameron) and Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc. (collectively Amercoat) supplied Sable with paint for parts of the Sable structures. Sable brought three lawsuits alleging that the paint failed to prevent corrosion.
- 5 In the lawsuit that is the subject of this appeal, Sable sued Ameron, Amercoat, and 12 other contractors and applicators who were responsible for preparing surfaces and applying the paint coatings. The claims against Ameron and Amercoat were for negligence, negligent misrepresentation and breach of a collateral warranty. The claims against the other defendants were similar.
- **6** Sable entered into three Pierringer Agreements with some of the defendants. Named for the 1963 Wisconsin case of *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963), a Pierringer Agreement allows one or more defendants in a multi-party proceeding to settle with the plaintiff and withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused. There is no joint liability with the settling defendants, but non-settling defendants may be jointly liable with each other.
- **7** As part of the terms of the Agreements, Sable agreed to amend its statement of claim against the non-settling defendants to pursue them only for their share of liability. In addition, all the relevant evidence in the possession of the settling defendants, would, in accordance with the Agreements, be given to the Plaintiffs and be discoverable by the non-settling defendants.
- 8 Ameron and Amercoat did not settle. All the terms of the Pierringer Agreements were disclosed to Ameron and Amercoat except the amounts agreed to.
- **9** These settlement agreements were approved by court order on April 27, 2010. On December 3, 2010, Ameron filed an application pursuant to Rules 20.02 and 20.06 of Nova Scotia's 1972 *Civil Procedure Rules* (which the parties previously agreed would govern the litigation) for disclosure of the settlement amounts paid under the Pierringer Agreements. Sable's position was that the amounts were subject to settlement privilege.
- 10 Hood J. dismissed the defendants' application for disclosure of the settlement amounts. She concluded that the public interest was best served by preserving settlement privilege and keeping the settlement amounts confidential. The Court of Appeal overturned that decision and ordered the amounts disclosed.

#### Analysis

11 Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by

Callaghan A.C.J.H.C. in Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225 (H.C.J.):

[T]he courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system.

[p. 230]

This observation was cited with approval in *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, at p. 259, where L'Heureux-Dubé J. acknowledged that promoting settlement was "sound judicial policy" that "contributes to the effective administration of justice".

- 12 Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a *prima facie* presumption of inadmissibility, exceptions will be found "when the justice of the case requires it" (*Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (H.L.), at p. 740).
- 13 Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "Without Prejudice' Communications -- Their Admissibility and Effect" (1974), 9 *U.B.C. L. Rev.* 85, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597, at p. 605:

[P]arties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations ... may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.

What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

- 14 Rush & Tompkins confirmed that settlement privilege extends beyond documents and communications expressly designated to be "without prejudice". In that case, a contractor settled its action against one defendant, the Greater London Council (the GLC), while maintaining it against the other defendant, the Carey contractors. The House of Lords considered whether communications made in the process of negotiating the settlement with the GLC should be admissible in the ongoing litigation with the Carey contractors. Lord Griffiths reached two conclusions of significance for this case. First, although the privilege is often referred to as the rule about "without prejudice" communications, those precise words are not required to invoke the privilege. What matters instead is the intent of the parties to settle the action (p. 739). Any negotiations undertaken with this purpose are inadmissible.
- 15 Lord Griffiths' second relevant conclusion was that although most cases considering the "without prejudice" rule have dealt with the admissibility of communications once negotiations have failed, the rationale of promoting settlement is no less applicable if an agreement is actually reached. Lord Griffiths explained that a plaintiff in Rush & Tompkins' situation would be discouraged from settling with one defendant if any admissions it made during the course of its negotiations were admissible in its claim against the other:

In such circumstances it would, I think, place a serious fetter on negotiations ... if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant. [p. 744]

view that settlement privilege covers any settlement negotiations. The plaintiff James Middelkamp launched a civil suit against Fraser Valley Real Estate Board claiming that it had engaged in practices that were contrary to the Competition Act, R.S.C. 1985, c. C-34, and caused him to suffer damages. He also complained about the Board's conduct to the Director of Investigation and Research under different provisions of the Act, resulting in an investigation by the Director and criminal charges against the Board. The Board negotiated a settlement with the Department of Justice, leading to the criminal charges being resolved. Middelkamp sought disclosure of any communications made during the course of negotiations between the Board and the Department of Justice. McEachern C.J.B.C. refused to order disclosure of the communications on the basis of settlement privilege, explaining:

... the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "blanket, *prima facie*, common law, or 'class'" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeayour.

In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served. [Emphasis added; paras. 19-20.]

17 As McEachern C.J.B.C. pointed out, the protection is for settlement negotiations, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement. The reasoning in *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, 302 N.S.R. (2d) 84, is instructive. A plaintiff brought separate claims against two defendants for unrelated injuries to the same knee. She settled with one defendant and the Court of Appeal had to consider whether the trial judge was right to order disclosure of the amount of the settlement to the remaining defendant. Bryson J.A. found that disclosure should not have been ordered since a principled approach to settlement privilege did not justify a distinction between settlement negotiations and what was ultimately negotiated:

Some of the cases distinguish between extending privilege from negotiations to the concluded agreement itself... . The distinction ... is arbitrary. The reasons for protecting settlement communications from disclosure are not usually spent when a deal is made. Typically parties no more wish to disclose to the world the terms of their agreement than their negotiations in achieving it. [Emphasis added; para. 41.]

Notably, this is the view taken in Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law Of Evidence in Canada* (3rd ed. 2009), where the authors conclude:

- ... the privilege applies not only to failed negotiations, but also to the *content of successful negotiations*, so long as the existence or interpretation of the agreement itself is not in issue in the subsequent proceedings and none of the exceptions are applicable. [Emphasis added; para. 14. 341.]
- 18 Since the negotiated amount is a key component of the "content of successful negotiations", reflecting the admissions, offers, and compromises made in the course of negotiations, it too is protected by the privilege. I am aware that some earlier jurisprudence did not extend the privilege to the concluded agreement (see Amoco Canada Petroleum Co. v. Propak Systems Ltd., 2001 ABCA 110, 281 A.R. 185, at para. 40, citing Hudson Bay Mining and Smelting Co. v. Wright (1997), 120 Man. R. (2d) 214 (Q.B.)), but in my respectful view, it is better to adopt an approach that more robustly promotes settlement by including its content.
- 19 There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (Dos Santos

Estate v. Sun Life Assurance Co. of Canada, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (Unilever plc v. Procter & Gamble Co., [2001] 1 All E.R. 783 (C.A.), Underwood v. Cox (1912), 26 O.L.R. 303), and preventing a plaintiff from being overcompensated (Dos Santos).

- 20 The non-settling defendants argue that there should be an exception to the privilege for the amounts of the settlements because they say they need this information to conduct their litigation. I see no tangible prejudice created by withholding the amounts of the settlements which can be said to outweigh the public interest in promoting settlements.
- 21 The particular settlements negotiated in this case are known as Pierringer Agreements. Pierringer Agreements were developed in the United States to address the obstacles to settlement that arose in multi-party litigation. Professor Peter B. Knapp summarized the value -- and complexity -- of trying to settle multi-party litigation as follows:

Settlement of complicated multi-defendant civil litigation is particularly valuable, because complicated civil trials can consume enormous amounts of a judge's time and can be expensive for the parties. However, settling multi-defendant civil litigation can be especially difficult. Different defendants have different tolerances for risk, and some defendants are simply far less willing to settle than others.

"Keeping the *Pierringer* Promise: Fair Settlements and Fair Trials" (1994), 20 Wm. Mitchell L. Rev. 1, at p. 5.

22 Professor Knapp also explained why, prior to Pierringer Agreements, settlements had been difficult to encourage:

On one hand, a plaintiff contemplating settlement with one of several defendants faced the possibility that release of the one defendant would also extinguish all claims against the nonsettling defendants. On the other hand, in jurisdictions which permitted contribution among joint tortfeasors, a settling defendant faced the possibility of post-settlement contribution claims made by the nonsettling defendants. [pp. 6-7]

- 23 In the United States, Pierringer Agreements were found to significantly attenuate the obstacles in the way of negotiating settlements in multi-party litigation. Under a Pierringer Agreement, the plaintiff's claim was only "extinguished" against those defendants with whom it settled; the claims against the non-settling defendants continued. The settling defendants, meanwhile, were assured that they could not be subject to a contribution claim from the non-settling defendants, who would be accountable only for their own share of liability at trial.
- 24 Pierringer Agreements in Canada built on these American foundations and routinely included additional protections for non-settling defendants, such as requiring that non-settling defendants be given access to the settling defendants' evidence. In this case, for example, the court order approving the settlement required that the plaintiffs get production of all relevant evidence from the settling defendants and make this evidence available to the non-settling defendants on discovery. It also ordered that, with respect to factual matters, there be no restrictions on the non-settling defendants' access to experts retained by the settling defendants. In addition, the Agreements in this case specified that their non-financial terms would be disclosed to the court and non-settling defendants "to the extent required by the laws of the Province of Nova Scotia and the rulings and ethical guidelines promulgated by the Nova Scotia Barristers' Society" (A.R., at pp. 142 and 184).
- 25 The non-settling defendants have in fact received all the non-financial terms of the Pierringer Agreements. They have access to all the relevant documents and other evidence that was in the settling defendants' possession. They also have the assurance that they will not be held liable for more than their share of damages. Moreover, Sable agreed that at the end of the trial, once liability had been determined, it would disclose to the trial judge the amounts it settled for. As a result, should the non-settling defendants establish a right to set-off in this case, their liability for damages will be adjusted downwards if necessary to avoid overcompensating the plaintiff.

- 26 As for any concern that the non-settling defendants will be required to pay more than their share of damages, it is inherent in Pierringer Agreements that non-settling defendants can only be held liable for their share of the damages and are severally, and not jointly, liable with the settling defendants.
- 27 It is therefore not clear to me how knowledge of the settlement amounts materially affects the ability of the non-settling defendants to know and present their case. The defendants remain fully aware of the claims they must defend themselves against and of the overall amount that Sable is seeking. It is true that knowing the settlement amounts might allow the defendants to revise their estimate of how much they want to invest in the case, but this, it seems to me, does not rise to a sufficient level of importance to displace the public interest in promoting settlements.
- 28 The non-settling defendants also argued that refusing disclosure impedes their own possible settlement initiatives since they are more likely to settle if they know the settlement amounts already negotiated. Perhaps. But they may also, depending on the amounts, arguably come to see them as a disincentive. In any event, theirs is essentially a circular argument that the interest in *subsequent* settlement outweighs the public interest in encouraging the *initial* settlement. But the likelihood of an initial settlement decreases if the amount is disclosable.
- 29 Someone has to go first, and encouraging that first settlement in multi-party litigation is palpably worthy of more protection than the speculative assumption that others will only follow if they know the amount. The settling defendants, after all, were able to come to a negotiated amount without the benefit of a guiding settlement precedent. The non-settling defendants' position is no worse. As Smith J. noted in protecting the settlement amount from disclosure in *Bioriginal Food & Science Corp. v. Sascopack Inc.*, 2012 SKQB 469 (CanLII):

... imperfect knowledge is virtually always the case in settlement negotiations. There are always knowns and known unknowns ... [para. 33].

And Bryson J.A. compellingly summarized the competing arguments in Brown as follows:

Some courts have argued that it is necessary to go further and disclose the settlement amount itself.... They hold either that the agreement (unlike negotiations) is not privileged or that the settling parties have an advantage which should be redressed by disclosure.... If indeed settling parties thereby enjoy an advantage over non-settling parties, it is one for which they have bargained. The court should hesitate to expropriate that advantage by ordering disclosure at the instance of non-settling parties, intransigent or otherwise. The argument that disclosure would facilitate settlement amongst the remaining parties ignores that, but for the privilege, the first settlement would often not occur. [Citations omitted; para. 67.]

- **30** A proper analysis of a claim for an exception to settlement privilege does not simply ask whether the non-settling defendants derive some tactical advantage from disclosure, but whether the reason for disclosure outweighs the policy in favour of promoting settlement. While protecting disclosure of settlement negotiations and their fruits has the demonstrable benefit of promoting settlement, there is little corresponding harm in denying disclosure of the settlement amounts in this case.
- 31 I would therefore allow the appeal with costs throughout.

Appeal allowed with costs throughout.

#### Solicitors:

Solicitors for the appellants: McInnes Cooper, Halifax.

Solicitors for the respondents Ameron International Corporation and Ameron B.V.: Merrick Jamieson Sterns Washington & Mahody, Halifax.

Solicitors for the respondents Allcolour Paint Limited, Americant Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc.: Bingham Law, Moncton.

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# Briarwood Estates (Tottenham) Ltd. v. Gordon et al., 2017 ONSC 6330 (CanLII)

Date:

2017-10-23

File number:

DETWEEN.

DC-17-539

Citation:

Briarwood Estates (Tottenham) Ltd. v. Gordon et al., 2017 ONSC 6330 (CanLII), <a href="http://canlii.ca/t/hkpss">http://canlii.ca/t/hkpss</a>, retrieved on

2019-06-07

CITATION: Briarwood Estates (Tottenham) Ltd. v. Gordon et al., 2017 ONSC 6330 DIVISIONAL COURT FILE NO.: DC-17-539, Small Claims Court # SC-16-1582 DATE: 20171023

#### **ONTARIO**

#### SUPERIOR COURT OF JUSTICE

#### **DIVISIONAL COURT**

) ) ))
S. Juzkiw, for the Appellant/Plaintiff
W. Thomson, for the Respondents/Defendants
) ) HEARD: October 19, 2017

#### REASONS FOR DECISION

#### **DITOMASO J.**

#### THE APPEAL

[1] The Appellant (Plaintiff) Briarwood Estates (Tottenham) Ltd. ("Briarwood") appeals the decision of Deputy Judge Kowalsky of the Small Claims Court on February 21, 2017 concerning a motion brought by the Respondents (Defendants) Carly Gordon ("Gordon") and Shaun Hansen ("Hansen") to strike Briarwood's claim in accordance with Rule 12.02 of the Rules of the Small Claims Court. On March 6, 2017, for written reasons, the motion judge dismissed Briarwood's claim.

#### **OVERVIEW**

- [2] Gordon and Hansen are common law spouses who own a property municipally known as 84 Sydie Lane in Tottenham, Ontario ("the property") which was built by Briarwood. Briarwood is an Ontario corporation in the business of developing lands and building residential homes in and around Tottenham, Ontario.
- [3] Gordon and Hansen purchased the property from Briarwood pursuant to an assignment of the Agreement of Purchase and Sale executed on or around June 16, 2013.
- [4] In the Small Claims Court action, Briarwood sued for damages on the basis of an alleged obligation by Gordon and Hansen to pay Briarwood for a small deck (5' x 6') built onto the subject property. Briarwood claims damages in the amount of \$11,300 for the preparatory work and additional costs involved in building the deck.
- [5] Gordon and Hansen at all times understood the purchase price was in the amount of \$338,962 which specifically included the cost of constructing the deck based on a plain reading of the agreement.
- [6] Briarwood asserts that the deck was not an included item and the purchase price was subject to adjustment dependent upon the municipality's final approval of grading and engineering plans. Briarwood contends that Gordon and Hansen agreed to pay the additional cost in respect of the construction of the deck which was not included in the purchase price.
- [7] In his reasons, the motion judge found that there was a fundamental ambiguity in the contract with respect to the deck and whether or not it was included in the purchase price. His finding was the basis for applying the doctrine of *contra proferentem* in favour of Gordon and Hansen's motion to strike.

#### **ISSUES**

- [8] There are several issues on this appeal:
  - (a) Did the motion judge err in finding that there was an ambiguity in the contract?
  - (b) Did the motion judge err in finding that the deck constructed was included in the purchase price?
  - (c) Did the motion judge err in finding that there was no basis for the claim for an increased lot charge in the contract as claimed?
  - (d) Did the motion judge err in finding no rational basis for an adjustment based upon the contract?
  - (e) Did the motion judge err in dismissing Briarwood's claim?
- [9] The fundamental issue is whether the motion judge erred in finding there was an ambiguity in the contract and misapplied the doctrine of contra proferentem.

#### **POSITION OF THE PARTIES**

#### Position of Briarwood

Briarwood takes the position that the motion judge erred by finding there was an ambiguity in the contract, by misapplying the doctrine of contra proferentem and by ultimately concluding that the deck was included in the purchase price and that Briarwood's claim should be dismissed. Briarwood's position is that the deck was not included in the purchase price. The construction of the deck was an additional charge once the final municipal approval process was completed and once the builder knew what was to be built and how much it would cost. At all times, Briarwood submits that Gordon and Hansen were well aware from the contract provisions that they would be responsible for those preparatory and construction costs. The deck was built by Briarwood and Briarwood claims that it is owed the sum of \$11,300.

#### Position of Gordon and Hansen

[11] Gordon and Hansen submit that the construction of the 5'x 6' walkout deck was included in the Agreement of Purchase and Sale on a plain reading of certain provisions in the contract. They further assert that there are conflicting provisions in the contract and where an ambiguity is presented, in respect of certain contractual terms in this case, then the doctrine of contra proferentem properly applies in their favour. They contend that the motion judge properly found that there was an ambiguity, that the doctrine of contra proferentem applied in their favour and that Briarwood's claim was dismissed. They further assert that the motion judge committed no palpable or overriding error and that his decision was correct. They submit that the appeal ought to be dismissed.

#### STANDARD OF REVIEW

- [12] The standard of review for decisions in the Small Claims Court is determined by the principles outlined by the Supreme Court of Canada in Housen v. Nikolaisen, 2002 SCC 33 (CanLll).... on a pure question of law, the standard of review is that of correctness. The standard of review for findings of fact or mixed fact and law are reviewable only for palpable and overriding error.
- [13] With respect to findings of fact, the Supreme Court noted in H.L. v. Canada (Attorney General), 2005 SCC 25 (CanLII), [2005] 1 SCR 401 at para. 4 an appellate court "may substitute its own view of the evidence and draw its own inferences of fact where the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence".

#### **ANALYSIS**

#### FRESH EVIDENCE

- [14] On appeal, Briarwood sought to tender the evidence of an employee Joe Tuzi by way of affidavit not before the motion judge.
- [15] I have considered all four branches set out in *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759. I find that this is not a proper case for the admission of fresh evidence. I find the so-called fresh evidence does not pass the *Palmer* "due diligence" test nor does it bear upon a decisive issue or could it reasonably be expected to have affected the result. The proposed evidence was entirely available prior to the hearing of the motion. However, Briarwood did not tender the evidence when it could have done so.
- [16] Accordingly, Briarwood's leave to adduce fresh evidence on the appeal is denied.

#### REASONS OF THE MOTIONS JUDGE

- [17] The motion judge identified in his reasons that at issue was the written contract and the interpretation of that contract. More specifically, he identified whether this matter should or should not be permitted to proceed to trial, whether the claim disclosed a cause of action or was frivolous and a waste of time of the court. The claim was for the cost of providing a deck at additional cost to Gordon and Hansen, and for an upgraded lot fee.
- [18] Gordon and Hansen contended the deck was included in the "purchase price" which was a "defined term" and therefore included in the purchase price under "Schedule B" of the contract. The motion judge found that there was no disagreement between the parties that the deck was constructed and that Gordon and Hansen did not pay for it. There was no dispute in respect of the deck constructed as being the deck being referred to in "Schedule B" and that its dimensions were 5'x 6'.
- [19] The motion judge identified the issue as whether section 27 of the agreement was inconsistent with section 28 and Schedule B of the agreement. Section 27 of the agreement provided for a deck to be constructed at additional cost to the purchaser in certain circumstances. However, upon the reading section 28 and Schedule B, in issue was whether the deck was included in the purchase price.
- [20] The motion judge saw no way to reconcile the operation of both clauses. He applied the doctrine of *contra proferentem* in favour of Gordon and Hansen.

- [21] The motion judge found that the matter was driven exclusively by documentation, all of which was before him. He was of the view that the trial judge would be in no better position to interpret the contract.
- [22] The motion judge held:

I find that there is an ambiguity in the contract where section 27 and 28 appear to produce different results. On the basis of the doctrine of contra proferentem, resolution must favour the defendant. I therefore find that the deck constructed is included in the purchase price. I also find that there is no basis for the claim for an increased lot charge in the contract as claimed.

[23] He dismissed Briarwood's claim.

#### Did the motion judge err in finding that there was an ambiguity in the contract?

- I find that the motion judge was correct and did not commit any palpable or overriding error in determining that there was an ambiguity on the face of the contract. He was correct when he held that there was a fundamental contradiction or ambiguity in the agreement. Section 27 of the agreement in reference to the deck states: "the purchaser agrees further to pay the Vendor the additional cost involved in constructing such walkout to basement or walkout deck". Section 28 of the agreement provides "the purchase price shall include only those items, furnishings, and chattels enumerated in Schedule "B" attached hereto". Schedule B provides "where a deck is required at rear patio door due to grade conditions, the builder supplies standard 5'x 6' deck on townhouse and semi-detached home designs and 5'x 6' deck on single home designs as per plan".
- [25] The evidence before the motion judge was that the agreement simultaneously provided for the purchaser to pay for the deck and at the same time that same deck would be provided as part of the purchase price.
- [26] Briarwood has attempted to argue that, in fact, it is claiming for the "costs of grading the land and constructing and/or installing such a 5'x 6' walk-out deck and not for the cost of providing the 5'x 6' walk-out deck as understood by the motion judge at the time of his decision".
- [27] This submission is not supported by a plain reading of the agreement.
- [28] I find on a plain reading of the agreement the motion judge was correct in finding an ambiguity on the face of the contractual terms. The motion judge assessed the competing clauses of the agreement being sections 27 and 28 including Schedule B and in doing so, he found there was an irreconcilable ambiguity in the contract. He did not commit a palpable and overriding error in so finding.

#### Did the motion judge err in finding that the deck constructed is included in the purchase price?

- [29] This issue is closely related to the preceding issue. Again, Briarwood argues that the cost was for land services rather than the deck itself. I disagree. The motion judge held that "the deck constructed is included in the purchase price". His finding was made with reference to the contract terms and application of the doctrine of *contra proferentem* which he was entitled to do on the evidence before him.
- [30] As such, his finding was of mixed fact and law and is subject to review on a spectrum between correctness and palpable and overriding error. I find the motion judge was correct and made no palpable and overriding error in determining that the deck was included in the purchase price.
- Briarwood submits that the purchase price was not defined and is subject to adjustments. Briarwood refers to section 14 of the agreement which identifies the adjustments on closing. However, section 14 does not mention anything about an adjustment for a deck on closing.
- [32] Again, on the plain reading of Schedule B, the agreement provides that "where a deck is required", the "builder supplies".

#### Did the motion judge err in finding there was no basis for the claim for an increased lot charge in the contract as claimed?

[33] In his reasons, the motion judge noted that Briarwood's counsel provided no argument based on the contract which would give it any relief for the additional fee for an upgraded lot. Further, the motion judge saw no basis for that relief in the contract. The claim was dismissed for an increased Lot charge as no argument was made before the motion judge in that respect. This ground of appeal fails as the motion judge made no palpable and overriding error in this regard.

#### Did the motion judge err in finding no rational basis for an adjustment based up on the contract?

The motion judge did not err on his reading of the contractual terms in finding no rational basis that the deck costs would constitute an adjustment to the purchase price as he properly found the cost of the deck was included.

#### Did the motion judge err in dismissing Briarwood's claim?

- [35] The motion judge was alive to Rule 12.02 on the motion and considered same within the context of the "summary nature of the Small Claims Court".
- [36] In this regard, the motion judge held:
  - ...I am reluctant to making any final pronouncements on the rights of the parties. However, this matter is driven exclusively by the documentation, all of which is before me, and which would be also put before a trial judge. The trial judge would be in no better position than this court to interpret the contract.
- [37] Briarwood submits that the motion judge should have given Briarwood a further opportunity to provide extrinsic evidence to explain any ambiguity. The motion judge held that all the evidence was before him and made a ruling accordingly. Briarwood failed to tender evidence at the motion which would or could "explain any ambiguity", despite having the opportunity to do so.
- [38] On all of the evidence before the motion judge, I find he was correct in dismissing Briarwood's claim and made no palpable and overriding error in doing so.

#### **DISPOSTION**

[39] For these reasons, the appeal must fail. The appeal is therefore dismissed.

#### **COSTS**

[40] Submissions were heard in respect of costs. In all of the circumstances, the Respondents were successful on the appeal. Their costs are fixed in the amount of \$2,000 all inclusive. It is ordered that Briarwood Estates (Tottenham) Ltd. shall pay Carly Gordon and Shaun Hansen the sum of \$2,000 all inclusive of fees, disbursements and HST.

G.P. DiTomaso J.

Released: October 23, 2017

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# Non-Marine Underwriters, Lloyd's of London v. Scalera, [2000] 1 S.C.R. 551

Supreme Court Reports

Supreme Court of Canada

Present: L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

1999: October 14 / 2000: May 3.

File No.: 26695

[2000] 1 S.C.R. 551 | [2000] 1 R.C.S. 551 | [2000] S.C.J. No. 26 | [2000] A.C.S. no 26 | 2000 SCC 24

Vincent Scalera, appellant; v. M. J. Oppenheim in his quality as Attorney in Canada for the Non-Marine Underwriters, members of Lloyd's of London, respondent.

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL (139 paras.)

### **Case Summary**

Insurance — Homeowner's insurance — Insurer's duty to defend — Plaintiff bringing action against insured alleging battery, negligent battery, negligent misrepresentation and breach of fiduciary duty — Policy containing exclusion for intentional acts of insured — Whether insurer has a duty to defend.

Torts — Intentional torts — Battery — Evidence — Burden of proof — Consent — Whether plaintiff must prove lack of consent.

In 1996, a plaintiff brought a civil action against five B.C. Transit bus drivers, including the appellant, arising out of various alleged sexual assaults between 1988 and 1992. The allegations included battery, negligent battery, negligent misrepresentation and breach of fiduciary duty. The appellant owned a homeowner's insurance policy issued by the respondent insurer. The policy provided coverage for "compensatory damage because of bodily injury" arising from the insured's personal actions, excepting "bodily injury or property damage caused by any intentional or criminal act". The British Columbia Supreme Court dismissed the respondent's request for a declaration that it not be required to defend [page552] the appellant against the plaintiff's claims. The Court of Appeal allowed the respondent's appeal.

Held: The appeal should be dismissed.

Per L'Heureux-Dubé, Gonthier, McLachlin and Binnie JJ.: The plaintiff's claims could not trigger coverage under the policy. Accordingly, the respondent has no duty to defend. While there is substantial agreement with lacobucci J.'s reasoning, his approach to the tort of battery in the sexual context is disagreed with. In the tort of sexual battery, consent operates as a defence and must be proven by the defendant. The plaintiff is not required to prove that the defendant either knew that she was not consenting or that a reasonable person in the defendant's position would have known that she was not consenting.

The traditional rights-based approach to the law of battery that is now the law of Canada should not be set aside lightly. The tort of battery is a form of trespass against the person and is aimed at protecting the personal autonomy of the individual. Its purpose is to recognize the right of each person to control his or her body and who touches it, and to permit damages where this right is violated. The compensation stems not from fault, but from

violation of the right to personal autonomy. When a person interferes with the body of another, a prima facie case of violation of the plaintiff's autonomy is made out. The law may then fairly call upon the person thus implicated to explain, or raise some defence, such as the defence of consent. If he can show that he acted with consent, the prima facie violation is negated and the plaintiff's claim will fail. But it is not up to the plaintiff to prove that, in addition to directly interfering with her body, the defendant was also at fault. Unlike negligence, where the requirement of fault can be justified because the tortious sequence may be complicated, trespass to the person is confined to direct interferences. Where the trespass causes actual injury to the plaintiff, there is a direct connection between the defendant's action and the plaintiff's injury. The traditional approach to trespass is also practical, since, if the defendant is in a position to say what happened, it is both sensible and just to give him an incentive to do so by putting the burden of explanation on him. In addition, the close causal relationship between the defendant's conduct and the violation of the plaintiff's bodily integrity, the identification of the loss with the plaintiff's personality and freedom, the infliction of the loss in isolated (as opposed to systemic) circumstances, and [page553] the perception of the defendant's conduct as anti-social all support the legal position that once the direct interference with the plaintiff's person is shown, the defendant may fairly be called upon to explain his behaviour if indeed it was innocent.

Therefore, while a plaintiff generally must prove all elements of the tort she alleges, the fact that contact must be harmful or offensive to constitute battery does not mean that the plaintiff must prove that she did not consent and that the defendant actually or constructively knew she did not consent to sexual contact. When it is accepted that the foundation of the tort of battery is a violation of personal autonomy, all contact outside the exceptional category of contact that is generally accepted or expected in the course of ordinary life is prima facie offensive. Since sexual contact is not generally accepted or expected in the course of ordinary activities, the plaintiff may establish an action for sexual battery without negativing actual or constructive consent. Nothing special about sexual battery justifies requiring the plaintiff to prove that she did not consent or that the defendant either knew or ought to have known that she did not consent.

The exclusion clause in the policy must be interpreted as requiring an intent to injure. Where there is an allegation of sexual battery, courts will conclude as a matter of legal inference that the defendant intended harm for the purpose of construing exemptions of insurance coverage for intentional injury.

It is unnecessary to comment on the relationship between battery and negligence.

Per lacobucci, Major and Bastarache JJ.: The respondent has no duty to defend the appellant because the plaintiff's statement of claim makes no allegation that could potentially give rise to indemnity under the insurance contract.

An insurer only has a duty to defend when a lawsuit against the insured raises a claim that could potentially [page554] fall within coverage. The insurer's duty to defend is related to its duty to indemnify. Therefore if an insurance policy, like the one in this case, excludes liability arising from intentionally caused injuries, there will be no duty to defend actions based on such injuries.

A three-step process must be applied to determine whether a claim could trigger indemnity. First, a court should determine which of the plaintiff's legal allegations are properly pleaded. In doing so, courts are not bound by the legal labels chosen by the plaintiff. A plaintiff cannot change an intentional tort into a negligent one simply by choice of words, or vice versa. Therefore, when ascertaining the scope of the duty to defend, a court must look beyond the choice of labels, and examine the substance of the allegations contained in the pleadings. This does not involve deciding whether the claims have any merit; all a court must do is decide, based on the pleadings, the true nature of the claims.

At the second stage, the court should determine if any claims are entirely derivative in nature. The duty to defend will not be triggered simply because a claim can be cast in terms of both negligence and intentional tort. A claim for negligence will not be derivative if the underlying elements of the negligence and of the intentional tort are sufficiently disparate to render the two claims unrelated. However, if both the negligence and intentional tort claims arise from the same actions and cause the same harm, the negligence claim is derivative, and it will be subsumed into the intentional tort for the purposes of the exclusion clause analysis. If neither claim is derivative, the claim of negligence will survive and the duty to defend will apply. Finally, at the third stage, the court must decide whether any of the properly pleaded, non-derivative claims could potentially trigger the insurer's duty to

defend. This appeal's holding with respect to the proper characterization of a plaintiff's tort allegations should not be taken to affect any areas of law outside the insurance context presented by this appeal.

In this case, the exclusion clause must be read to require that the injuries be intentionally caused, in that they must be the product of an intentional tort and not of negligence. The plaintiff has stated three possible claims arising out of the alleged sexual assaults: sexual battery, negligent battery, and breach of fiduciary duty. Sexual [page555] battery requires the plaintiff to prove that a reasonable person should have known that the plaintiff did not validly consent to the sexual activity in question. Since non-consensual sexual activity is inherently harmful, any injuries resulting therefrom are intentionally caused, and the exclusion clause would apply. If a reasonable person would not have known that the plaintiff did not validly consent, the plaintiff's claim will fail, and there will be no duty to indemnify or duty to defend. The plaintiff's claims of negligence and breach of fiduciary duty are either not properly pleaded or are subsumed into the sexual battery because these claims are based on the same facts and resulted in the same harm. Therefore the exclusion clause applies equally to them. There being no potentially indemnifiable claim, the respondent has no duty to defend.

### **Cases Cited**

By McLachlin J.

Referred to: Collins v. Wilcock, [1984] 3 All E.R. 374; Cook v. Lewis, [1951] S.C.R. 830; Larin v. Goshen (1974), 56 D.L.R. (3d) 719; Walmsley v. Humenick, [1954] 2 D.L.R. 232; Tillander v. Gosselin (1966), 60 D.L.R. (2d) 18, aff'd (1967), 61 D.L.R. (2d) 192; Dahlberg v. Naydiuk (1969), 10 D.L.R. (3d) 319; Ellison v. Rogers (1967), 67 D.L.R. (2d) 21; Reibl v. Hughes, [1980] 2 S.C.R. 880; Norberg v. Wynrib, [1992] 2 S.C.R. 226; Scott v. Shepherd (1773), 2 Black. W. 892, 96 E.R. 525; Leame v. Bray (1803), 3 East 593, 102 E.R. 724; Fowler v. Lanning, [1959] 1 Q.B. 426; Letang v. Cooper, [1965] 1 Q.B. 232; Bell Canada v. COPE (Sarnia) Ltd. (1980), 11 C.C.L.T. 170, aff'd (1980), 31 O.R. (2d) 571; Cole v. Turner (1704), 6 Mod. 149, 87 E.R. 907; Stewart v. Stonehouse, [1926] 2 D.L.R. 683; In re F., [1990] 2 A.C. 1; M. (K.) v. M. (H.), [1992] 3 S.C.R. 6; Freeman v. Home Office, [1983] 3 All E.R. 589, aff'd [1984] 1 All E.R. 1036; H. v. R., [1996] 1 N.Z.L.R. 299; Pursell v. Horn (1838), 8 AD. & E. 602, 112 E.R. 966; Green v. Goddard (1704), 2 Salkeld 641, 91 E.R. 540; Humphries v. Connor (1864), 17 Ir. Com. L. Rep. 1; Forde v. Skinner (1830), 4 Car. & P. 239, 172 E.R. 687; Schweizer v. Central Hospital (1974), 53 D.L.R. (3d) 494; Allan v. New Mount Sinai Hospital (1980), 109 D.L.R. (3d) 634, rev'd on other grounds (1981), 33 O.R. (2d) 603; Brushett v. Cowan (1990), 3 C.C.L.T. (2d) 195; [page556] O'Bonsawin v. Paradis (1993), 15 C.C.L.T. (2d) 188; State Farm Fire and Casualty Co. v. Williams, 355 N.W.2d 421 (1984).

By Iacobucci J.

Referred to: Sansalone v. Wawanesa Mutual Insurance Co., [2000] 1 S.C.R. 627, 2000 SCC 25; Brissette Estate v. Westbury Life Insurance Co., [1992] 3 S.C.R. 87; Wigle v. Allstate Insurance Co. of Canada (1984), 49 O.R. (2d) 101; Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co., [1993] 1 S.C.R. 252; Indemnity Insurance Co. of North America v. Excel Cleaning Service, [1954] S.C.R. 169; Parsons v. Standard Fire Insurance Co. (1880), 5 S.C.R. 233; Scott v. Wawanesa Mutual Insurance Co., [1980] 1 S.C.R. 1445; Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888; Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423; Nichols v. American Home Assurance Co., [1990] 1 S.C.R. 801; Conner v. Transamerica Insurance Co., 496 P.2d 770 (1972); Modern Livestock Ltd. v. Kansa General Insurance Co. (1993), 11 Alta. L.R. (3d) 355; B.P. Canada Inc. v. Comco Service Station Construction & Maintenance Ltd. (1990), 73 O.R. (2d) 317; Kates v. Hall, [1990] 5 W.W.R. 569; Colorado Farm Bureau Mutual Insurance Co. v. Snowbarger, 934 P.2d 909 (1997); Aerojet-General Corp. v. Transport Indemnity Co., 948 P.2d 909 (1997); Lawyers Title Insurance Corp. v. Knopf, 674 A.2d 65 (1996); Allstate Insurance Co. v. Patterson, 904 F. Supp. 1270 (1995); Allstate Insurance Co. v. Brown, 834 F. Supp. 854 (1993); Gray v. Zurich Insurance Co., 419 P.2d 168 (1966);

Bacon v. McBride (1984), 6 D.L.R. (4th) 96; Peerless Insurance Co. v. Viegas, 667 A.2d 785 (1995); Houg v. State Farm Fire and Casualty Co., 481 N.W.2d 393 (1992); Linebaugh v. Berdish, 376 N.W.2d 400 (1985); Horace Mann Insurance Co. v. Leeber, 376 S.E.2d 581 (1988); Allstate Insurance Co. v. Troelstrup, 789 P.2d 415 (1990); Nationwide Mutual Fire Insurance Co. v. Lajoie, 661 A.2d 85 (1995); M. (K.) v. M. (H.), [1992] 3 S.C.R. 6; Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd., [1976] 1 S.C.R. 309; Wilson v. Pringle, [1986] 2 All E.R. 440; Spivey v. Battaglia, 258 So.2d 815 (1972); Bettel v. Yim (1978), 20 O.R. (2d) 617; Long v. Gardner (1983), 144 D.L.R. (3d) 73; Veinot v. Veinot (1977), 81 D.L.R. (3d) 549; Rumsey v. The Queen (1984), 12 D.L.R. (4th) 44; Holt v. Verbruggen (1981), 20 C.C.L.T. 29; Garratt v. Dailey, 279 P.2d 1091 (1955); Vosburg v. Putney, 50 N.W. 403 (1891); Reibl v. Hughes, [1980] 2 S.C.R. 880; Clayton v. New Dreamland Roller Skating Rink, Inc., 82 A.2d 458 (1951); [page557] Kirkpatrick v. Crutchfield, 100 S.E. 602 (1919); Cook v. Lewis, [1951] S.C.R. 830; Norberg v. Wynrib, [1992] 2 S.C.R. 226; Hambley v. Shepley (1967), 63 D.L.R. (2d) 94; Mandel v. The Permanent (1985), 7 O.A.C. 365; Wiffin v. Kincard (1807), 2 Bos. & Pul. (N.R.) 471, 127 E.R. 713; Coward v. Baddeley (1859), 4 H. & N. 478, 157 E.R. 927; Freeman v. Home Office, [1983] 3 All E.R. 589, aff'd [1984] 1 All E.R. 1036; H. v. R., [1996] 1 N.Z.L.R. 299; State Farm Fire and Casualty Co. v. Williams, 355 N.W.2d 421 (1984); R. v. Mills, [1999] 3 S.C.R. 668; R. v. Osolin, [1993] 4 S.C.R. 595; R. v. Seaboyer, [1991] 2 S.C.R. 577; R. v. Ewanchuck, [1999] 1 S.C.R. 330; M. (M.) v. K. (K.) (1989), 61 D.L.R. (4th) 392; Harder v. Brown (1989), 50 C.C.L.T. 85; Lyth v. Dagg (1988), 46 C.C.L.T. 25; R. v. McCraw, [1991] 3 S.C.R. 72; CNA Insurance Co. v. McGinnis, 666 S.W.2d 689 (1984); B.B. v. Continental Insurance Co., 8 F.3d 1288 (1993); J.C. Penney Casualty Insurance Co. v. M.K., 804 P.2d 689 (1991); State Farm Fire & Casualty Co. v. D.T.S., 867 S.W.2d 642 (1993); American States Insurance Co. v. Borbor, 826 F.2d 888 (1987); Troelstrup v. District Court, 712 P.2d 1010 (1986); Rodriguez v. Williams, 729 P.2d 627 (1986); Horace Mann Insurance Co. v. Independent School District No. 656, 355 N.W.2d 413 (1984); Altena v. United Fire and Casualty Co., 422 N.W.2d 485 (1988); Wilkieson-Valiente v. Wilkieson, [1996] I.L.R. para. 1-3551; Ellison v. Rogers (1967), 67 D.L.R. (2d) 21; Hatton v. Webb (1977), 81 D.L.R. (3d) 377; Co-operative Fire & Casualty Co. v. Saindon, [1976] 1 S.C.R. 735; Newcastle (Town) v. Mattatall (1988), 52 D.L.R. (4th) 356; Long Lake School Division No. 30 of Saskatchewan Board of Education v. Schatz (1986), 18 C.C.L.I. 232; Devlin v. Co-operative Fire & Casualty Co. (1978), 90 D.L.R. (3d) 444; Pistolesi v. Nationwide Mutual Fire Insurance Co., 644 N.Y.S.2d 819 (1996); M'Alister v. Stevenson, [1932] A.C. 562; Frame v. Smith, [1987] 2 S.C.R. 99; Rodriguez by Brennan v. Williams, 713 P.2d 135 (1986).

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APPEAL from a judgment of the British Columbia Court of Appeal (1998), 106 B.C.A.C. 268, 172 W.A.C. 268, 48 B.C.L.R. (3d) 143, 158 D.L.R. (4th) 385, 2 C.C.L.I. (3d) 1, [1998] I.L.R. para. 1-3568, [1998] 9 W.W.R. 209, [1998] B.C.J. No. 834 (QL), allowing an appeal from the British Columbia Supreme Court (1997), 47 B.C.L.R. (3d) 187, 49 C.C.L.I. (2d) 305, [1998] I.L.R. para. 1-3519, [1997] B.C.J. No. 2481 (QL). Appeal dismissed.

Bruce P. Cran and Murray G. Madryga, for the appellant. Eric A. Dolden and Karen F. W. Liang, for the respondent.

Solicitors for the appellant: Cran Law Offices, Vancouver. Solicitors for the respondent: Dolden Walker Folick, Vancouver.

The judgment of L'Heureux-Dubé, Gonthier, McLachlin and Binnie JJ. was delivered by

# McLACHLIN J.

- 1 I have read the reasons of lacobucci J. and agree with the result he reaches and with much of his reasoning. I would respectfully disagree, however, from the view that in the tort of sexual battery, the onus rests on the plaintiff to prove that the defendant either knew that she was not consenting or that a reasonable person in [page560] the defendant's position would have known that she was not consenting.
- 2 As Goff L.J. (as he then was) stated in Collins v. Wilcock, [1984] 3 All E.R. 374 (Q.B.), at p. 378, "[t]he fundamental principle, plain and incontestable, is that every person's body is inviolate". The law of battery protects this inviolability, and it is for those who violate the physical integrity of others to justify their actions. Accordingly, in my respectful view, the plaintiff who alleges sexual battery makes her case by tendering evidence of force applied directly to her. "Force", in the context of an allegation of sexual battery, simply refers to physical contact of a sexual nature, and is neutral in the sense of not necessarily connoting a lack of consent. If the defendant does not dispute that the contact took place, he bears the burden of proving that the plaintiff consented or that a reasonable person in his position would have thought that she consented. My reasons for so concluding are the following.
  - 1. Analysis
  - II. The Canadian Law of Battery Places the Onus of Proving Consent on the Defendant
- 3 As lacobucci J. states (at para. 103) "for traditional batteries, consent is conceived of as an affirmative defence that must be raised by the defendant".
- 4 This Court has long affirmed this proposition. In Cook v. Lewis, <u>[1951] S.C.R. 830</u>, at p. 839, Cartwright J. stated that "where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and [page561] the onus falls upon the defendant to prove 'that such trespass was utterly without his fault'."
- **5** In Larin v. Goshen (1974), 56 D.L.R. (3d) 719 (N.S.C.A.), at p. 722, Macdonald J.A., citing numerous authorities, stated: "The law in Canada at present is this: In an action for damages in trespass where the plaintiff proves that he has been injured by the direct act of the defendant, the onus falls upon the defendant to prove that his act was both unintentional and without negligence on his part, in order for him to be entitled to a dismissal of the action." (Emphasis in original.) See also Walmsley v. Humenick, [1954] 2 D.L.R. 232 (B.C.S.C.); Tillander v. Gosselin (1966), 60 D.L.R. (2d) 18 (Ont. H.C.), affd (1967), 61 D.L.R. (2d) 192 (Ont. C.A.); Dahlberg v. Naydiuk (1969), 10 D.L.R. (3d) 319 (Man. C.A.), and Ellison v. Rogers (1967), 67 D.L.R. (2d) 21 (Ont. H.C.). A number of academic commentators also agree that the burden of proving consent lies on the defence: see J. G. Fleming, The Law of Torts (9th ed. 1998), at p. 86; A. M. Linden and L. N. Klar, Canadian Tort Law: Cases, Notes and Materials (10th ed. 1994), at p. 102, note 2; and G. H. L. Fridman, The Law of Torts in Canada (1989), vol. 1, at p. 63.
- **6** This proposition holds for particular forms of battery like medical battery and sexual battery. In Reibl v. Hughes, [1980] 2 S.C.R. 880, at p. 890, dealing with medical battery, Laskin C.J. stated for the Court that:

The tort [of battery] is an intentional one, consisting of an unprivileged and unconsented to invasion of one's bodily security. True enough, it has some advantages for a plaintiff over an action of negligence since it does not require proof of causation and it casts upon the defendant the burden of proving consent to what was done.

And in Norberg v. Wynrib, [1992] 2 S.C.R. 226, dealing with sexual battery, La Forest J., for the plurality, stated, at p. 246, that "[a] battery is the intentional infliction of unlawful force on another person. Consent, express or implied,

is a defence [page562] to battery." None of the members of the Court participating in the decision dissented from the view that the burden lies on the defendant to prove consent.

- 7 The question, then, is whether we should in this case depart from the settled rule that requires the plaintiff in a battery case to show only contact through a direct, intentional act of the defendant and places the onus on the defendant of showing consent or lawful excuse, including actual or constructive consent. For the reasons that follow, I am not convinced that we should alter the established rule.
  - B. The Traditional Approach to Trespass is Justified as a Rights-Based Tort
- 8 The traditional rule, as noted, is that the plaintiff in an action for trespass to the person (which includes battery) succeeds if she can prove direct interference with her person. Interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant: see Scott v. Shepherd (1773), 2 Black. W. 892, 96 E.R. 525 (K.B.); Leame v. Bray (1803), 3 East 593, 102 E.R. 724 (K.B.). The burden is then on the defendant to allege and prove his defence. Consent is one such defence.
- 9 Some critics have suggested that this rule should be altered. They suggest that tort must always be fault-based. This means the plaintiff must prove fault as part of her case, by showing either: (1) that the defendant intended to harm; (2) that the defendant failed to take reasonable care or was "negligent"; or (3) that the tort is one of strict liability, i.e. legally presumed fault. On a practical level, some, like F. L. Sharp, argue that the traditional approach confers an unfair advantage on the plaintiff by easing her burden of proof: "Negligent Trespass in Canada: A Persistent Source of Embarrassment" (1977-78), 1 Advocates' Q. 311, at pp. 312-14 and 326 [page563]. It is suggested that the law has moved in this direction in England: see Fowler v. Lanning, [1959] 1 Q.B. 426, approved in obiter in Letang v. Cooper, [1965] 1 Q.B. 232 (C.A.). In the spirit of these comments, my colleague lacobucci J. proposes to alter the traditional rule, at least for sexual battery, to require the plaintiff to prove fault, i.e. that the defendant either knew or ought to have known that she was not consenting.
- 10 I do not agree with these criticisms of the traditional rule. In my view the law of battery is based on protecting individuals' right to personal autonomy. To base the law of battery purely on the principle of fault is to subordinate the plaintiff's right to protection from invasions of her physical integrity to the defendant's freedom to act: see R. Sullivan, "Trespass to the Person in Canada: A Defence of the Traditional Approach" (1987), 19 Ottawa L. Rev. 533, at p. 546. Although I do not necessarily accept all of Sullivan's contentions, I agree with her characterization, at p. 551, of trespass to the person as a "violation of the plaintiff's right to exclusive control of his person". This right is not absolute, because a defendant who violates this right can nevertheless exonerate himself by proving a lack of intention or negligence: Cook, supra, at p. 839, per Cartwright J. Although liability in battery is based not on the defendant's fault, but on the violation of the plaintiff's right, the traditional approach will not impose liability without fault because the violation of another person's right can be considered a form of fault. Basing the law of battery on protecting the plaintiff's physical autonomy helps explain why the plaintiff in an action for battery need prove only a direct interference, at which point the onus shifts to the person who is alleged to have violated the right to justify [page564] the intrusion, excuse it or raise some other defence.
- 11 I agree with Sullivan's view that the traditional approach to trespass to the person remains appropriate in Canada's modern context for a number of reasons. First, unlike negligence, where the requirement of fault can be justified because the tortious sequence may be complicated, trespass to the person is confined to direct interferences. Where the trespass causes actual injury to the plaintiff, there is a direct connection between the defendant's action and the plaintiff's injury. As Sullivan notes, at p. 562:
  - ... where the injury complained of is an immediate consequence of the defendant's act, it is intuitively sound to require compensation from the defendant unless he offers a defence. In cases of direct interference, the relationship between the defendant's will, his decision to act, and the injury to the plaintiff is both simple and clear; there are no competing causal factors to obscure the defendant's role or dilute his factual responsibility. The question of his moral and legal responsibility is thus posed with unusual sharpness: as

between the defendant who caused the injury and the plaintiff who received it, other things being equal, who shall pay? ... Once the plaintiff has shown that his right to personal autonomy has been violated by the defendant, prima facie the defendant should pay. [Emphasis added.]

12 Another factor supporting retaining the traditional approach to trespass and battery is that it makes practical sense. Linden J. in Bell Canada v. COPE (Sarnia) Ltd. (1980), 11 C.C.L.T. 170 (Ont. H.C.), aff'd (1980), 31 O.R. (2d) 571 (C.A.), after noting the attacks on the Canadian law of trespass, writes (at p. 180):

The trespass action still performs several functions, one of its most important being a mechanism for shifting the onus of proof of whether there has been intentional or negligent wrongdoing to the defendant, rather than [page565] requiring the plaintiff to prove fault. The trespass action, though perhaps somewhat anomalous, may thus help to smoke out evidence possessed by defendants, who cause direct injuries to plaintiffs, which should assist Courts to obtain a fuller picture of the facts, a most worthwhile objective. [Emphasis added.]

- 13 In cases of direct interference, the defendant is likely to know how and why the interference occurred. I agree with Sullivan's suggestion, at p. 563, that "if the defendant is in a position to say what happened, it is both sensible and just to give him an incentive to do so by putting the burden of explanation on him".
- 14 Finally, I share Sullivan's concern with the fact that cases of direct interference with the person tend to produce high "demoralization costs" (p. 563). Victims and those who identify with them tend to feel resentment and insecurity if the wrong is not compensated. The close causal relationship between the defendant's conduct and the violation of the plaintiff's bodily integrity, the identification of the loss with the plaintiff's personality and freedom, the infliction of the loss in isolated (as opposed to systemic) circumstances, and the perception of the defendant's conduct as anti-social, all support the legal position that once the direct interference with the plaintiff's person is shown, the defendant may fairly be called upon to explain his behaviour if indeed it was innocent.
- 15 These arguments persuade me that we should not lightly set aside the traditional rights-based approach to the law of battery that is now the law of Canada. The tort of battery is aimed at protecting the personal autonomy of the individual. Its purpose is to recognize the right of each person to control his or her body and who touches it, and to permit damages where this right is violated. The compensation stems from violation of the right to autonomy, not fault. When a person interferes with [page566] the body of another, a prima facie case of violation of the plaintiff's autonomy is made out. The law may then fairly call upon the person thus implicated to explain, if he can. If he can show that he acted with consent, the prima facie violation is negated and the plaintiff's claim will fail. But it is not up to the plaintiff to prove that, in addition to directly interfering with her body, the defendant was also at fault.
- 16 Having stated that we should not set aside the traditional approach to battery, I do not wish to foreclose the possibility of future growth in this area of the law. References in definitions of the tort of battery to "injury", or to contact being "unlawful" or "harmful or offensive" are different ways of expressing the idea that not every physical contact constitutes a battery. In other words, the tort requires contact "plus" something else. One view, as I discuss in the next section, is that the "plus" refers merely to non-trivial contact. The caselaw to date tends to support this view, and generally does not require actual physical or psychological injury: Cole v. Turner (1704), 6 Mod. 149, 87 E.R. 907; Stewart v. Stonehouse, [1926] 2 D.L.R. 683 (Sask. C.A.), at p. 684; Fleming, supra, at p. 29; Fridman, supra, at p. 45. In a future case, it may be necessary to consider whether the "plus" required in addition to contact should be extended beyond the minimum of non-trivial acts. However, the issue does not arise in this case, since the plaintiff pleads physical and psychological damage. This is sufficient to bring the case within the traditional view of battery, however the "plus" is defined. Therefore, for the purposes of this case, I proceed upon the traditional view.

- C. The Argument that the Contact Must Be "Harmful or Offensive" Does Not Support Placing the Onus of Proving Non-Consent on the Plaintiff
- 17 The proposition that the law should require a plaintiff in an action for sexual battery to prove that she did not consent, is supported, it is suggested, by a requirement that the contact involved in battery must be harmful or offensive. The argument may be summarized as follows. The plaintiff must prove all the essential elements of the tort of battery. One of these is that the contact complained of was inherently harmful or offensive on an objective standard. Consensual sexual contact is neither harmful nor offensive. Therefore the plaintiff, in order to make out her case, must prove that she did not consent or that a reasonable person in the defendant's position would not have thought she consented.
- 18 I do not dispute that a plaintiff generally must prove all elements of the tort she alleges. Nor do I dispute that contact must be "harmful or offensive" to constitute battery. However, I am not persuaded that plaintiffs in cases of sexual battery must prove that contact was "non-consensual" in order to prove that it was "harmful or offensive". If one accepts that the foundation of the tort of battery is a violation of personal autonomy, it follows that all contact outside the exceptional category of contact that is generally accepted or expected in the course of ordinary life, is prima facie offensive. Sexual contact does not fall into the category of contact generally accepted or expected in the course of ordinary activities. Hence the plaintiff may establish an action for sexual battery without negativing actual or constructive consent.
- 19 The idea that battery is confined to conduct that is "harmful or offensive" finds root in the old [page568] cases involving trivial contacts. While the law of battery traditionally has held that the defendant, not the plaintiff, bears the onus of proving consent, it has also held that not every trivial contact suffices to establish battery. The classic example is being jostled in a crowd. A person who enters a crowd cannot sue for being jostled; such contact is not "offensive". Two theories have been put forward to explain this wrinkle on the general rule that all a plaintiff in a battery action must prove is direct contact. The first is implied consent: Salmond and Heuston on the Law of Torts (21st ed. 1996), at p. 121. The second sees these cases as "a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of everyday life": In re F., [1990] 2 A.C. 1 (H.L.), at p. 73, per Lord Goff.
- 20 Both these theories are consistent with the settled rule in Canadian law that a plaintiff in a battery action need not prove the absence of consent. On the implied consent theory, even if the plaintiff proves contact, the burden never shifts to the defendant to prove consent because consent is implied by law. On the "exception" theory, the plaintiff cannot succeed merely by proving contact if such contact falls within the exceptional category of conduct generally acceptable in ordinary life. It is not necessary in this appeal to choose between these approaches, but in my view both refer to the sort of everyday physical contact which one must be expected to tolerate, even if one does not actually consent to it.
- 21 The question then becomes whether sexual battery falls into the extraordinary category of cases where proving contact will not suffice to establish the plaintiff's case. Is sexual activity the sort of activity where consent is implied? Clearly it is not. [page569] Alternatively, is it the sort of activity, like being jostled in a crowd, that is generally accepted and expected as a normal part of life? Again, I think not. The sort of conduct the cases envision is the inevitable contact that goes with ordinary human activity, like brushing someone's hand in the course of exchanging a gift, a gratuitous handshake, or being jostled in a crowd. Sexual contact does not fall into this category. It is not the casual, accidental or inevitable consequence of general human activity and interaction. It involves singling out another person's body in a deliberate, targeted act.
- 22 The assertion in some of the authorities that the contact must be harmful or offensive to constitute battery (see, e.g., La Forest J. in M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, at p. 25), reflects the need to exclude from battery the casual contacts inevitable in ordinary life. It does not, however, require the conclusion that to make out a case of battery, a plaintiff must prove that the contact was physically or psychologically injurious or morally offensive. The law of battery protects the inviolability of the person. It starts from the presumption that apart from the usual and inevitable contacts of ordinary life, each person is entitled not to be touched, and not to have her person violated.

The sexual touching itself, absent the defendant showing lawful excuse, constitutes the violation and is "offensive". Sex is not an ordinary casual contact which must be accepted in everyday life, nor is it the sort of contact to which consent can be implied. To require a plaintiff in an action for sexual battery to prove that she did not consent or that a reasonable person in the defendant's position would not have thought she consented, would be to deny the protection the law has traditionally afforded to the [page570] inviolability of the body in the situation where it is perhaps most needed and appropriate.

23 Only two cases, one in England concerning therapeutic administration of drugs and one in New Zealand concerning sexual assault, are cited in favour of the proposition that the plaintiff must show harm by proving a lack of consent as an element of the tort of battery: see Freeman v. Home Office, [1983] 3 All E.R. 589 (Q.B.), affd [1984] 1 All E.R. 1036 (C.A.), H. v. R., [1996] 1 N.Z.L.R. 299 (H.C.). The proposition that the plaintiff must prove a lack of consent, on the basis that she must prove that the impugned contact was harmful, is not supported by the law of battery, which has traditionally been confined to acts which are inherently harmful, like hitting, shooting or stabbing someone. Rather, its focus is on the protection of one's bodily integrity from any unwanted contact. Many of the older cases concern contacts devoid of any real harm apart from the violation of bodily integrity: Pursell v. Horn (1838), 8 AD. & E. 602, 112 E.R. 966 (pouring water on a person); Green v. Goddard (1704), 2 Salkeld 641, 91 E.R. 540 (forcibly taking an object held by another); Humphries v. Connor (1864), 17 Ir. Com. L. Rep. 1 (Q.B.) (taking flower worn by plaintiff), and Forde v. Skinner (1830), 4 Car. & P. 239, 172 E.R. 687 (cutting a person's hair). In more modern times, the same is true of medical battery cases. Like sexual acts, medical interventions may incidentally produce physical and psychological harm which may go to damages, but the basic "offence" or "harm" upon which the tort rests is the violation of the plaintiff's bodily integrity. As I discuss below, Canadian courts do not require plaintiffs alleging medical battery to prove that the defendant medical practitioner knew or ought to have known that the plaintiff did not consent to the medical contact.

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- 24 The practical counterpart of the argument that battery must involve inherently harmful or offensive conduct in some larger sense is the suggestion that absent such a requirement, plaintiffs will be able to unfairly drag defendants into court as a result of consensual sex, putting them to the trouble and risk of proving that the plaintiff consented or that a reasonable person would have concluded she consented. This point was not strongly argued, and with reason. Few plaintiffs to consensual sex or in situations where consent is a reasonable inference from the circumstances, are likely to sue if they are virtually certain to lose when the facts come out. Moreover, the rules of court provide sanctions for vexatious litigants. There is no need to change the law of battery to avoid vexatious claims.
- 25 Moreover, the prospect of plaintiffs suing and saying nothing about consent is more theoretical than real. In fact, plaintiffs suing for sexual battery usually testify that they did not consent to the sexual contact. Failure to do so, absent an explanation, makes it more likely the defendant could win when he calls evidence of consent or reasonable appearance of consent. Even if a plaintiff were to bring an action in sexual battery against the estate of a deceased defendant, many provincial and territorial evidence acts would not allow the plaintiff to obtain a judgment against the estate unless her evidence were corroborated by other material evidence: see Evidence Acts of Alberta, R.S.A. 1980, c. A-21, s. 12; Newfoundland, R.S.N. 1990, c. E-16, s. 16; Northwest Territories, R.S.N.W.T. 1988, c. E-8, s. 17; Nova Scotia, R.S.N.S. 1989, c. 154, s. 45; Ontario, R.S.O. 1990, c. E.23, s. 13; Prince Edward Island, R.S.P.E.I. 1988, c. E-11, s. 11; Yukon, R.S.Y. 1986, c. 57, s. 14. At the same time, as discussed more fully below, placing on the plaintiff the legal burden of always [page572] negativing actual and constructive consent on pain of non-suit, may lead to injustice.
- 26 I conclude that the fact that the law of battery excludes trivial contact and requires contact that is "harmful or offensive" does not require us to conclude that the plaintiff bears the burden of proving that the defendant actually or constructively knew she did not consent to sexual contact.

- D. There Is Nothing Particular About Sexual Assault that Makes it Necessary to Have a Special Rule of Battery for Sexual Assaults for What the Plaintiff Must Prove
- 27 If there were something special about sexual battery that justified requiring the plaintiff to prove that the defendant either knew she was not consenting or ought to have known that she was not consenting, a case might be made for so doing. The result would be a special rule for sexual battery inconsistent with the law of battery generally, and the creation of a new tort of sexual battery. Thus far the courts have declined to do this. As Professor Feldthusen notes, "[t]here has yet to be recognised a new nominate tort of sexual battery" (emphasis in original): "The Canadian Experiment with the Civil Action for Sexual Battery", in N. J. Mullany, ed., Torts in the Nineties (1997), 274, at p. 281. The sexual aspects of the claim go only to damages. However, as I stated above, a new tort of sexual battery with different rules from ordinary battery could be recognized in an appropriate case.
- 28 Before examining whether sexual battery is so different that special rules are required as to what the plaintiff must show, it is important to take note of the danger of placing special, unjustified [page573] burdens on victims of sexual encounters. At p. 282, Feldthusen notes that "in the criminal sphere, enquiries into alleged consent have allowed the focus of the criminal trial to shift from the actions of the defendant to the character of the complainant. The same potential exists in tort law" (emphasis added). As he points out, "[t]here exist in our law deeply imbedded tendencies towards victim blaming" (p. 283). This is not to say that alleged victims of sexual assault could never be singled out by placing special rules of proof on them that do not apply to other types of plaintiffs. It is rather to say that we must guard against placing such burdens upon alleged victims of sexual assault unless it can objectively be shown that it is necessary to do so in order to achieve justice.
- 29 To require plaintiffs in actions for sexual battery to prove that they did not consent and that a reasonable person in the circumstances of the defendant would not have believed they consented, is to place a burden on plaintiffs in actions for sexual battery that plaintiffs in other types of battery do not bear. It is to do so, moreover, in the absence of any compelling reason. Indeed, there are powerful reasons for applying the usual rules that require a plaintiff to prove only direct contact in cases of sexual battery.
- 30 The first concern is that by requiring the plaintiff to prove more than the traditional battery claim requires, we inappropriately shift the focus of the trial from the defendant's behaviour to the plaintiff's character. Requiring the plaintiff to prove that a reasonable person in the position of the defendant would have known that she was not consenting requires her to justify her actions. In practical terms, she must prove that she made it clear through her conduct and words that she did not consent to the sexual contact. Her conduct, not the [page574] defendant's, becomes the primary focus from the outset. If she cannot prove these things, she will be non-suited and the defendant need never give his side of the story.
- 31 The proposed shift to the plaintiff of the onus of disproving constructive consent runs the risk of victim blaming, against which Feldthusen and others properly warn. It also runs the risk of making it impossible for deserving victims of sexual battery to even get their foot in the litigation door. Consider the case of the victim of sexual assault who cannot testify to the events because of shock, loss of memory or inebriation. If she can prove that she was sexually assaulted and identify the perpetrator through third-person evidence, should she be non-suited at the outset because she cannot prove that her conduct in the circumstances would have led a reasonable person to conclude she was not consenting? Is it not better in such cases that the defendant be called upon to give evidence so the court can decide the case on a more complete picture of the facts? This is what the law of battery would traditionally require. Why should we exempt the defendant because the battery is a sexual battery?
- 32 The proposed shift of onus runs counter to Parliament's expressed view in the criminal context. Although the aims of criminal law and the law of tort are not identical, it remains significant that Parliament in s. 273.2(b) of the Criminal Code, R.S.C., 1985, c. C-46, stipulates that those accused of sexual assault who seek to invoke the defence of honest but mistaken belief in consent must have taken reasonable steps in the circumstances known to them at the time to ascertain the complainant's [page575] consent. Parliament has thus moved to counteract the historic tendency of criminal trials for sexual assault to focus unduly on the behaviour of the complainant, and to redirect some of the focus to the defendant. The traditional tort of battery already provides this focus in the civil

domain. That focus should be retained in my view. To quote Sullivan, supra, at p. 563, "if the defendant is in a position to say what happened, it is both sensible and just to give him an incentive to do so by putting the burden of explanation on him".

- 33 Requiring the plaintiff to disprove constructive consent seems all the more unfair because the relevant facts lie first and foremost within the defendant's sphere of knowledge. He alone knows whether he actually believed the plaintiff was consenting, and if he believed she was consenting, he is in the best position to give evidence on the factors that led him to believe that. The plaintiff, by contrast, is not in a position to produce evidence of what was in the defendant's mind nor in as good a position to say what factors led him to that state of mind and whether he acted reasonably. While the defendant's particular knowledge about his state of mind regarding consent is not determinative of who bears the burden of proof regarding consent, it is one of the principles of fairness and policy that are said to influence the allocation of this burden: see J. Sopinka, S. N. Lederman, and A. W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at para. 3.70; McCormick on Evidence (5th ed. 1999), vol. 2, at para. 337.
- 34 I conclude that there is nothing about sexual battery that requires that the traditional rules of onus governing battery actions be changed. On the contrary, placing the onus on the plaintiff of disproving consent and constructive consent seems [page576] unfairly to impose special obligations on plaintiffs who sue for sexual assault.
  - E. To Require the Plaintiff to Prove that the Defendant Knew or Ought to Have Known She Was Not Consenting Presents the Dilemma of Either Changing the Law for Other Types of Battery or Introducing an Inconsistency in the Law of Battery
- **35** To hold that battery must involve a contact that is inherently harmful or offensive has the potential to change the law relating to other types of battery, like medical battery. Alternatively, if it does not, it will introduce an inconsistency into the law of battery.
- 36 As discussed, Canadian courts have repeatedly held that for medical battery, the defendant bears the onus of proving consent as a defence: see, for example, Reibl, supra; Schweizer v. Central Hospital (1974), 53 D.L.R. (3d) 494 (Ont. H.C.); Allan v. New Mount Sinai Hospital (1980), 109 D.L.R. (3d) 634 (Ont. H.C.), rev'd on other grounds (1981), 33 O.R. (2d) 603 (C.A.); Brushett v. Cowan (1990), 3 C.C.L.T. (2d) 195 (Nfld. C.A.), at p. 199, and O'Bonsawin v. Paradis (1993), 15 C.C.L.T. (2d) 188 (Ont. Ct. (Gen. Div.)). Like sexual contact, the act of medical intervention is not inherently harmful or offensive, beyond its potential to violate bodily integrity. If sexual battery requires the plaintiff to prove that the defendant knew or ought to have known that the plaintiff did not consent, it is difficult to see why the same would not hold for medical malpractice. Yet no one has suggested that the law of medical malpractice ought to be changed to place an additional burden on the plaintiff of proving a culpable state of mind in the defendant medical practitioner. The alternative, if the law of battery were changed in this regard for sexual battery, would be inconsistency in the law of battery. Neither alternative is attractive. This suggests a further reason for being wary of the proposition that battery requires proof [page577] by the plaintiff of an inherently harmful or offensive act.
  - F. Requiring the Plaintiff to Prove that the Defendant Knew or Ought to Have Known that She Did Not Consent is Neither Necessary nor Sufficient to Permit the Conclusion that the Insurers in this Case Are Not Obligated to Defend the Defendant
- 37 The question at issue on this appeal is whether the insurer may avoid the obligation to defend the defendant to the battery action under the policy exclusion for "any intentional ... act". I agree with Iacobucci J. that this clause must be interpreted as requiring an intent to injure. It follows that for the tort of sexual battery to be excluded from policy coverage, it must always involve intent to injure.
- 38 As I understand his reasons, lacobucci J. finds this intent to injure is present on the basis of legal inference, not as a matter of fact. The law presumes that in actions of battery for sexual assault, the defendant intends to injure the plaintiff. Thus lacobucci J. states "[g]iven ... actual or constructive knowledge of non-consent, the law will not

permit the appellant to claim that he did not intend any harm" (para. 94 (emphasis added)). This legal inference is necessary because in cases of constructive knowledge, the defendant may be held liable despite the fact that he had no actual knowledge of lack of consent and hence no actual intent to harm the plaintiff. Iacobucci J. elaborates at para. 121 in reviewing the American jurisprudence [page578] on this issue, in the context of sexual assaults on children:

Courts have had little difficulty in concluding that defendants in these cases are presumed to intend harm to their victims -- notwithstanding the fact that "males who are involved in such activities do not expect or intend that the females will sustain any injury".... [Emphasis added.]

In other words, where there is an allegation of sexual battery, courts will conclude as a matter of legal inference that the defendant intended harm for the purpose of construing exemptions of insurance coverage for intentional injury.

39 This presumption of intent to harm does not depend on requiring the plaintiff to prove that the defendant knew or ought to have known that the plaintiff was not consenting to the sexual contact. Rather, the presumption flows from the allegation in the pleadings of battery of a sexual nature. American cases, like State Farm Fire and Casualty Co. v. Williams, 355 N.W.2d 421 (Minn. 1984), do not turn on the plaintiff's bearing the burden of showing the defendant either knew or ought to have known she did not consent. The logic is simply that either the act must have been consensual or not consensual. If it was not consensual, the policy does not apply because neither the insured nor the insurer contemplated coverage for non-consensual sexual activities. If it was consensual, then there is no battery and no claim for recovery. In either case, the policy does not apply. As stated in Williams, at p. 424:

Does the fact that Williams, the victim, was an adult distinguish this case? We think not. Neither the insured nor the insurer in entering into the insurance contract contemplated coverage against sexual claims arising out of non-consensual sexual assaults.

- **40** This reasoning applies equally to allegations of negligent sexual battery where the alleged negligence relates to the defendant's belief in the plaintiff's consent to sexual contact. For these reasons [page579] I conclude that it is not necessary to place on the plaintiff the burden of proving the defendant's knowledge or constructive knowledge of the plaintiff's non-consent.
- 41 If this reasoning is correct, then placing the non-traditional burden of disproving consent or constructive consent on the plaintiff is neither a necessary nor a sufficient condition of concluding that the policy does not apply in cases like this. Regardless of how one views the matter of onus, the result will be the same.

### G. Negligent Battery

42 It is unnecessary on this appeal to comment on the relationship between battery (traditionally thought of mainly as an intentional tort) and negligence. In this case, insofar as one could speak of negligent battery, it would be to recognize the defence of reasonable belief in consent to a suit based on an intentional act. As discussed, the law in these circumstances presumes an intention to injure, taking it out of the realm of pure negligence and bringing it within the ambit of the exclusion clause.

### II. Conclusion

43 I conclude that there is no justification in cases of battery of a sexual nature for departing from the traditional rule that the plaintiff in a battery action must prove direct contact, at which point the onus shifts to the defendant to prove consent. To do so would be to place a burden upon plaintiffs in battery actions of a sexual nature which plaintiffs in other battery actions do not bear. I see neither the need nor the justification for doing this on the material before us in this case.

- 44 This said, I agree fully with Iacobucci J. that the law will not permit a defendant in an action for sexual battery to say that though he might be found to have committed the battery, he did not intend any harm. This leaves the defendant with two alternatives discussed in Williams, supra. Either the plaintiff consented, in which case no action lies, or she did not consent and the defendant is deemed to have intended to injure her. In neither case does the policy provide coverage.
- 45 Like lacobucci J., I would dismiss the appeal with costs.

The reasons of lacobucci, Major and Bastarache JJ. were delivered by

### IACOBUCCI J.

- I. Introduction and Overview
- **46** This appeal raises the novel question of whether an insurance company has a duty to defend the holder of a homeowner's insurance policy against a civil sexual assault suit. In answering this question, we must also address the role of consent in an action for sexual assault.
- 47 It should be noted that this appeal was heard along with the appeal in Sansalone v. Wawanesa Mutual Insurance Co., [2000] 1 S.C.R. 627, 2000 SCC 25, reasons in which are being released concurrently.
- 48 This appeal concerns the insurance implications of a series of allegedly non-consensual sexual touchings. For ease of reference, I will use the term "sexual assault" to refer in general to any allegation of non-consensual sexual touching. My use of the term "sexual assault" should not be taken to imply any specific legal ramifications. But for "sexual battery", by contrast, I will give a more specific definition in the course of these reasons.

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- 49 An insurance company's duty to defend is related to its duty to indemnify. A homeowner's insurance policy entitles the holder to have the insurer indemnify any liability falling within the policy's terms. Since the insurance company will be paying these costs, it has also developed the right -- now a duty -- to conduct the defence of such claims. However, the duty to defend is not so great that it is presumed to be independent of the duty to indemnify. Absent express language to the contrary, the duty to defend extends only to claims that could potentially trigger indemnity under the policy. Therefore if an insurance policy, like the one in this case, excludes liability arising from intentionally caused injuries, there will be no duty to defend intentional torts.
- 50 Determining whether or not a given claim could trigger indemnity is a three-step process. First, a court should determine which of the plaintiff's legal allegations are properly pleaded. In doing so, courts are not bound by the legal labels chosen by the plaintiff. A plaintiff cannot change an intentional tort into a negligent one simply by choice of words, or vice versa. Therefore, when ascertaining the scope of the duty to defend, a court must look beyond the choice of labels, and examine the substance of the allegations contained in the pleadings. This does not involve deciding whether the claims have any merit; all a court must do is decide, based on the pleadings, the true nature of the claims.
- 51 At the second stage, having determined what claims are properly pleaded, the court should determine if any claims are entirely derivative in nature. The duty to defend will not be triggered simply because a claim can be cast in terms of both negligence and intentional tort. If the alleged negligence is based on the same harm as the intentional [page582] tort, it will not allow the insured to avoid the exclusion clause for intentionally caused injuries.

- **52** Finally, at the third stage the court must decide whether any of the properly pleaded, non-derivative claims could potentially trigger the insurer's duty to defend. In this appeal, I conclude that the respondent has no duty to defend. The plaintiff has alleged three basic claims against the appellant: sexual battery, negligence, and breach of fiduciary duty.
- 53 To prove a claim for sexual battery, the plaintiff will have to establish that the defendant intentionally inflicted a harmful or offensive touching on her. In the context of sexual battery, "harmful or offensive" is equivalent to non-consensual. This test is objective: to establish sexual battery, the plaintiff must demonstrate that a reasonable person would have known that the plaintiff did not validly consent to sexual relations. To put it another way, the plaintiff will have to prove that the defendant should have known that she did not validly consent. It is important to note that, absent any evidence from the defendant, a simple allegation of non-consensual sex will suffice to meet this initial burden. If the plaintiff succeeds, then the defendant must also be presumed to have intended to injure the plaintiff, given the inherently harmful nature of non-consensual sexual activity. The same facts that prove the sexual battery also necessarily prove an intent to injure, and therefore the exclusion clause should apply. If, on the other hand, the plaintiff cannot establish non-consent, then the plaintiff's action would have no chance of success, there would be no possibility of a claim for indemnity, and the duty to defend would not arise.
- 54 The claims for negligence and breach of fiduciary duty fail to trigger the duty to defend not because they could not fall within coverage, but because they are either not properly pleaded, or derivative of the claim for sexual battery. As a [page583] result, they are also covered by the exclusion for injuries intentionally caused.
- 55 As there are no properly pleaded claims that, even if successful, could potentially trigger indemnity, the respondent has no duty to defend, and I would therefore dismiss the appeal.

### II. Facts

- 56 The underlying action in this appeal is based on a series of alleged sexual assaults committed against a young girl ("the plaintiff"), who was born in 1974 and was an adolescent at the time of the incidents in question. The plaintiff worked part-time at a grocery store owned and operated by her parents, located near the terminus of two B.C. Transit bus routes. In 1996, the plaintiff brought a civil action against five B.C. Transit bus drivers, including the appellant, alleging various sexual assaults between 1988 and 1992. The liability insurance policy owned by one of the bus drivers, Vincent Scalera, is at issue in this appeal.
- 57 The plaintiff's statement of claim alleges that between 1986 and 1992, while on duty with B.C. Transit, the appellant regularly attended the store belonging to the plaintiff's parents, and became acquainted with the plaintiff. She, in turn, regularly rode on buses driven by the appellant. The statement of claim further alleges as follows:
  - 103.On one occasion between approximately January and June of 1991 Scalera committed various sexual acts upon [the plaintiff], including:
    - (a) sexual kissing;
    - (b) sexual touching of her neck, back, breasts, and genitals; and
    - (c) fellatio

together (the "Scalera sexual acts").

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- 104. Scalera committed the Scalera sexual acts upon [the plaintiff] in various locations, including:
  - (a) on buses owned by B.C. Transit; and

- (b) in his truck.
- 105. The Scalera sexual acts were committed upon [the plaintiff] by Scalera for a sexual purpose and/or without [the plaintiff]'s consent.
- 106. Scalera committed the Scalera sexual acts upon [the plaintiff] by coercion, manipulation, and abuse of power.
- 107. The Scalera sexual acts were sexual assaults and/or sexual exploitation and/or unlawful.
- 108.At all material times, Scalera was an adult and [the plaintiff] was an infant and/or a young person.
- 109. Scalera, by words or conduct, threatened that harm would come to [the plaintiff] if she disclosed the Scalera sexual acts to another person, intending to persuade [the plaintiff] to submit to the Scalera sexual acts.
- 110. Scalera, by words or conduct, knowingly, fraudulently, and deceitfully misrepresented the Scalera sexual acts committed by him upon [the plaintiff] as:
  - (a) the prerogative of an adult;
  - (b) consensual activity; and/or
  - (c) a healthy, normal expression of his affection for her

together (the "Scalera Representations").

- 111. Scalera made the Scalera Representations intending to persuade [the plaintiff] to submit to the Scalera sexual acts.
- 112. The Scalera Representations were untrue.
- 113.[The plaintiff] relied on the Scalera Representations concerning the nature of the Scalera sexual acts and thereby submitted to the Scalera sexual acts.
- 114.[The plaintiff] relied on the Scalera Representations concerning the nature of the Scalera sexual acts and thereby failed to report Scalera's conduct to other adults.
- 115. Scalera knew or ought to have known that the Scalera sexual acts were unlawful and/or the Scalera Representations were untrue.

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- 116. Scalera knew or ought to have known that [the plaintiff] was an infant and/or a young person.
- 117. Scalera knew or ought to have known that [the plaintiff] did not consent to the Scalera sexual acts.
- 118. Scalera owed a duty of care to [the plaintiff], which duty of care arose from the relationship of authority and trust between himself as an adult and/or bus driver and [the plaintiff] as an infant and/or young person and/or bus passenger, and Scalera breached this duty of care.
- 119. Scalera owed a fiduciary duty to [the plaintiff], which fiduciary duty arose from the relationship of authority and trust between himself as an adult and/or bus driver and [the plaintiff] as an infant and/or young person and/or bus passenger, and Scalera breached this fiduciary duty.
- 120. Scalera committed the Scalera sexual acts willfully and without lawful justification.
- 121. The Scalera sexual acts were committed intentionally and/or with reckless disregard as to their effect on [the plaintiff].
- 122. By reason of Scalera's actions in committing the Scalera sexual acts [the plaintiff] has suffered nervous shock and sustained severe personal injuries, particulars of which are set out in paragraph 127 below.

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- 128.As a result of the aforesaid sexual assaults, sexual exploitation, intentional infliction of nervous shock, misrepresentations, negligence, breaches of duty, and breaches of fiduciary duty committed by ... Scalera, and/or B.C. Transit [the plaintiff] has suffered a loss of income and a loss of ability to earn income in the future.
- 129.As a result of the aforesaid sexual assaults, sexual exploitation, intentional infliction of nervous shock, misrepresentations, negligence, breaches of duty, and breaches of fiduciary duty committed by ... Scalera, and/or B.C. Transit [the plaintiff] has and/or will continue to incur expenses, including obtaining proper psychiatric and psychological counselling and treatment which will be required on both an ongoing and crisis basis.

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- 58 In response to a demand for particulars, counsel for the plaintiff stated that the coercion, manipulation, and abuse of power alleged in para. 106 of the statement of claim consisted of:
  - (a) pressure to engage in the sexual acts as a result of Scalera's position as an adult and [the plaintiff]'s position as an infant and/or young person;
  - (b) pressure to engage in the sexual acts in order to demonstrate affection to Scalera;
  - (c) pressure to engage in the sexual acts in order to secure and/or maintain Scalera's alleged affection and/or friendship;
  - (d) pressure to engage in the sexual acts in order to overcome personal loneliness and/or insecurity;
  - (e) pressure to engage in the sexual acts in order to demonstrate maturity.
- **59** The appellant owned a homeowner's insurance policy issued by the respondent. The relevant provisions of that policy are as follows:

### SECTION TWO -- PERSONAL LIABILITY INSURANCE

This insurance applies only to accidents or occurrences which take place during the period of insurance indicated on the Declarations. ...

We will pay all sums which you become legally liable to pay as compensatory damage because of bodily injury or property damage. ...

You are insured for claims made against you arising from:

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1. Personal Liability -- legal liability arising out of your personal actions anywhere in the world.

We will defend, by counsel of our choice, any suit against you alleging bodily injury or property damage and seeking compensatory damages, even if it is groundless, false or fraudulent. We reserve the right to investigate, negotiate and settle any claim or suit if we decide this is appropriate.

### GENERAL EXCLUSIONS APPLICABLE TO THIS SECTION TWO

You are not insured for claims arising from:

- (5) bodily injury or property damage caused by any intentional or criminal act or failure to act by:
- (a) any person insured by this document ...
- **60** The respondent sought a declaration that it not be required to defend the appellant against the plaintiff's claims. Humphries J. dismissed the respondent's petition, but the Court of Appeal allowed the appeal.
  - III. Judicial Decisions
  - A. British Columbia Supreme Court (1997), 47 B.C.L.R. (3d) 187
- 61 Humphries J. interpreted the insurance policy's exclusion such that only intentional acts, but not intentional injuries, trigger exclusion. However, she believed that the relevant act underlying the plaintiff's claim must be sexual assault, not merely sexual contact, for it to fall within the exclusion. Relying on Co-operative Fire & Casualty Co. v. Saindon, [1976] 1 S.C.R. 735, she found at para. 23 that "[i]f the allegations in the Statement of Claim include a possible claim in negligence against [the appellant], and if such a plea is a legitimate one made in good faith, [the respondent] [page588] cannot rely on the exclusion clause because injury or damage caused by a negligent act falls outside it". Since it was possible that the appellant had intended only sexual contact, but was simply negligent regarding sexual assault, there was a duty to defend.
  - B. British Columbia Court of Appeal (1998), 48 B.C.L.R. (3d) 143
  - (i) Hollinrake J.A., Proudfoot J.A. concurring
- 62 The appeals of the respondent and Wawanesa Mutual Insurance Co., respondent in the companion appeal, Sansalone, were consolidated at the Court of Appeal. Having accepted Saindon as the leading case on point, Hollinrake J.A. turned to the specific issues raised by the Scalera appeal. He concluded that the exclusion clause in question barred claims based on intentional acts. Since most tort claims allege negligence and not intent to injure, excluding intentional acts from coverage was "in keeping with coverage historically provided by policies insuring against liability imposed by law caused by accident" (para. 91). It was also consistent with the reasonable expectations of the parties.
- 63 Hollinrake J.A. found that the claim advanced sounded in intentional tort, and saw no reason to require the respondent to prove the intent to injure. The appellant's act was clearly intentional and was within the exclusion clause, so there was no possibility of coverage. Any claims based on the power-dependency relationship between the plaintiff and the appellant also fell within the exclusion, as it had in Sansalone. Finally, Hollinrake J.A. disagreed with Finch J.A. as to the meaning of the duty to defend clause. He concluded that, in order for there to be a duty to defend, there had to be at least a possibility of coverage. Since he had [page589] already determined that there

was no possibility of coverage, he allowed the appeal.

- (ii) Finch J.A., dissenting
- 64 Finch J.A. concluded that in spite of the exclusion clause's language referring only to intentional acts, it must be read to exclude liability only for injury or damage caused intentionally. To do otherwise would exclude the vast majority of all claims, since most accidents or occurrences can be traced back to an intentional act. Finch J.A. did not read the pleadings as alleging an intention on the part of the appellant to cause the plaintiff injury. He therefore concluded that the duty to defend should apply.
- 65 Moreover, Finch J.A. held that under the wording of the appellant's policy, the duty to defend was not linked to the duty to indemnify. As a result, the respondent was obliged to defend any claim for bodily injury causing compensable damages, regardless of whether that claim could also trigger indemnity.
  - IV. Issues
- 66 This appeal raises four issues.
  - 1. Is the duty to defend in the appellant's insurance policy linked to the duty to indemnify?
  - 2. Do the intentional act exclusion clauses in the appellant's insurance policy operate to relieve the respondent's duty in this case?
  - 3. Was there an "accident" or "occurrence" that is sufficient to trigger coverage?
  - 4. Does s. 28 of the British Columbia Insurance Act, R.S.B.C. 1996, c. 226, absolve the respondent of any duty to defend the appellant?

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Because of my disposition of the first two issues, I find it unnecessary to address the latter two in this appeal.

- V. Analysis
- A. General Principles of Insurance Contract Interpretation
- **67** To begin with, I should like to discuss briefly several principles that are relevant to the interpretation of the insurance policy in question. While these principles are merely interpretive aids that cannot decide any issues by themselves, they are nonetheless helpful when interpreting provisions of an insurance contract.
  - (i) The General Purpose of Insurance
- **68** It is important to keep in mind the underlying economic rationale for insurance. C. Brown and J. Menezes, Insurance Law in Canada (2nd ed. 1991), state this point well at pp. 125-26:

Insurance is a mechanism for transferring fortuitous contingent risks. Losses that are neither fortuitous nor contingent cannot economically be transferred because the premium would have to be greater than the value of the subject matter in order to provide for marketing and adjusting costs and a profit for the insurer. It follows, therefore, that even where the literal working of a policy might appear to cover certain losses, it does not, in fact, do so if (1) the loss is from the inherent nature of the subject matter being insured, or (2) it results from the intentional actions of the insured.

69 In other words, insurance usually makes economic sense only where the losses covered are unforeseen or

accidental: "The assumptions on which insurance is based are undermined if successful claims arise out of loss which is not fortuitous" (C. Brown, Insurance Law in Canada (3rd ed. 1997), at p. 4). This economic rationale takes on a public policy flavour where, as here, the acts for which the insured is seeking coverage are socially harmful. It may be undesirable to encourage people to injure others intentionally by indemnifying them from the civil consequences. On the other hand, denying coverage has the undesirable [page591] effect of precluding recovery against a judgment-proof defendant, thus perhaps discouraging sexual assault victims from bringing claims. See B. Feldthusen, "The Civil Action for Sexual Battery: Therapeutic Jurisprudence?" (1993), 25 Ottawa L. Rev. 203, at p. 233.

### (ii) Contra Proferentem

70 Since insurance contracts are essentially adhesionary, the standard practice is to construe ambiguities against the insurer: Brissette Estate v. Westbury Life Insurance Co., [1992] 3 S.C.R. 87, at p. 92; Wigle v. Allstate Insurance Co. of Canada (1984), 49 O.R. (2d) 101 (C.A.), per Cory J.A. A corollary of this principle is that "coverage provisions should be construed broadly and exclusion clauses narrowly": Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co., [1993] 1 S.C.R. 252, at p. 269; Indemnity Insurance Co. of North America v. Excel Cleaning Service, [1954] S.C.R. 169, at pp. 179-80, per Estey J. Therefore one must always be alert to the unequal bargaining power at work in insurance contracts, and interpret such policies accordingly.

### (iii) Reasonable Expectations

71 Where a contract is unambiguous, a court should give effect to the clear language, reading the contract as a whole: Brissette Estate, supra, at p. 92; Parsons v. Standard Fire Insurance Co. (1880), 5 S.C.R. 233. Where there is ambiguity, this Court has noted "the desirability ... of giving effect to the reasonable expectations of the parties": Reid Crowther, supra, at p. 269 (citing Brown and Menezes, supra, at pp. 123-31, and Brissette Estate, supra). See also Scott v. Wawanesa Mutual Insurance Co., [1989] 1 S.C.R. 1445, at p. 1467; Wigle, supra. Estey J. stated the point succinctly in Consolidated-Bathurst Export Ltd. v. Mutual [page592] Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888, at pp. 901-2:

[L]iteral meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result... . Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

This court recently re-stated the importance of commercial reality, in another context, in Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, at para. 62.

72 With these principles in mind, I now wish to discuss the principal issues in this appeal.

- B. The Scope of the Insurer's Duty to Defend
  - (i) The Linkage Between the Duties to Indemnify and to Defend

73 The appellant's first argument is that the duty to defend is independent of the duty to indemnify. The relevant clause in the appellant's policy states: "We will defend, by counsel of our choice, any suit against you alleging bodily injury or property damage and seeking compensatory damages, even if it is groundless, false or fraudulent." The

appellant argues, and Finch J.A. agreed in dissent at the Court of Appeal, that this requires not a potentially [page593] indemnifiable claim, but only a claim alleging bodily injury and seeking compensatory damages.

74 With respect, I cannot agree. McLachlin J. addressed this question in Nichols v. American Home Assurance Co., [1990] 1 S.C.R. 801. The policy in that appeal specifically limited the duty to defend to suits "seeking damages which are or may be payable under the terms of this Policy" (p. 805), and so there was obviously no independent duty to defend under that particular policy. However, McLachlin J. went on, at pp. 810-11, to set out general principles governing the duty to defend, regardless of whether there is express language or not:

Thus far, I have proceeded only by reference to the actual wording of the policy. However, general principles relating to the construction of insurance contracts support the conclusion that the duty to defend arises only where the pleadings raise claims which would be payable under the agreement to indemnify in the insurance contract. Courts have frequently stated that "[t]he pleadings govern the duty to defend": Bacon v. McBride (1984), 6 D.L.R. (4th) 96 (B.C.S.C.), at p. 99. Where it is clear from the pleadings that the suit falls outside of the coverage of the policy by reason of an exclusion clause, the duty to defend has been held not to arise: Opron Maritimes Construction Ltd. v. Canadian Indemnity Co. (1986), 19 C.C.L.I. 168 (N.B.C.A.), leave to appeal refused by this Court, [1987] 1 S.C.R. xi.

At the same time, it is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend. The mere possibility that a claim within the policy may succeed suffices. In this sense, as noted earlier, the duty to defend is broader than the duty to indemnify.

Other Canadian authority overwhelmingly supports the view that normally the duty to defend arises only with respect to claims which, if proven, would fall [page594] within the scope of coverage provided by the policy....

The same view generally prevails in the United States... .

75 McLachlin J. also provided two policy reasons in support of this conclusion, and in so doing refuted the contrary arguments made in the American case Conner v. Transamerica Insurance Co., 496 P.2d 770 (Okla. 1972). First, the insurer would have to pay defence costs for claims outside the policy's scope. This raised "policy questions of whether others in the insurance pool should be taxed with providing defences for matters outside the purview of the policy": Nichols, supra, at pp. 811-12. Second, an independent duty to defend raises conflict of interest problems. If the insurer is defending claims for which it owes no duty to indemnify, there is a strong incentive simply to settle the claim as quickly as possible. At the very least, the insurer has an incentive to try to prove only that the insured is liable for claims falling outside coverage. There would be little incentive to establish that the insured was entirely without blame. McLachlin J. therefore concluded, at p. 812, that

considerations relat[ing] to insurance law and practice, as well as the authorities, overwhelmingly support the view that the duty to defend should, unless the contract of insurance indicates otherwise, be confined to the defence of claims which may be argued to fall under the policy. That said, the widest latitude should be given to the allegations in the pleadings in determining whether they raise a claim within the policy.

76 While this is obiter dictum, I find McLachlin J.'s arguments compelling. Absent specific language to the contrary, the duty to defend is broader than the duty to indemnify only in so far as it extends to groundless, false, or fraudulent claims. Given the historical evolution of the duty [page595] to defend as a way for insurers to protect their interests when they will be forced to pay any resulting judgment (see J. M. Fischer, "Broadening the Insurer's Duty to Defend: How Gray v. Zurich Insurance Co. Transformed Liability Insurance Into Litigation Insurance" (1991), 25 U.C. Davis L. Rev. 141, at pp. 146-57; E. S. Pryor, "The Tort Liability Regime and the Duty to Defend" (1999), 58 Md. L. Rev. 1), it makes little sense to presume an independent duty to defend absent express language: see B. Vail, "'My Mistake, Your Problem': The Duty to Defend Liability Claims in Canada" (1996), 6 C.I.L.R. 201, at p. 207, and Fischer, supra. To hold otherwise would convert indemnity insurance into litigation insurance. In my opinion,

such an interpretation would violate the reasonable expectations of the parties absent express language to that effect.

77 Although prior to Nichols, Canadian courts were split on the issue, since Nichols courts have followed the dictum from that case. See Modern Livestock Ltd. v. Kansa General Insurance Co. (1993), 11 Alta. L.R. (3d) 355 (Q.B.); B.P. Canada Inc. v. Comco Service Station Construction & Maintenance Ltd. (1990), 73 O.R. (2d) 317 (H.C.), and Kates v. Hall, 1990 5 W.W.R. 569 (B.C.S.C.).

78 This conclusion is consistent with the majority of American courts, which have concluded that the "duty to defend arises when the underlying complaint alleges any facts that might fall within the coverage of the policy": Colorado Farm Bureau Mutual Insurance Co. v. Snowbarger, 934 P.2d 909 (Colo. Ct. App. 1997), at p. 912. See also, e.g., Aerojet-General Corp. v. Transport Indemnity Co., 948 P.2d 909 (Cal. 1997), at p. 921; Lawyers Title Insurance Corp. v. Knopf, 674 A.2d 65 (Md. Ct. Spec. App. 1996), at p. 70; Allstate Insurance Co. v. Patterson, 904 F. Supp. 1270 (D. Utah 1995); Allstate Insurance Co. v. Brown, 834 F. Supp. 854 [page596] (E.D. Pa. 1993). To the contrary, see Gray v. Zurich Insurance Co., 419 P.2d 168 (Cal. 1966).

### (ii) The Relevance of the Pleadings

79 The appellant notes that the plaintiff's statement of claim alleged the non-intentional torts of negligence and breach of fiduciary duty. He therefore argues that the respondent has a duty to defend because the exclusion clause does not apply to these claims. However, these bare assertions alone cannot be determinative. Otherwise, the parties to an insurance contract would always be at the mercy of the third-party pleader. What really matters is not the labels used by the plaintiff, but the true nature of the claim.

**80** The general rule regarding the role of the pleadings is well stated by Wallace J. in Bacon v. McBride (1984), 6 D.L.R. (4th) 96 (B.C.S.C.), at p. 99:

The pleadings govern the duty to defend -- not the insurer's view of the validity or nature of the claim or by the possible outcome of the litigation. If the claim alleges a state of facts which, if proven, would fall within the coverage of the policy the insurer is obliged to defend the suit regardless of the truth or falsity of such allegations.

This principle was expanded upon by McLachlin J., for the Court in Nichols, supra, at pp. 810-11, in the following words cited in part above:

Where it is clear from the pleadings that the suit falls outside of the coverage of the policy by reason of an exclusion clause, the duty to defend has been held not to arise: Opron Maritimes Construction Ltd. v. Canadian Indemnity Co. (1986), 19 C.C.L.I. 168 (N.B.C.A.), leave to appeal refused by this Court, [1987] 1 S.C.R. xi.

At the same time, it is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend. The mere possibility that a claim within the policy may succeed suffices. In this sense, as noted earlier, the duty to defend is broader than the duty [page597] to indemnify. O'Sullivan J.A. wrote in Prudential Life Insurance Co. v. Manitoba Public Insurance Corp. (1976), 67 D.L.R. (3d) 521 (Man. C.A.), at p. 524:

Furthermore, the duty to indemnify against the costs of an action and to defend does not depend on the judgment obtained in the action. The existence of the duty to defend depends on the nature of the claim made, not on the judgment that results from the claim. The duty to defend is normally much broader than the duty to indemnify against a judgment. (Emphasis added.)

In that case it was unclear whether the insurer might be liable to indemnify under the policy, so the duty to defend was held to apply. In the court's view it would have been unjust for the insurers to be able to assert that "the claim is probably groundless, or will probably end up falling outside of the indemnity coverage.

Since we have no proof that we owe an indemnity in this case, we take the position that we owe no duty to defend".

- 81 This does not, however, mean that the parties to an insurance contract are to be bound by the plaintiff's choice of labels, and thus defenceless against inaccurate or manipulative pleadings. Nichols only held that, having determined the nature of the claim, an insured need not further prove that the claim would succeed. This is just common sense, since otherwise an insured would have to prove he is actually liable in order to get an insurer to defend a liability claim.
- 82 In my view, the correct approach in the circumstances of this case is to ask if the allegations, properly construed, sound in intentional tort. If they do, the plaintiff's use of the word "negligence" will not be controlling. The Rhode Island Supreme Court, in Peerless Insurance Co. v. Viegas, 667 A.2d 785 (1995), cleverly expressed the point as follows at p. 789:

[page598]

In civil actions for damages that result from an act of child sexual molestation, an insurer will be relieved from its duty to defend and to indemnify its insured if the perpetrator is insured under a policy in which there is contained an intentional act exclusion provision... . The fact that the allegations in that complaint are described in terms of "negligence" is of no consequence. A plaintiff, by describing his or her cat to be a dog, cannot simply by that descriptive designation cause the cat to bark.

- 83 To be somewhat more prosaic, when determining the scope of the duty to defend, courts must take the factual allegations as pleaded, but then ask which of the plaintiff's legal claims could potentially be supported by those factual allegations. This is clear from Bacon, supra, at p. 99, where the court limited the duty to defend to cases where the "claim alleges a state of facts which, if proven, would fall within ... coverage" (emphasis added). Similarly, in Nichols, supra, at p. 810, McLachlin J. cited with approval O'Sullivan J.A.'s direction to look at "the nature of the claim made".
- **84** I would note that this approach can assist the insured, and not just the insurer. For example, as the California Supreme Court noted in Gray, supra, at p. 176,

the complainant in the third party action drafts his complaint in the broadest terms; he may very well stretch the action which lies in only nonintentional conduct to the dramatic complaint that alleges intentional misconduct. In light of the likely overstatement of the complaint and of the plasticity of modern pleading, we should hardly designate the third party as the arbiter of the policy's coverage.

Conversely, a plaintiff may draft a statement of claim in a way that seeks to turn intention into negligence in order to gain access to an insurer's deep pockets. See E. S. Pryor, "The Stories We Tell: Intentional Harm and the Quest for Insurance Funding" (1997), 75 Tex. L. Rev. 1721, at p. 1735. A court must therefore look beyond the labels used by the plaintiff, and determine the true nature of [page599] the claim pleaded. It is important to emphasize that at this stage a court must not attempt to determine the merit of any of the plaintiff's claims. Instead, it should simply determine whether, assuming the verity of all of the plaintiff's factual allegations, the pleadings could possibly support the plaintiff's legal allegations.

85 Having construed the pleadings, there may be properly pleaded allegations of both intentional and non-intentional tort. When faced with this situation, a court construing an insurer's duty to defend must decide whether the harm allegedly inflicted by the negligent conduct is derivative of that caused by the intentional conduct. In this context, a claim for negligence will not be derivative if the underlying elements of the negligence and of the intentional tort are sufficiently disparate to render the two claims unrelated. If both the negligence and intentional tort claims arise from the same actions and cause the same harm, the negligence claim is derivative, and it will be subsumed into the intentional tort for the purposes of the exclusion clause analysis. If, on the other hand, neither claim is derivative, the claim of negligence will survive and the duty to defend will apply. Parenthetically, I note that

the foregoing should not preclude a duty to defend simply because the plaintiff has pleaded in the alternative. As Pryor, "The Stories We Tell: Intentional Harm and the Quest for Insurance Funding", supra, points out at p. 1752, "[p]laintiffs must have the freedom to plead in the alternative, to develop alternative theories, and even to submit alternative theories to the jury". A claim should only be treated as "derivative", for the purposes of this analysis, if it is an ostensibly separate claim which nonetheless is clearly inseparable from a claim of intentional tort.

- 86 The reasons for this conclusion are twofold. First, as discussed above, one must always remember that insurance is presumed to cover only negligence, not intentional injuries. Second, this [page600] approach will discourage manipulative pleadings by making it fruitless for plaintiffs to try to convert intentional torts into negligence, or vice versa. While courts should not concern themselves with whether or not pleadings are designed to generate insurance coverage, following the guidelines set out above will provide insurers with sufficient protections against manipulative pleadings.
- 87 These concepts may seem rather complicated in the abstract, but they are more straightforward to apply in practice. While this issue is relatively new to Canadian law, it has been extensively canvassed in the United States, where courts have denied insurance coverage for claims of negligent battery, negligent misrepresentation, negligent infliction of emotional distress, negligent interference with familial relations, and any other claim of "negligence" where it is derivative of an intentional sexual assault. For example, in Houg v. State Farm Fire and Casualty Co., 481 N.W.2d 393 (Minn. Ct. App. 1992), a parishioner sued a priest who had been counselling her for sexual assault. In addition to intentional sexual battery, the plaintiff alleged negligent counselling by the defendant.
- 88 The court had little difficulty in finding that this allegation of negligence did not raise the duty to defend, because "[a]ny negligent counseling is so intertwined with [the insured]'s sexual exploitation of a psychologically dependent person as to be inseparable" (Houg, supra, at p. 397). To use the approach I have set out above, the negligent counselling claim was merely derivative of the sexual assault. The fact that there may have been negligent aspects of the priest's conduct will not change the essentially intentional nature of his conduct, for the purpose of the exclusion clause. To similar effect are: Linebaugh v. Berdish, 376 N.W.2d 400 (Mich. Ct. App. 1985) (denying a claim for "negligent" child molestation, which was "a transparent [page601] attempt to trigger insurance coverage by characterizing allegations of tortious conduct under the guise of 'negligent' activity" (p. 406)); Horace Mann Insurance Co. v. Leeber, 376 S.E.2d 581 (W. Va. 1988) (alleged negligent seduction of a child by a teacher (p. 587)); Allstate Insurance Co. v. Troelstrup, 789 P.2d 415 (Colo. 1990) (same (p. 418, n. 7)); Nationwide Mutual Fire Insurance Co. v. Lajoie, 661 A.2d 85 (Vt. 1995) (agreeing with the trial judge that "labeling [the insured]'s conduct as negligent is simply a disingenuous attempt to create a factual dispute" (p. 86)); Colorado Farm Bureau Mutual Insurance Co. v. Snowbarger, supra ("[T]he only facts recited in the complaint concern the repeated acts of sexual assault. There are no factual allegations provided in the complaint to substantiate a negligence theory" (p. 912)).
- 89 I wish to make it clear that I am not denying that a given state of facts may give rise to several different tort claims. For example, in M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, the Court noted at p. 59 that "[i]ncest is a breach of both common law and equitable duties". The Court therefore held that limitation periods applying to intentional or negligent actions did not apply to claims for breach of fiduciary duty. While I fully agree with this proposition, I would note that the present appeal presents a distinct question. In the context of an insurance contract's intentional injury exclusion clause, the goal is to determine the gravamen of the complaint, and whether one can infer an intent to injure from that complaint. Limitations issues, as shown by M. (K.), are different, and not applicable in the present appeal. Indeed, this appeal's holding with respect to the proper characterization of a plaintiff's tort allegations should not be taken [page602] to affect any areas of law outside the insurance context presented by this appeal.
  - (iii) Conclusion on the Scope of the Insurer's Duty to Defend
- **90** I therefore conclude that the respondent will only have to defend the appellant if the plaintiff's statement of claim alleges a state of facts that, properly construed, would support an action that could potentially fall within coverage.
  - C. Is There a Claim that Could Fall Within Coverage?

- **91** There is no dispute in this case that the plaintiff's allegations fall within the general coverage provisions of the policy. All that is at stake is whether the exclusion clause applies. That clause states that the appellant is "not insured for claims arising from: ... bodily injury or property damage caused by any intentional or criminal act or failure to act" by the insured.
- 92 At the outset, the wording of this clause presents a threshold issue. The respondent argues that the clause requires only an intentional act, not an intent to injure. The majority below agreed with this interpretation. However, I agree with Finch J.A.'s dissent on this point. If the respondent were correct, almost any act of negligence could be excluded under this clause. After all, most every act of negligence can be traced back to an "intentional ... act or failure to act". As this Court made clear in Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd., [1976] 1 S.C.R. 309, "negligence is by far the most frequent source of exceptional liability which [an insured] has to contend with. Therefore, a policy which would not cover liability due to negligence could not properly be called 'comprehensive'" (pp. 316-17). Consistent with this decision, the purpose of insurance, and the doctrines of reasonable expectations and contra proferentem referred to above, I believe the exclusion clause must be read to require that the injuries be intentionally caused, in that they are the [page603] product of an intentional tort and not of negligence.
- 93 Our task, therefore, is to decide which of the plaintiff's legal allegations are properly pleaded, whether any of them are derivative, and whether any of the surviving claims evince an intention to injure, thus triggering the exclusion clause. To do this, it is necessary to understand precisely what the elements of the various torts alleged against the appellant are. If the elements of a tort claim require proof of conduct that also proves an intent to injure, there will be no duty to defend because any potentially successful claim would fall under the exclusion clause.
- 94 As will be seen from the following discussion, I conclude that each of the plaintiff's properly pleaded claims necessarily involves an intent to injure, because each requires proof that the appellant either knew, or should have known, that the plaintiff did not validly consent to sexual activity. Given this actual or constructive knowledge of nonconsent, the law will not permit the appellant to claim that he did not intend any harm. The exclusion therefore applies because there is no claim against the appellant that, if successful, could potentially fall within coverage. There being no potentially indemnifiable claim, the respondent has no duty to defend.
  - (i) Sexual Battery
  - (ii) Elements of the Tort of Sexual Battery
- 95 The tort of sexual battery is a relatively new one. As Professor Feldthusen points out in "The Canadian Experiment with the Civil Action for [page604] Sexual Battery", in N. J. Mullany, ed., Torts in the Nineties (1997), 274, at p. 274, this action is one that has appeared more frequently in the last 15 years. The sexual battery action signals the possibility of "dramatic changes to the law of consent, to the action for breach of fiduciary duty, to the rules governing punitive damages, to the rules of discovery and to the law of evidence" (p. 275). However, this appeal requires no such changes. Contrary to McLachlin J.'s assertions, my approach entails nothing more than understanding how traditional tort law applies in the context of sexual battery.
- 96 Sexual battery is a form of battery, the traditional test for which is relatively straightforward. In M. (K.), supra, at p. 25, La Forest J. defined assault and battery as "causing another person to apprehend the infliction of immediate harmful or offensive force on her person coupled with the actual infliction of that harmful or offensive force". What is notably absent from this definition is any intent to injure. Professor Klar, in his second edition of Tort Law (1996), makes this point at p. 42:

For the tort of intentional battery, the defendant must have intended an offensive, physical contact with the plaintiff. The defendant need not have intended to harm or injure the plaintiff, although in most battery cases there is an intention to injure.

- 97 A. M. Linden, in Canadian Tort Law (6th ed. 1997), emphasizes this point at p. 43: "A battery can be committed even though no harm or insult is intended by the contact. If the contact is offensive to the recipient, even if a compliment was intended, it is tortious." See also Wilson v. Pringle, [1986] 2 All E.R. 440 (C.A.), at p. 445; Spivey v. Battaglia, 258 So.2d 815 (Fla. 1972); O. M. Reynolds, "Tortious Battery: Is 'I Didn't [page605] Mean Any Harm' Relevant?" (1984), 37 Okla. L. Rev. 717.
- **98** Intentional battery generally requires only the intent to cause the physical consequences, namely, an offensive touching. Klar, supra, makes this point at p. 30:

Technically, however, the concept of "intention" in the intentional torts does not require defendants to know that their acts will result in harm to the plaintiffs. Defendants must know only that their acts will result in certain consequences. It is not necessary for defendants to realize that these intended consequences are in fact an infringement of the legal rights of others. Intention, in other words, focusses on physical consequences.

To similar effect is Linden, supra, at p. 33: "Conduct is intentional if the actor desires to produce the consequences that follow from an act."

99 Moreover, if a tort is intended, it will not matter that the result was more harmful than the actor should, or even could have foreseen. Linden, supra, at p. 45, quotes Borins Co. Ct. J. (as he then was) in Bettel v. Yim (1978), 20 O.R. (2d) 617, at p. 628:

If physical contact was intended, the fact that its magnitude exceeded all reasonable or intended expectations should make no difference. To hold otherwise ... would unduly narrow recovery where one deliberately invades the bodily interests of another with the result that the totally innocent plaintiff would be deprived of full recovery for the totality of the injuries suffered as a result of the deliberate invasion of his bodily interests. [Emphasis added.]

- 100 The appellant's argument, in light of the foregoing, is quite simple. Battery requires only intentional contact, not an intent to harm. Therefore, he could have had non-consensual sex with the plaintiff, thus committing battery, while thinking consent was present and thus not intending any harm. Any injuries could therefore have been unintentional, [page606] and the exclusion clause should not apply because a claim within coverage could succeed.
- 101 The problem with the appellant's argument is that it fails to recognize the subtleties of intentional tort, particularly as they apply to sexual battery. The law of intentional tort has traditionally focussed on a different set of problems from those presented in cases of sexual battery. In traditional battery, which is what the above-cited authorities were considering, what is usually at stake is whether the defendant can be liable for unintended physical consequences of his or her intentional actions, as in Bettel, supra. In these cases, the plaintiff's consent is not in question because of the nature of the conduct. Punching, shooting, stabbing, or otherwise attempting to injure another person is clearly offensive, and we would not expect someone to consent to it. See, e.g., Long v. Gardner (1983), 144 D.L.R. (3d) 73 (Ont. H.C.); Veinot v. Veinot (1977), 81 D.L.R. (3d) 549 (N.S.C.A.); Rumsey v. The Queen (1984), 12 D.L.R. (4th) 44 (F.C.T.D.); Holt v. Verbruggen (1981), 20 C.C.L.T. 29 (B.C.S.C.). As Borins Co. Ct. J. said in Bettel, supra, at p. 627, defendants in these cases have acted "with intent to violate the interests of others" (quoting J. J. Atrens, "International Interference with the Person", in Studies in Canadian Tort Law (1968), 378). Consent simply is not an issue, and intent to injure is obvious.
- 102 Moreover, even in those cases where intent to harm is less obvious, lack of consent usually is obvious. For example, Reynolds, supra, discusses various instances where courts have debated the need to show intent to harm. These cases typically involve childish pranks, see Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955), Vosburg v. Putney, 50 N.W. 403 (Wis. 1891); unconsented medical treatment, [page607] see Reibl v. Hughes, [1980] 2 S.C.R. 880, Clayton v. New Dreamland Roller Skating Rink, Inc., 82 A.2d 458 (N.J. Super. Ct. App. Div. 1951); or unintended consequences, see Bettel, supra, Kirkpatrick v. Crutchfield, 100 S.E. 602 (N.C. 1919). In all of these

situations, there is never any suggestion that the plaintiff consented to the battery; the focus instead is on whether the appellant intended any harm, and these cases have generally decided that no such intent is needed.

103 What is necessary, therefore, is to decide what role consent plays in an action for sexual battery. It is clear that for traditional batteries, consent is conceived of as an affirmative defence that must be raised by the defendant. As Cartwright J. said in Cook v. Lewis, [1951] S.C.R. 830, at p. 839, "where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove 'that such trespass was utterly without his fault". Obviously, one way to make this showing, is by establishing that the plaintiff consented to the touching. Therefore in Norberg v. Wynrib, [1992] 2 S.C.R. 226, La Forest J. stated in obiter dictum that "[c]onsent, express or implied, is a defence to battery" (p. 246). See also Reibl, supra, at p. 890 (battery "casts upon the defendant the burden of proving consent to what was done"); Hambley v. Shepley (1967), 63 D.L.R. (2d) 94 (Ont. C.A.), at p. 95; Linden, supra, at p. 67; G. H. L. Fridman, The Law of Torts in Canada (1989), vol. 1, at p. 63. If consent is merely a defence to battery, then presumably the plaintiff could establish battery without showing lack of consent. To paraphrase Cartwright J. in Cook, the plaintiff's case would be made by showing the mere application of force by the defendant. As I understand it, this is the position taken by McLachlin J. However, I have trouble concluding on these terms that the appellant necessarily intended injury. Without a fault requirement of any kind, I cannot agree that the exclusion clause [page608] would necessarily apply, and the respondent would therefore have a duty to defend.

104 This doctrine is of course consistent with our basic notions of intentional tort. A person's body is inviolable, and those who interfere with one's "intangible right to autonomy over one's own body" will be held liable: Klar, supra, at p. 41. However, not all intentional touchings are presumptively instances of battery. There are any number of contacts that are usually consensual. For example, in Mandel v. The Permanent (1985), 7 O.A.C. 365 (Div. Ct.), at p. 370, Henry J. noted that a man's placing his hand on the plaintiff's arm to guide her to the door was "merely a polite gesture and an accepted usage in daily life in a civilized society, whether or not she was in fact consenting to it". A more obvious example is certain sports, where physical contact is expected and even encouraged. What these examples show is that, in all cases, one must look to the context to understand the role of consent.

105 While, for reasons already given, consent is not a well-developed concept in battery cases, it is closely related to the more familiar requirement in tort law that a given contact be "harmful or offensive" if it is to generate liability: see M. (K.), supra, at p. 25. Unlike more traditional batteries, sexual activity by itself is not inherently harmful. Without denying the seriousness and frequency of sexual assault, the simple fact is that sexual activity -- unlike being punched, stabbed, or shot -- is usually consensual. It generally becomes harmful only if it is non-consensual, in the wider meaning of that word. Without trying to catalogue the various [page609] ways that consent may be vitiated, I note that Norberg, supra, established that simply because someone ostensibly consents to sexual activity does not mean that their consent is valid. See, generally, Feldthusen, "The Canadian Experiment with the Civil Action for Sexual Battery", supra, at pp. 282-86.

106 That the "harmful or offensive" standard is a familiar one in tort law is shown by Wiffin v. Kincard (1807), 2 Bos. & Pul. (N.R.) 471, 127 E.R. 713 (C.P.), and Coward v. Baddeley (1859), 4 H. & N. 478, 157 E.R. 927 (Ex.). In those cases, the courts determined that touching someone on the shoulder to get their attention is not a battery, even if the recipient objected to the contact. As Linden, supra, at p. 44, points out:

A line must be drawn between those contacts which are regarded as normal everyday events, which people must put up with in a crowded world, and those which are considered to be offensive and, therefore, unacceptable.

Klar, supra, at pp. 43-44, elaborates on this point:

The distinction between "hostile" and "friendly" contact seems to depend upon the standard of generally acceptable conduct in society. The test is objective: what would the reasonable person consider to be acceptable? Two recent English cases demonstrate this proposition. In the first, Collins v. Wilcock, [1984] 1 W.L.R. 1172 (Q.B.), the act of a police officer in taking hold of someone's arm to restrain her from walking

off was deemed to constitute a battery. The test suggested by Goff L.J. was this: "whether the physical conduct so persisted in has in the circumstances gone beyond generally acceptable standards of conduct." lbid., at 1178.... In the second case, Wilson v. Pringle, [1986] 2 All E.R. 440 (C.A.), a schoolboy playfully pulled the schoolbag off the plaintiff's shoulder, causing him injury. In deciding whether this was a hostile touching and consequently a battery, Croom-Johnson L.J....agreed that certain conduct must be judged as [page610] "acceptable in the ordinary conduct of everyday life." [Emphasis added.]

107 In England, courts have concluded that "[t]he absence of consent is so inherent in the notion of a tortious invasion of interests in the person that the absence of consent must be established by the plaintiff": Street on Torts (10th ed. 1999), at p. 32. This issue was decided by Freeman v. Home Office, [1983] 3 All E.R. 589 (Q.B.), aff'd [1984] 1 All E.R. 1036 (C.A.), where the court held that a prisoner suing for battery because of therapeutic drug injections had the burden of proving non-consent. While it is not necessary in this appeal to decide whether the burden of proving non-consent will always rest on the plaintiff, I believe that it should for sexual battery. To repeat, sexual contact is only "harmful or offensive" when it is non-consensual. To succeed in an action for intentional battery, one must prove both that (a) the defendant intended to do the action; and (b) the reasonable person would have perceived that action as being harmful or offensive. For sexual activity, an action is harmful or offensive if it is non-consensual. Therefore in sexual battery, the trier of fact must be satisfied that the defendant intended to engage in sexual activity which a reasonable person would have perceived to be non-consensual.

108 The New Zealand High Court came to the same conclusion in H. v. R., [1996] 1 N.Z.L.R. 299, at p. 305:

In sexual abuse cases, a conceptual difficulty with the tort has been as to whether an absence of consent is an element of the tort, or a defence. It seems to me that to the extent that it has always been necessary for the plaintiff to prove a hostile intent to ground this tort, the burden of demonstrating a lack of consent must be surmounted by the plaintiff, of course on the civil standard. I[f] that is so, lack of consent has always been, strictu sensu, an element of the offence.

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In short, the appellant's attempt to convert an intentional tort into negligence because of the possibility that he lacked a subjective intent to injure must fail. Consent, in so far as it is concerned with whether something is harmful or offensive, is an objective standard. If the plaintiff can prove that the appellant failed to meet this standard, the latter is liable for intentional sexual battery, not negligence.

109 In summary, I would advance the following basic propositions. For there to be a duty to defend, there must be the possibility of a duty to indemnify. In the context of the pleadings in this case raising in substance a sexual assault through a sexual battery, the issue of consent produces two possible results for the purposes of the duty to defend, both of which are unfavourable to the appellant. If the consent of the plaintiff was present, then no claim of sexual battery is made out since the conduct of the appellant would not be regarded objectively as being harmful or offensive, and therefore the duty to indemnify would not arise because the plaintiff's claim has no possibility of success. See State Farm Fire and Casualty Co. v. Williams, 355 N.W.2d 421 (Minn. 1984), at p. 424. On the other hand, if consent of the plaintiff is absent, the conduct of the appellant would be actionable as an intentional tort of sexual battery. As I will discuss, infra, in such a case an intent to harm is inferred, the exclusion clause would apply, and there would be no duty to indemnify. There being no state of affairs in which there could be a duty to indemnify, the duty to defend does not apply.

110 I wish to emphasize that the foregoing should not be taken to endorse in any way the inappropriate stereotype that women are to be presumed willing partners to sexual activity. See R. v. Mills, [1999] 3 S.C.R. 668, at para. 90; R. v. Osolin, [1993] 4 S.C.R. 595, at p. 670; R. v. Seaboyer, [1991] 2 S.C.R. 577, at p. 604; [page612] Federal/Provincial/Territorial Working Group of Attorneys General Officials on Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action (1992). Nothing in these reasons should be read to the contrary. Putting the onus of proving lack of consent on the

plaintiff simply recognizes that in the sexual assault context, "non-consensual" is equivalent to "harmful or offensive"; and the latter has always been an element of the plaintiff's case.

- 111 I would also emphasize that the plaintiff's burden in a civil action to prove non-consent is much less onerous than the one faced by the prosecution in a criminal case. As Major J. noted in R. v. Ewanchuk, [1999] 1 S.C.R. 330, at para. 42, the mens rea of criminal sexual assault requires the Crown to prove beyond a reasonable doubt that the accused was "knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched". To prove the civil tort of sexual battery, by contrast, one need only prove by a balance of probabilities that the defendant knew or ought to have known that the plaintiff did not consent.
- 112 The onus of proving consent will be largely of theoretical importance. To meet her initial burden, the plaintiff need simply allege that the sexual activity was non-consensual. The issue will then be the same regardless of where the onus lies: on the balance of probabilities, should the defendant have known that the plaintiff did not validly consent? The only time the plaintiff's burden of pleading non-consent would be relevant is in those rare cases where, for whatever reason, the defence chooses to present no evidence. In such a case, having the onus on the plaintiff ensures that the defendant will only be liable if the plaintiff alleges, at a minimum, that the sexual activity was non-consensual. While the practical difference is thus minimal, I believe the theoretical one is important. Placing the onus of proving lack of consent on the [page613] plaintiff better reflects our traditional notions of tort law, as adapted to the relatively new tort of sexual battery.
- 113 Having concluded that in the context of sexual battery the "harmful or offensive" element is satisfied by showing lack of consent, I will now discuss whether the elements of a sexual battery claim necessarily prove an intent to injure on the part of the defendant. If a sexual battery claim requires proof of elements that also establish an intent to injure, then any successful claim would necessarily be excluded under the policy and there can be no duty to defend such a claim.
  - (b) Are There Properly Pleaded Allegations of Sexual Battery that Could Trigger the Duty to Indemnify?
- 114 As set out above, the first step is to determine whether there are properly pleaded allegations of sexual battery. In my opinion, this requirement is clearly satisfied. The plaintiff has alleged intentional sexual activity by the appellant, to which the plaintiff did not consent. Moreover, para. 117 of the statement of claim specifically alleges that "Scalera knew or ought to have known that [the plaintiff] did not consent to the Scalera sexual acts". The next question is whether sexual battery necessarily implies an intent to injure sufficient to trigger the exclusion clause.
- 115 This Court was presented with this issue, in a different context, in Norberg, supra. In that case the Court split three ways on the appropriate characterization of the actions of a doctor who convinced a drug-addicted patient to engage in sexual acts with him in return for pills to which she was addicted. This issue is not before the Court in this [page614] appeal. However, I will assume all three approaches set out in that case -- sexual battery, breach of duty, and breach of fiduciary duty -- are possible.
- 116 Writing for himself, Gonthier and Cory JJ., La Forest J. concluded that Wynrib's conduct amounted to sexual assault. Drawing an analogy to contract law, La Forest J. concluded that consent may be vitiated where "there is an overwhelming imbalance in the power relationship between the parties" (p. 248). If there was no valid consent, Wynrib was liable for battery.
- 117 What La Forest J.'s reasons left undecided is whether or not Wynrib had any intent to harm, or indeed whether such intent is necessary for sexual battery. La Forest J. did not inquire into subjective intent to harm, but instead focused on the presence or absence of valid consent. This approach is consistent with the few reported lower court decisions addressing sexual assault. For example, in M. (M.) v. K. (K.) (1989), 61 D.L.R. (4th) 392 (B.C.C.A.), the court concluded that notwithstanding the fact that the victim initiated the sexual contact, there could be no valid consent between a 41-year-old man and his 15-year-old foster daughter. Harder v. Brown (1989), 50 C.C.L.T. 85

(B.C.S.C.), and Lyth v. Dagg <u>(1988)</u>, <u>46 C.C.L.T. 25</u> (B.C.S.C.), similarly declined to consider intention to harm, instead finding that consent was vitiated by the extreme power imbalances in the relationships.

118 One conclusion that could be drawn from these cases is that sexual battery requires no intent to harm, only the absence of consent. If this is correct, the exclusion clause would not necessarily apply to a sexual battery claim, and the respondent would have a duty to defend. However, in my view [page615] this interpretation is not correct. Consent, linked as it is to the "harmful or offensive" standard, as already discussed, is an objective standard. Sexual battery requires an objective set of circumstances such that the defendant either knew or should have known that there was no valid consent.

119 Leaving aside the physical injuries that can be inflicted by sexual assault, there can be no question that it occasions untold injury to the victim's dignity, physical integrity, and psychological well-being. The same facts that prove lack of consent will prove intent to injure; this follows because if a reasonable person should have known there was no consent, the law will not excuse that person's failure to perceive the lack of consent. On the other hand, a defendant will not be liable for sexual assault if there was no way for him or her to know that the victim did not, or could not, consent to sexual activity.

120 This Court has recognized the grave harm occasioned by sexual assault. For example, in R. v. McCraw, [1991] 3 S.C.R. 72, the Court held that threats of rape amounted to threats of serious bodily harm, within the meaning of s. 264.1(1)(a) of the Criminal Code. Cory J. aptly summarized the harm inherent in non-consensual sexual activity, at pp. 83-84:

It seems to me that to argue that a woman who has been forced to have sexual intercourse has not necessarily suffered grave and serious violence is to ignore the perspective of women. For women rape under any circumstance must constitute a profound interference with their physical integrity. As well, by force or threat of force, it denies women the right to exercise freedom of choice as to their partner for sexual relations and the timing of those relations. These are choices of great importance that may have a substantial effect upon the life and health of every woman. Parliament's intention in replacing the rape laws with the sexual assault offences was to convey the message that rape is not just a sexual act but is basically an act of violence. See K. [page616] Mahoney, "R. v. McCraw: Rape Fantasies v. Fear of Sexual Assault" (1989), 21 Ottawa L. Rev. 207, at pp. 215-16.

See also Osolin, supra, at p. 669; Ewanchuk, supra, at para. 69 (per L'Heureux-Dubé J.). While McCraw was concerned with forcible rape, I do not think the harm is any less real just because the victim has been coerced into sex by mental as opposed to physical means. It can hardly be disputed, I think, that any type of non-consensual sex clearly evinces an intent to harm the victim thereof.

121 In the considerable jurisprudence on the point, most U.S. courts have reached the same conclusion. The majority of these cases have involved sexual assaults of children. Courts have had little difficulty in concluding that defendants in these cases are presumed to intend harm to their victims -- notwithstanding the fact that "males who are involved in such activities do not expect or intend that the females will sustain any injury": CNA Insurance Co. v. McGinnis, 666 S.W.2d 689 (Ark. 1984), at p. 690. See also B.B. v. Continental Insurance Co., 8 F.3d 1288 (8th Cir. 1993); J.C. Penney Casualty Insurance Co. v. M.K., 804 P.2d 689 (Cal. 1991); Horace Mann Insurance Co. v. Leeber, supra; State Farm Fire & Casualty Co. v. D.T.S., 867 S.W.2d 642 (Mo. Ct. App. 1993); Amercian States Insurance Co. v. Borbor, 826 F.2d 888 (9th Cir. 1987); Troelstrup v. District Court, 712 P.2d 1010 (Colo. 1986) (en banc); Rodriguez v. Williams, 729 P.2d 627 (Wash. 1986) (en banc); Linebaugh v. Berdish, supra; Horace Mann Insurance Co. v. Independent School District No. 656, 355 N.W.2d 413 (Minn. 1984). These cases are obviously much easier than the present appeal. It is difficult to imagine someone successfully arguing that they intended no harm from sex with someone too young to consent to sexual activity.

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also inferred an intent to harm in these cases. For example, in State Farm Fire and Casualty Co. v. Williams, supra, the court denied insurance coverage to someone who had sexually assaulted a man with cerebral palsy who was confined to a wheelchair. The court first examined cases involving assaults on minors, and concluded as follows, at p. 424:

Does the fact that Williams, the victim, was an adult distinguish this case? We think not. Neither the insured nor the insurer in entering into the insurance contract contemplated coverage against claims arising out of non-consensual sexual assaults. On the other hand, if the sexual contacts were consensual, as asserted by respondent Keller, there would be no assault and hence no claim for recovery.

See also Houg, supra; Altena v. United Fire and Casualty Co., 422 N.W.2d 485 (lowa 1988); and D. S. Florig, "Insurance Coverage for Sexual Abuse or Molestation" (1995), 30 Tort & Ins. L.J. 699.

123 Finally, I would note that the Canadian case most directly on point has reached a similar conclusion. Wilkieson-Valiente v. Wilkieson, [1996] I.L.R. para. I-3351 (Ont. Ct. (Gen. Div.)), involved an action by a young girl against her stepfather. The court disagreed with the defendant's assertion that "it is possible to commit a sexual assault without necessarily 'intending' injury" (p. 4132). Instead, the court concluded as follows at p. 4133:

It may be conceivable, in rare circumstances, to commit a sexual assault without an intent to cause any psychological harm, (such as in the case of a transitory touching of a sleeping or unconscious victim). However, bearing in mind that "intentionally" does not refer to "desired result" but "awareness of possible result" such cases will be rare indeed. Particularly, as here, where the pleadings claim repeated sexual assaults over a period of many years on a victim who is a child, it is inconceivable that any right-thinking person would not be fully [page618] aware of the possible, indeed probable consequences of such conduct; that is, psychological harm to the victim.

124 Unlike the Court in Wilkieson-Valiente, supra, I cannot accept that one can commit sexual assault without an intent to harm: see Linden, supra, at p. 45; Restatement (Second) of Torts, s. 18 cmt. d (1965). Even if the victim is unconscious, the perpetrator has still violated another person's physical integrity. However, I agree that to prove sexual assault, a plaintiff must prove sufficient culpability on the part of the defendant that an intent to harm follows. Accordingly, the exclusion clause must apply, and the respondent has no duty to defend the plaintiff's claim of sexual battery.

- (ii) Negligent Battery
- (a) Elements of Negligent Battery

125 Klar, supra, defines negligent battery at p. 47:

A negligent battery exists when the defendant causes a direct, offensive, physical contact with the plaintiff as a result of negligent conduct. The defendant's negligence consists of unreasonably disregarding a foreseeable risk of contact, even though the contact was neither desired nor substantially certain to occur.

The plaintiff has also alleged breach of duty, which is essentially negligence. In Norberg, supra, Sopinka J. relied on this theory to find Dr. Wynrib liable to Ms. Norberg. However, his reasoning was based on the professional duty owed by a physician to a patient. No such duty was alleged in the present appeal. Instead, and absent any particularized pleading by the plaintiff, I must presume that [page619] she is relying on a traditional negligent battery theory.

126 As Klar's definition makes clear, the "negligence" in negligent battery refers only to the "risk of contact". One might commit negligent battery by carelessly stretching one's arms, thereby striking someone. More commonly, negligent battery cases have involved projectiles. See Cook, supra; Ellison v. Rogers (1967), 67 D.L.R. (2d) 21 (Ont. H.C.); Hatton v. Webb (1977), 81 D.L.R. (3d) 377 (Alta. Dist. Ct.). The important point is that negligent battery

is concerned with the physical consequences of one's actions. However, the appellant has not disputed the physical consequence of his actions for the purposes of this appeal. He has, appropriately, assumed the truth of the allegations contained in the plaintiff's Statement of Claim, which asserts that he intended to have sexual relations with the plaintiff. The only question is whether it was consensual, which is determined on an objective standard, as I have explained above.

127 I therefore do not find Co-operative Fire & Casualty Co. v. Saindon, supra; Newcastle (Town) v. Mattatall (1988), 52 D.L.R. (4th) 356 (N.B.C.A.); Long Lake School Division No. 30 of Saskatchewan Board of Education v. Schatz (1986), 18 C.C.L.I. 232 (Sask. C.A.), and Devlin v. Co-operative Fire & Casualty Co. (1978), 90 D.L.R. (3d) 444 (Alta. C.A.), to be relevant. These cases are not helpful in the present appeal, as they all involved unforeseen physical consequences of the actions of the insured, and asked whether the result was "substantially certain" given the defendant's actions. The "substantial certainty" test, focusing as it does on physical consequences, has no bearing on the issue of consent. The case at bar involves deciding solely whether the plaintiff validly consented to the appellant's actions. A negligent battery is properly pleaded only if the plaintiff alleges that the appellant was negligent as to the physical consequences of his actions; in other words, that he did not intend for sexual contact to [page620] occur. As explained above, lack of intention to have non-consensual sex is more properly construed as going to the "harmful or offensive" element of intentional battery, and will not found a claim for negligent battery. Therefore negligent battery will only be relevant if the pleadings allege that the appellant negligently harmed the plaintiff by disregarding a foreseeable risk of physical contact. No such allegation has been made. As the court said in Pistolesi v. Nationwide Mutual Fire Insurance Co., 644 N.Y.S.2d 819 (App. Div. 1996), at p. 820:

... the mere allegation that the injuries were the unintended result of an intentional act does not convert the cause of action from one sounding in intentional tort to one sounding in negligence... .

(b) Are There Properly Pleaded Allegations of Negligent Battery That Could Trigger the Duty to Indemnify?

128 Once again, the first step is to determine whether negligent battery was properly pleaded. I have concluded that it was not. As discussed above, negligent battery occurs when the defendant causes harm by negligently disregarding a foreseeable risk of physical contact. The plaintiff has not alleged such conduct; both parties have assumed, for the purposes of this appeal, that the appellant intended to have sexual contact with the plaintiff. Since there is no properly pleaded allegation of negligent battery, it is unnecessary to determine whether the exclusion clause would apply to such a claim.

### (iii) Negligent Misrepresentations

**129** Aside from the vague assertions of "breach of duty", the appellant notes that the plaintiff has [page621] alleged negligent acts independent of the sexual assault. For example, the statement of claim alleges negligent misrepresentations. It is unnecessary to spend much time on this issue. It is well established that one can be liable for damages to personal security caused by negligent statements, as well as acts:

A statement of fact, on which the plaintiff relied, would give rise to liability if (i) it were inaccurate as a result of negligence (and a fortiori deceit); and (ii) it caused physical injury to the plaintiff or damage to his property.

(Fridman, supra, at p. 263.)

See also Klar, supra, at p. 177; M'Alister v. Stevenson, [1932] A.C. 562 (H.L.), at pp. 580-81 (per Atkin L.J.).

130 Assuming without deciding that negligent misrepresentation has been properly pleaded here, I find that these claims are entirely derivative of the intentional sexual battery, and are thus subsumed into the latter for the purposes of the exclusion clause. The statement of claim alleges that the misrepresentations were designed to seduce the plaintiff, and convince her to engage in sexual activity with the appellant. As such, they were entirely subservient to the sexual battery. They arise from the same actions and cause the same harm. Indeed, para. 111 of

the plaintiff's statement of claim alleges that the appellant "made the Scalera Representations intending to persuade [the plaintiff] to submit to the Scalera sexual acts". The West Virginia Supreme Court of Appeals reached the same conclusion in Horace Mann Insurance Co. v. Leeber, supra, at p. 587, where an exclusion clause applied in spite of allegations of negligent seduction of a student by a teacher. The court concluded that the allegations of "negligence" in the complaint were

a transparent attempt to trigger insurance coverage by characterizing allegations of [intentional] tortious conduct [page622] under the guise of 'negligent' activity. [Insertion in Leeber; quoting Linebaugh, supra, at p. 406.]

I reach the same conclusion in this appeal. While courts must be careful not to restrict pleading in the alternative unduly and should only subsume allegations of negligence that are clearly derivative of the intentional tort, I conclude that this is one of those cases. The plaintiff has clearly alleged intentional conduct by the appellant. Without ruling out the possibility that the plaintiff's pleadings could support claims of both intention and negligence as a matter of tort law, I conclude as a matter of insurance law that the negligent claims are subsumed for the purposes of the exclusion clause. The allegations of negligent misrepresentation are derivative of the intentional sexual assault claims, and cannot trigger the duty to defend.

### (iv) Breach of Fiduciary Duty

131 The final approach to allegations of sexual misconduct in Norberg, supra, was the fiduciary duty route taken by McLachlin J., L'Heureux-Dubé J. concurring. They concluded that the duty owed from a doctor to the patient met the test for fiduciary relationships set out by Wilson J. in Frame v. Smith, [1987] 2 S.C.R. 99, at p. 136. No doubt relying on these reasons, the plaintiff has also alleged breach of fiduciary duties against the appellant.

132 Without commenting on whether the relationship between the appellant and the plaintiff could potentially be characterized as a fiduciary one, the plaintiff's claims for breach of fiduciary duty are excluded much for the same reasons as the negligence claims. Looking beyond the label to what is actually alleged in the pleadings, and without expressing any opinion on the validity of a fiduciary duty claim on the facts of this appeal, there are no facts pleaded to suggest that the breach of fiduciary [page623] duty was anything but intentional in nature. The appellant was alleged to have intentionally seduced the plaintiff, and whether or not this can be characterized as a fiduciary duty claim, any injuries resulting therefrom were caused intentionally. The harm caused by any breach of fiduciary duty is identical to that caused by the sexual battery, and the claim is therefore subsumed, for the purpose of the exclusion clause, into the intentional battery.

### (v) Conclusion

133 In summary, all of the plaintiff's claims against the appellant are covered by the exclusion clause for injuries caused intentionally. To prove her case, the plaintiff will have to establish that the appellant knew or should have known that the plaintiff did not validly consent to sexual relations with him. In such a situation, the appellant will not be heard to complain that he did not intend any harm. One who engages in objectively non-consensual sexual activity will be presumed to have intended harm; whether or not he subjectively intended harm will not change the injurious nature of his actions, and will not deny an insurer its bargained-for exclusion of intentionally injurious activities. This conclusion is consistent with the basic principles of insurance law discussed above.

134 In particular, it is consistent with the reasonable expectations of the parties. In this respect, I agree with the Iowa Supreme Court in Altena, supra, at p. 490, where the court quoted the following passage from Rodriguez by Brennan v. Williams, 713 P.2d 135 (Wash. Ct. App. 1986), at pp. 137-38:

... [t]he average person purchasing homeowner's insurance would cringe at the very suggestion that [the person] was paying for such coverage. And certainly [the person] would not want to share that type of risk with [page624] other homeowner's policy holders. [Insertions added in Altena.]

Similarly, in Horace Mann Insurance Co. v. Leeber, supra, at pp. 586-87, the court said the following:

The majority rule rejecting an alleged duty to defend or to pay in sexual misconduct liability insurance cases is consistent with the "doctrine of reasonable expectations." ... [W]e simply believe that the insured under a homeowner's insurance policy does not reasonably expect the insurer to defend an action against the insured for, and to pay for, damages alleged to have been caused by the sexual misconduct of the insured.

See also R. Bell, "Sexual Abuse and Institutions: Insurance Issues" (1996), 6 C.I.L.R. 53, at pp. 54-55.

135 This conclusion is also consistent with basic insurance theory. Insurance is meant to cover risk of loss. See C. Brown, Insurance Law in Canada (loose-leaf), vol. 1, at p. 1-1. Where the loss is caused intentionally, it is hardly the result of a risk. Regardless of whether an insurance company could find a way profitably to insure someone against intentionally caused injuries, the respondent clearly did not believe it was doing so when it wrote the policy at issue in this appeal. Sexually assaulting someone is not like getting in a car accident, or having someone injure themselves by slipping on an unshovelled sidewalk. If the plaintiff is to succeed, she must prove that the appellant's conduct went beyond mere negligence, and rose to the level of sexual assault. Absent express language to the contrary, I am unable to conclude that the parties to this insurance contract agreed to cover such a claim.

136 Nor do I believe that contra proferentem, or any other insurance principle, is sufficient to overcome these conclusions. While ambiguous language will often be construed against the insurer, this consideration alone cannot be determinative. Moreover, I find that the most accurate reading of the language [page625] and intentions of the contract is that the exclusion clause applies to the allegations of sexual misconduct made by the plaintiff.

### D. Other Arguments Raised by the Respondent

137 The respondent has also argued that the actions alleged by the plaintiff are not "accidents" or "occurrences", as required by the policy, and that s. 28 of the British Columbia Insurance Act, excludes the claim because it alleges a criminal act. Given my interpretation of the exclusion clause, I find it unnecessary to consider these other questions and therefore express no opinion on them.

### VI. Summary and Disposition

138 I believe my conclusions in this appeal can be summarized fairly briefly:

- 1. An insurance company only has a duty to defend when a lawsuit against the insured raises a claim that could potentially fall within coverage.
- 2. In determining if a claim falls within coverage, courts are not bound by the labels chosen by the plaintiff, but must determine the true nature of the claim stated in the pleadings.
- 3. In this appeal, the plaintiff has stated three possible claims arising out of an alleged sexual assault: sexual battery, negligent battery, and breach of fiduciary duty.

None of these claims could potentially fall within coverage because, even if ultimately successful, the respondent will have no duty to indemnify owing to the insurance policy's exclusion for injuries caused intentionally by the insured.

a. Sexual battery requires proof that a reasonable person should have known that the plaintiff did not validly consent to the sexual activity in question. Since non-consensual [page626] sexual activity is inherently harmful, any injuries resulting therefrom are intentionally caused, and the exclusion clause would apply. If, to the contrary, a reasonable person would not have known that the plaintiff did not validly consent, the plaintiff's claim will fail, there will be no duty to indemnify, and therefore equally no duty to defend.

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- b. Claims of negligence and breach of fiduciary duty are either not properly pleaded, or are subsumed into the sexual battery in this case because these claims are based on the same facts and resulted in the same harm. Therefore the exclusion clause applies equally to them.
- 4. Since there is no possible set of circumstances in which one of the plaintiff's claims could trigger indemnity, there is no duty to defend.

139 For the foregoing reasons, I would dismiss the appeal with costs.

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### Canadian Contractual Interpretation Law

THIRD EDITION

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1384. A consumer contract is a contract whose field of application is delimited by legislation respecting consumer protection whereby one of the parties, being a natural person, the consumer, acquires, leases, borrows or obtains in any other manner, for personal, family or domestic purposes, property or services from the other party, who offers such property and services as part of an enterprise which he carries on. <sup>21</sup>

The doctrine notes that article 1432 is a codification of a rule that developed gradually in the jurisprudence, beginning with insurance policies and gradually expanding to other areas, particularly contracts of adhesion.<sup>22</sup>

### 8.3 CONTRACTS OF ADHESION

A "contract of adhesion" has been defined as a written contract having five characteristics:

- 1. Drafted by one party to the transaction;
- 2. On a form regularly used by the drafter;
- Presented to the adherent on a take-it-or-leave-it basis;
- One in which the adherent enters into relatively few such transactions as compared with the drafting party;
- One in which the principal obligation of the adherent is the payment of money.<sup>23</sup>

The relevant time for assessing whether a contract is one of adhesion is when the contract was made. The fact that a party could later recommend and lobby for a change does not alter the character of a contract of adhesion. <sup>24</sup> Contracts of adhesion arise most often in the context of insurance contracts, consumer contracts and guarantees.

By and large, contracts of adhesion are interpreted like any other contract, with the normal rules of contractual interpretation applying. There is, however, one way in which interpretation differs. In the case of a contract of adhesion, there is an increased propensity to apply the *contra proferentem* rule. As expressed by the Supreme Court of Canada in *Zurich Life Insurance Co. of Canada v. Davies*, <sup>25</sup> "there is every reason to apply a *contra proferentem* construction to a contract of adhesion such as we have here". The principle that the *contra proferentem* rule is more apt to be applied to a contract of adhesion has been followed on numerous occasions, <sup>26</sup> most recently in a case where a disputed clause in an

Civil Code of Québec, art. 1384.

Jean-Louis Baudouin and Pierre-Gabriel Jobin, "Les effets du contrat entre les parties" in *Les obligations*, 6th ed. (Cowansville, QC: Yvon Blais, 2005).

Brissette Estate v. Westbury Life Insurance Co., [1992] S.C.J. No. 86, [1992] 3 S.C.R. 87 at para. 34 (S.C.C.), per Cory J., dissenting.

Birch v. Union of Taxation Employees, Local 70030, [2008] O.J. No. 4856, 93 O.R. (3d) 1 at para. 50 (Ont. C.A.), leave to appeal refused [2009] S.C.C.A. No. 29 (S.C.C.) [Birch].

<sup>&</sup>lt;sup>25</sup> [1981] S.C.J. No. 111, [1981] 2 S.C.R. 670 at 674 (S.C.C.).

Wagner Brothers Holdings Inc. v. Laurier Life Insurance Co., [1992] O.J. No. 1303, 8 O.R. (3d) 609 (Ont. C.A.), leave to appeal refused [1992] S.C.C.A. No. 455, [1993] 1 S.C.R. vii (S.C.C.); ETI Explosives Technologies International (Canada) Ltd. v. East Coast Explosives

employment contract was interpreted in favour of the employee because the agreement in question was a contract of adhesion.<sup>27</sup>

In Québec, article 1432 of the *Civil Code of Québec* mandates the application of the *contra proferentem* rule to contracts of adhesion: "In all cases, it is interpreted in favour of the adhering party ...." Article 1379 defines a contract of adhesion in a manner not much different from the common law definition set out above:

1379. A contract of adhesion is a contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable.

Any contract that is not a contract of adhesion is a contract by mutual agreement.<sup>29</sup>

### 8.4 EMPLOYMENT CONTRACTS

### 8.4.1 The principle

The interpretation of employment contracts is one of several areas in which policy goals other than interpretive accuracy affect the interpretive process. As stated by the Ontario Court of Appeal in 2004, "the judicial interpretation of contracts between employers and employees must be informed by the power imbalance between the two and the importance of employment to an individual's dignity and sense of self-worth". Thus interpretation of an employment contract is more than the usual effort of giving an accurate objective meaning to the words used by the contracting parties having regard to the context in which those words have been used. Unless there is a contractual provision to the contrary, an employment contract will be interpreted in a manner which furthers employment law principles, specifically the protection of employees who are vulnerable in dealings with their employers and for whom employment is important to their sense of self-worth:

In an important line of cases in recent years, the Supreme Court of Canada has discussed, often with genuine eloquence, the role work plays in a person's life, the imbalance in many employer-employee relationships and the desirability of interpreting legislation and the common law to provide a measure of protection to vulnerable employees: see *Alberta Union of Provincial Employees v. Alberta (Attorney General)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161, *Machtinger, supra*, and *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1 ("*Wallace*").

Ltd., [1994] N.S.J. No. 426, 135 N.S.R. (2d) 142 at para. 39 (N.S.T.D.); and Kuhberg v. Slave Lake Native Friendship Centre Society, [2003] A.J. No. 783 at paras. 30-32 (Alta. Q.B.).

Murray v. Xerox Corp., [2005] O.J. No. 3148 (Ont. C.A.).

Civil Code of Québec, art. 1432. See also Pierre-Gabriel Jobin, Les Obligations, 6th ed. (Cowansville, QC: Yvon Blais, 2005) at 86 and 456.

*Ibid.*, art. 1379.

<sup>30</sup> Rasanen v. Lisle-Metrix Ltd., [2004] O.J. No. 2095, 187 O.A.C. 65 at para. 1 (Ont. C.A.).

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