Court File No. CV-13-10313-00CL
Court of Appeal No. C58425

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HOME TRUST COMPANY

Applicant

- and -

2122775 ONTARIO INC.

Respondent

BOOK OF AUTHORITIES OF THE RECEIVER

DICKINSON WRIGHT LLP
Barristers & Solicitors
199 Bay Street, Suite 2200
Toronto, Ontario, M5L 1G4

LISA S. CORNE
LSUC Registration No. 27974M
Email: lcorne@dickinsonwright.com
Tel: (416) 646-4608

Fax: (416) 865-1398

Lawyers for Collins Barrow Toronto Limited in its capacity as receiver of 2122775 Ontario Inc.

INDEX

TAB 1

COURT OF APPEAL FOR ONTARIO

CITATION: Business Development Bank of Canada v. Pine Tree Resorts Inc., 2013 ONCA 282
DATE: 20130429
DOCKET: M42401, M42383 & M42395 (C56856)

R.A. Blair J.A. (in Chambers)

BETWEEN

Business Development Bank of Canada

Applicant (Respondent)

and

Pine Tree Resorts Inc. and 1212360 Ontario Limited

Respondents (Appellants)

Milton A. Davis, for the appellants Pine Tree Resorts Inc. and 1212360 Ontario Limited

David Preger, for the appellant Romspen Investment Corporation

Harvey Chaiton, for the respondent Business Development Bank of Canada

Heard: April 22, 2013

ENDORSEMENT

Overview

[1] On April 2, 2013, Justice Mesbur granted the application of Business Development Bank of Canada ("BDC") for the appointment of a receiver over the assets of the respondents, Pine Tree Resorts Inc. and 1212360 Ontario Limited

(together, "Pine Tree"). Pine Tree owns and operates the Delawana Inn in Honey Harbour, Ontario.

[2] Pine Tree and the second mortgagee, Romspen Investment Corporation ("Romspen"), seek to appeal from Mesbur J.'s order. At the heart of this motion is whether the order should be stayed pending the appeal if there is an appeal. Collateral issues include whether the appeal is as of right under s. 193 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3 ("BIA"). If the answer to that question is yes, should the automatic stay be lifted? If leave to appeal is required, should it be granted and, if so, should the order be stayed pending the disposition of the appeal?

[3] For the reasons that follow, I conclude that the appeal is not as of right, that leave to appeal is required and that in the circumstances here leave ought not to be granted. It is therefore unnecessary to deal with the specific question of whether a stay should be ordered pending appeal.

Background and Facts

[4] BDC is owed approximately $2.6 million by Pine Tree and holds first security for that indebtedness by way of a mortgage on the Delawana Inn lands and, additionally, by way of general security agreements covering both land and chattels. Romspen is the second mortgagee. Its mortgage, too, is in default. Romspen is owed approximately $4.3 million.

[5] The Inn has been in financial difficulties for several years and finally, after a number of negotiated extensions and forbearances, BDC demanded payment under both the mortgage and the general security agreements.

[6] Under its security documents, BDC is contractually entitled to the appointment of a receiver. Instead of appointing a private receiver, however, BDC chose to apply for a court-appointed receiver. Romspen chose to initiate power of sale proceedings but, at the time the order was made, was not in a position to proceed with the sale because three days remained under the period prescribed in the Notice of Power of Sale for redemption.

[7] Pine Tree and Romspen opposed BDC's application. That said, all parties agree the property must be sold immediately. Pine Tree does not have the financial ability to keep the Inn operating. In essence, the dispute is over which secured creditor will have control over the sale of the property and which plan for sale will be implemented.

[8] Pine Tree supports Romspen's plan because it involves re-opening the Inn for the upcoming summer season and attempting to sell the property on a going-concern basis. BDC rejects this option as unrealistic because it views the Inn's operations as being an irretrievably losing proposition.

[9] Romspen argued before the application judge – and argues here as well – that it was entitled to exercise its rights as a subsequent mortgagee under s. 22

of the *Mortgages Act*, R.S.O. 1990, c. M.40, to put BDC's mortgage in good standing and take over the sale of the property. It proposes to put the mortgage in good standing by paying all arrears of principal and interest, together with all of BDC's costs, expenses, and outstanding realty taxes. However, it does not propose to repay approximately $250,000 in HST arrears. Those arrears constitute a default under the BDC security documents.

[10] In seeking to appeal the order, Romspen and Pine Tree assert a number of grounds relating to the exercise of the application judge's discretion in granting the receivership order, but the centrepiece of their legal argument on appeal concerns the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*. They submit that the arrears of HST do not jeopardize BDC's security in any way because they are a subsequent encumbrance, and therefore it is not necessary for them to comply with that covenant in order to be able to take advantage of a subsequent mortgagee's rights under s. 22. Whether that view is correct is the question of law they wish to have determined on appeal.

[11] On behalf of BDC, Mr. Chaiton submits that there is nothing in s. 22 that permits a subsequent mortgagee to exercise its s. 22 rights unless it brings the prior mortgage into good standing, which involves both paying the amount due under the mortgage and – where there are unperformed covenants – performing those covenants as well.

Is Leave to Appeal Necessary?

[12] In my view, there is no automatic right to appeal from an order appointing a receiver: see *Century Services Inc. v. Brooklin Concrete Products Inc.* (11 March 2005), Court File No. M32275 (Ont. C.A., in Chambers), Catzman J.A.; *Alternative Fuel Systems Inc. v Edo (Canada) Ltd. (Trustee of)* (1997), 206 A.R. 295 (Alta. C.A., in Chambers).

[13] The portions of s. 193 of the BIA relied upon by Romspen and Pine Tree are the following:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> ...
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> ...
>
> (e) in any other case by leave of a judge of the Court of Appeal.

[14] Neither (a) nor (c) applies in these circumstances, in my view. I will address whether leave to appeal should be granted later in these reasons.

[15] "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised

in the future: see *Ravelston Corp., Re*, [2005] O.J. No. 5351 (C.A.), at para. 17. See also *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co., Re* (1965), 52 D.L.R. (2d) 79 (Man. C.A.); and *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A., in Chambers).

[16] Here, Romspen's legal rights are its right to exercise its power of sale remedy and its right to put the first mortgage in good standing under s. 22 of the *Mortgages Act*. The first crystallized on the default under the Romspen mortgage, the second on the default under the BDC mortgage. Both rights were therefore triggered before the order of Mesbur J. They were at best rights presently existing but exercisable in the future.

[17] Nor do I accept the argument that the property in the appeal exceeds in value $10,000 for purposes of s. 193(c). As noted by the Manitoba Court of Appeal in *Dominion Foundry Co.*, at para. 7, to allow an appeal as of right in these circumstances would require doing so in almost every case because very few bankruptcy cases would go to appeal where the value of the bankrupt's property did not exceed that amount. More importantly, though, an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval.

[18] In my view, leave to appeal is required in the circumstances of this case.

Should Leave to Appeal Be Granted?

The Test

[19] In *Fiber Connections Inc.*, Armstrong J.A. (in Chambers) reviewed extensively the jurisprudence surrounding the test to be applied for granting leave to appeal under s. 193(e). As he noted at para. 15, there is some confusion as to what that test is. Two articulations of the test have emerged, and each has its support in the case law.

[20] One formulation is that set out by McLachlin J.A. (as she then was) in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 210. It asks the following questions:

> (i) Is the point appealed of significance to the practice as a whole?
>
> (ii) Is the point raised of significance in the action itself?
>
> (iii) Is the appeal prima facie meritorious?
>
> (iv) Will the appeal unduly hinder the progress of the action?

[21] These are the criteria generally applied when considering whether to grant leave to appeal from orders made in restructuring proceedings under the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36 ("CCAA"), although their application has not been confined to those types of cases.

[22] A second approach to the test was adopted by Goodman J.A. in *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48 (C.A., in Chambers), at para. 6. Through this lens, the court is to determine whether the decision from which leave to appeal is sought (a) appears to be contrary to law; (b) amounts to an abuse of judicial power; or (c) involves an obvious error, causing prejudice for which there is no remedy.

[23] Ontario decisions have traditionally leaned toward the *R.J. Nicol* factors when determining whether to grant leave to appeal under s. 193(e) of the BIA: see, in addition to *R.J. Nicol*, for example, *Re Leard* (1994), 114 D.L.R. (4th) 135 (Ont. C.A., in Chambers); and *Century Services Inc.*

[24] This view has evolved in recent years, however, and three decisions in particular have added nuances to the *R.J. Nicol* approach by considering such factors as whether there is an arguable case for appeal and whether the issues sought to be raised are significant to the bankruptcy practice in general and ought to be addressed by this Court: see *Fiber Connections Inc.*, at paras. 16-20; *GMAC Commercial Credit Corp. of Canada v. TCT Logistics*, [2003] O.J. No. 5761 (C.A., in Chambers); and *Baker, Re* (1995), 22 O.R. (3d) 376 (C.A., in Chambers). These factors echo the criteria set out in *Power Consolidated.*

[25] In *Baker, Re,* Osborne J.A. acknowledged the two alternative approaches to determining whether leave to appeal should be granted. He concluded at p.

381 that the *R.J. Nicol* criteria were "generally relevant" but observed that all factors need not be given equal weight in every case. For that particular case, he emphasized the factor that the issue sought to be appealed was "a matter of considerable general importance in bankruptcy practice". In *TCT Logistics*, at para. 9, Feldman J.A. listed all of the *R.J. Nicol and* the *Power Consolidated* criteria – without apparently distinguishing between them – as matters to be taken into account. She granted leave holding that the issues in that case were significant to the commercial practice regulating bankruptcy and receivership and ought to be considered by this court.

[26] Finally, in *Fiber Connections Inc.*, Armstrong J.A. reviewed all of the foregoing authorities and, at para. 20, granted leave to appeal because he was satisfied in that case that there were arguable grounds of appeal (although it was not necessary for him to determine whether the appeal would succeed) and because the issues raised were significant to bankruptcy practice and ought to be considered by this Court.

[27] I take from this brief review of the jurisprudence that, while judges of this Court have tended to favour the *R.J. Nicol* test in the past, there has been a movement towards a more expansive and flexible approach more recently – one that incorporates the *Power Consolidated* notions of overall importance to the practice area in question or the administration of justice as well as some consideration of the merits.

[28] That being the case, it is perhaps time to attempt to clarify the "confusion" that arises from the co-existence of the two streams of criteria in the jurisprudence. I would adopt the following approach.

[29] Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,

> a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
>
> b) is *prima facie* meritorious, and
>
> c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

[30] It is apparent these considerations bear close resemblance to the *Power Consolidated* factors. One is missing: the question whether the point raised is of significance to the action itself. I would not rule out the application of that consideration altogether. It may be, for example, that in some circumstances the parties will need to have an issue determined on appeal as a step toward dealing with other aspects of the bankruptcy/insolvency proceeding. However, it seems to me that this particular consideration is likely to be of lesser assistance in the leave to appeal context because most proposed appeals to this Court raise

issues that are important to the action itself, or at least to one of the parties in the action, and if that consideration were to prevail there would be an appeal in almost every case.

[31] I have not referred specifically to the three *R.J. Nicol* criteria in the factors mentioned above. That is because those factors are caught by the "*prima facie* meritorious" criterion in one way or another. A proposed appeal in which the judgment or order under attack (a) appears to be contrary to law, (b) amounts to an abuse of judicial power, or (c) involves an obvious error causing prejudice for which there is no remedy, will be a proposed appeal that is *prima facie* meritorious. I recognize that the *Power Consolidated* "*prima facie* meritorious" criterion is different than the "arguable point" notion referred to by Osborne J.A. in *Baker* and by Armstrong J.A. in *Fiber Connections*. In my view, however, the somewhat higher standard of a *prima facie* meritorious case on appeal is more in keeping with the incorporation of the *R.J. Nicol* factors into the test.

[32] As I have explained above, however, the jurisprudence has evolved to a point where the test for leave to appeal is not simply merit-based. It requires a consideration of all of the factors outlined above.

[33] The *Power Consolidated* criteria are the criteria applied by this Court in determining whether leave to appeal should be granted in restructuring cases under the CCAA: see *Country Style Food Services (Re)*, [2002] O.J. No. 1377

(C.A., in Chambers), Feldman J.A., at para 15; and *Blue Range Resources Corp. (Re)* (1999), 244 A.R. 103 (C.A.). The criteria I propose are quite similar. There is something to be said for having similar tests for leave to appeal in both CCAA and BIA insolvency proceedings. Proposed appeals in each area often arise from discretionary decisions made by judges attuned to the particular dynamics of the proceeding. Those decisions are entitled to considerable deference. In addition, both types of appeal often involve circumstances where delays inherent in appellate review can have an adverse effect on those proceedings.

Application of the Test in the Circumstances

[34] I am not prepared to grant leave to appeal on the basis of the foregoing criteria in the circumstances of this case.

[35] First, Romspen and Pine Tree raise a number of grounds relating to the exercise of the application judge's discretion. These include her consideration and treatment of: the relative expenses involved in BDC's and Romspen's plans for the sale of the property; the impact of shutting down the Inn on employees and others and upon the potential sale prospects of the property; and her concern for "the usual unsecured creditors". These discretionary considerations are all entitled to great deference and, in any event, are purely factual and case specific, and do not give rise to any matters of general significance to the

practice in bankruptcy/insolvency matters or to the administration of justice as a whole.

[36] I would not grant leave to appeal on those grounds.

[37] The legal issue raised by Romspen is this: did the application judge err by relying on a covenant default that could not prejudice BDC or erode its first-ranking security as the basis for her conclusion that Romspen had not complied with the requirements for the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*? The basis for that submission is the argument that the outstanding HST arrears – although a default in the observance of a covenant under the BDC mortgage – could not in any circumstances constitute a claim that would have priority over BDC's security, and therefore Romspen, as a subsequent mortgagee, is not required to cure the default by performing that covenant in order to be able to exercise its s. 22 rights.

[38] I have serious reservations about the likelihood of success of this submission on appeal.

[39] Romspen relies upon the jurisprudence of this Court establishing that a mortgagor – and therefore, a subsequent mortgagee – is entitled as of right, upon tendering the arrears or performing the covenant in default, to be relieved of the consequence of default: see *Theodore Daniels Ltd. v. Income Trust Co.* (1982), 37 O.R. (2d) 316 (C.A.). The problem is that Romspen has not offered to

put the BDC mortgage in good standing, but has only offered to do so partially. It proposes to leave unperformed a $250,000 covenant – payment of the outstanding HST arrears.

[40] For Romspen to succeed on appeal would require a very creative interpretation of s. 22 of the *Mortgages Act*[1], and one that would potentially create an undesirable element of uncertainty in the field of mortgage enforcement, because no one would know which covenants could be left unperformed and which could not, without litigating the issue in each case.

[41] I am not persuaded that the s. 22 point crosses the *prima facie* meritorious threshold. In any event, given my serious reservations about the merits, that factor together with the need for a timely sale process leads me to conclude that leave to appeal ought not to be granted.

---

[1] Section 22(1) provides:

> Despite any agreement to the contrary, *where default has occurred* in making any payment of principal or interest due under a mortgage or *in the observance of any covenant in a mortgage* and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,
>
> (a) at any time before sale under the mortgage: or
>
> (b) before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee,
>
> *the mortgagor may perform such covenant* or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default. [Emphasis added]

It is not disputed that a subsequent mortgagee is a "mortgagor" for purposes of this provision.

[42] Interfering with the timeliness of that process could potentially impact on the success of the sale. All parties agree the property must be sold. They only differ over who will conduct the sale and how it will be done. The application judge considered the alternative plans at length, and her decision to accept the BDC plan was not dependent on her rejection of Romspen's s. 22 argument.

[43] There is some need for the sale to proceed expeditiously. The experienced application judge chose between BDC's and Romspen's two proposals and favoured that of BDC. Any further delay resulting from an appeal could well impact the potential sale, since the Inn is a seasonal business that only operates in the warm months of the year and those warm months are fast approaching.

[44] For the foregoing reasons, I decline to grant leave to appeal.

Disposition

[45] There is no appeal as of right from the receivership order granted by Mesbur J. under s. 193 of the BIA. Leave to appeal is required, but Romspen and Pine Tree have not met the test for leave to be granted in these circumstances. The motions of Romspen and Pine Tree are therefore dismissed. It follows that the receivership order is not stayed and that BDC's motion, to the extent it is necessary to deal with it, is successful.

[46] No order as to costs is required, since I am advised that BDC is entitled to add the costs of this proceeding to its debt under the mortgage.

TAB 2

2008 CarswellNB 463, 2008 NBCA 69, 47 C.B.R. (5th) 159, 862 A.P.R. 332, 336 N.B.R. (2d) 332, 299 D.L.R. (4th) 727, 169 A.C.W.S. (3d) 697

2008 CarswellNB 463, 2008 NBCA 69, 47 C.B.R. (5th) 159, 862 A.P.R. 332, 336 N.B.R. (2d) 332, 299 D.L.R. (4th) 727, 169 A.C.W.S. (3d) 697

Royal Bank v. Profor Kedgwick Ltée/Ltd.

A.C. Poirier & Associates Inc., as Trustee for the Estate of André Isabelle (Appellant) and The Royal Bank of Canada (Respondent)

New Brunswick Court of Appeal

J.T. Robertson, B.R. Bell, K.A. Quigg JJ.A.

Heard: April 16, 2008
Judgment: September 25, 2008
Docket: 137/07/CA

Proceedings: reversing *Royal Bank v. Profor Kedgwick Ltée/Ltd.* (2007), (sub nom. *Plancher Héritage Ltée/Heritage Flooring Ltd. (Bankrupt), Re)* 320 N.B.R. (2d) 76, (sub nom. *Plancher Héritage Ltée/Heritage Flooring Ltd. (Bankrupt), Re)* 825 A.P.R. 76, 2007 CarswellNB 422, 2007 NBQB 287, 36 C.B.R. (5th) 240 (N.B. Q.B.)

Counsel: Lee McKeigan-Dempsey for Appellant

Hugh J. Cameron for Respondent

Subject: Insolvency; Estates and Trusts; Civil Practice and Procedure

Bankruptcy and insolvency --- Administration of estate — Trustees — Legal proceedings by creditor in lieu of trustee — Grounds for refusal

Bank was financing agency for corporation — A was shareholder in corporation and related companies — A was guarantor of corporation's and related companies' debt — Corporation defaulted on its obligations under credit facility agreement and bank demanded payment — Corporation made assignment in bankruptcy — A did not file proof of claim alleging that he was creditor and outlining amount of his claim — Bank demanded payment from guarantors, but no amounts were paid — Bank

2008 CarswellNB 463, 2008 NBCA 69, 47 C.B.R. (5th) 159, 862 A.P.R. 332, 336 N.B.R. (2d) 332, 299 D.L.R. (4th) 727, 169 A.C.W.S. (3d) 697

commenced action against A, related company, and other individual guarantors of corporation's debt — A's motion before Registrar for order permitting him to commence action instead of trustee pursuant to s. 38 of Bankruptcy and Insolvency Act was dismissed — Trial judge found A was precluded from acquiring right to bring action pursuant to s. 38 — Trial judge found plain meaning of s. 38 limits its application to creditors — Trial judge found A was inspector in bankruptcy of bankrupt and was precluded from acquiring property of bankrupt without prior court approval — Trial judge found there was no evidence that A had received prior approval of Court — A appealed — Appeal allowed — Trial judge erred in not granting order — A was entitled to proceed with action for statutory and contractual breaches — Guarantor of debt of bankrupt was creditor of bankrupt — Contingent liability entitles guarantor to status as creditor — Request had been made of trustee to pursue action and trustee had not done so — Serious issue existed — A was creditor under s. 38 of Act — General security agreement did not give bank priority — Fact that A was inspector did not bar claim under s. 120 of Act — No evidence that A was not acting in best interests of other shareholders.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge

Bank was financing agency for corporation — A was shareholder in corporation and related companies — A was guarantor of corporation's and related companies' debt — Corporation defaulted on its obligations under credit facility agreement and bank demanded payment — Corporation made assignment in bankruptcy — A did not file proof of claim alleging that he was creditor and outlining amount of his claim — Bank demanded payment from guarantors, but no amounts were paid — Bank commenced action against A, related company, and other individual guarantors of corporation's debt — A's motion before Registrar for order permitting him to commence action instead of trustee pursuant to s. 38 of Bankruptcy and Insolvency Act was dismissed — Registrar granted standing to bank to oppose A's request and referred motion to court — Trial judge found A was precluded from acquiring right to bring action pursuant to s. 38 — Trial judge found plain meaning of s. 38 limits its application to creditors — Trial judge found A was inspector in bankruptcy of bankrupt and was precluded from acquiring property of bankrupt without prior court approval — Trial judge found there was no evidence that A had received prior approval of court — A appealed — Appeal allowed — Trial judge erred in not granting order — Leave to appeal required but failure to apply not fatal — A was entitled to proceed with action for statutory and contractual breaches — Chose in action at heart of dispute was not future right, and automatic leave to appeal under s. 193(a) of Bankruptcy and Insolvency Act not applicable — Cause of action which presently exists does not become future right merely because court order is required — Amount at issue was not over $10,000 and therefore s. 193(c) of Act inapplicable — Ultimate issue was whether issue would be determined, rather than possible consequences of possible judgment — Leave to appeal in bankruptcy proceedings in New Brunswick must be part of bifurcated process and not made at same time as appeal itself — Failure to seek leave was not fatal, and leave should be granted in case at bar — Delay would not occur and important issues of bankruptcy law were involved.

Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings — Proceedings by bankrupt

Bank was financing agency for corporation — A was shareholder in corporation and related companies — A was guarantor of corporation's and related companies' debt — Corporation defaulted on its obligations under credit facility agreement and bank demanded payment — Corporation made assignment in bankruptcy — A did not file proof of claim alleging that he was creditor and outlining amount of his claim — Bank demanded payment from guarantors, but no amounts were paid — Bank commenced action against A, related company, and other individual guarantors of corporation's debt — A's motion before Registrar for order permitting him to commence action instead of trustee pursuant to s. 38 of Bankruptcy and Insolvency Act

was dismissed — Trial judge found A was precluded from acquiring right to bring action pursuant to s. 38 — Trial judge found plain meaning of s. 38 limits its application to creditors — Trial judge found A was inspector in bankruptcy of bankrupt and was precluded from acquiring property of bankrupt without prior court approval — Trial judge found there was no evidence that A had received prior approval of court — A appealed — A declared bankruptcy after hearing of appeal but before decision rendered — Appeal allowed — Trial judge erred in not granting order — A was entitled to proceed with action for statutory and contractual breaches — Action was not stayed by A's bankruptcy — Sections 67 and 71 of Act did not prevent decision from being rendered — Issue not moot, as trustee was required to await decision on appeal before acting.

Cases considered by *J.T. Robertson J.A.*:

Adams-Eden Furniture Ltd. v. Kansa General Insurance Inc. (1995), 34 C.B.R. (3d) 36, 1995 CarswellMan 175 (Man. Q.B.) — referred to

Adams-Eden Furniture Ltd. v. Kansa General Insurance Inc. (June 16, 1995), Doc. CI 89-01-41905 (Man. Q.B.) — referred to

B. Donovan Interiors Ltd., Re (1990), 1990 CarswellNS 30, 3 C.B.R. (3d) 196 (N.S. T.D.) — referred to

B.N.R. Holdings Ltd. v. Royal Bank (1992), 14 C.B.R. (3d) 233, 1992 CarswellBC 516 (B.C. S.C.) — referred to

Bank of Nova Scotia v. Holland (1979), 1979 CarswellOnt 255, 32 C.B.R. (N.S.) 153 (Ont. S.C.) — considered

Braich, Re (2007), (sub nom. *Braich (Bankrupt), Re)* 250 B.C.A.C. 53, 2007 CarswellBC 3185, 2007 BCCA 641, (sub nom. *Braich (Bankrupt), Re)* 416 W.A.C. 53 (B.C. C.A. [In Chambers]) — considered

Bransen Construction Ltd. v. C.J.A., Local 1386 (2002), (sub nom. *United Brotherhood of Carpenters & Joiners of America, Local 1386 v. Bransen Construction Ltd.)* 2002 C.L.L.C. 220-023, (sub nom. *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.)* 249 N.B.R. (2d) 93, (sub nom. *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.)* 648 A.P.R. 93, (sub nom. *C.J.A., Local 1386 v. Bransen Construction Ltd.)* 80 C.L.R.B.R. (2d) 107, 39 Admin. L.R. (3d) 1, 2002 NBCA 27, 2002 CarswellNB 105 (N.B. C.A.) — referred to

Dugas, Re (2003), 43 C.B.R. (4th) 127, (sub nom. *Dugas Estate (Bankrupt), Re)* 261 N.B.R. (2d) 99, (sub nom. *Dugas Estate (Bankrupt), Re)* 685 A.P.R. 99, 2003 CarswellNB 270 (N.B. C.A.) — referred to

Elias v. Hutchison (1981), 37 C.B.R. (N.S.) 149, 27 A.R. 1, (sub nom. *Catalina Exploration & Development Ltd., Re)* 121 D.L.R. (3d) 95, 1981 CarswellAlta 183, 14 Alta. L.R. (2d) 268 (Alta. C.A.) — followed

Foss v. Harbottle (1843), 67 E.R. 189, 2 Hare 461 (Eng. V.-C.) — considered

Froment, Re (1925), 5 C.B.R. 765, [1925] 2 W.W.R. 415, [1925] 3 D.L.R. 377, 1925 CarswellAlta 55 (Alta. S.C.) — referred to

2008 CarswellNB 463, 2008 NBCA 69, 47 C.B.R. (5th) 159, 862 A.P.R. 332, 336 N.B.R. (2d) 332, 299 D.L.R. (4th) 727, 169 A.C.W.S. (3d) 697

Galaxy Sports Inc., Re (2003), 45 C.B.R. (4th) 42, 2003 BCCA 418, 2003 CarswellBC 1839 (B.C. C.A.) — considered

Galaxy Sports Inc. v. Galaxy Sports Inc. (Trustee of) (2003), 44 C.B.R. (4th) 218, 2003 CarswellBC 1305, 2003 BCCA 322, (sub nom. *Galaxy Sports Inc. (Bankrupt), Re)* 183 B.C.A.C. 192, (sub nom. *Galaxy Sports Inc. (Bankrupt), Re)* 301 W.A.C. 192 (B.C. C.A. [In Chambers]) — considered

Gatineau Power Co. v. Cross (1928), [1929] S.C.R. 35, 1928 CarswellQue 57 (S.C.C.) — considered

Grandview Ford Lincoln Sales Ltd., Re (2001), 22 C.B.R. (4th) 210, 2001 CarswellOnt 282 (Ont. Bktcy.) — considered

Hall-Chem Inc. v. Vulcan Packaging Inc. (1994), 21 O.R. (3d) 89, 33 C.P.C. (3d) 361, 1994 CarswellOnt 309, 28 C.B.R. (3d) 161, 75 O.A.C. 74, 120 D.L.R. (4th) 552 (Ont. C.A.) — distinguished

Hrebecka, Re (1999), 12 C.B.R. (4th) 47, 1999 CarswellOnt 2449 (Ont. C.A.) — considered

Hunter Douglas Ltd. v. Kool Vent Awnings Ltd. (1957), [1958] Que. S.C. 270, 37 C.B.R. 154, 1957 CarswellQue 30 (Que. S.C.) — referred to

J. McCarthy & Sons Co., Re (1916), 32 D.L.R. 441, 38 O.L.R. 3 (Ont. C.A.) — considered

John Deere Ltd. v. Toner (2008), 2008 CarswellNB 140 (N.B. C.A.) — referred to

Kennedy v. HSBC Bank Canada (2007), 2007 CarswellNB 448, (sub nom. *HSBC Bank of Canada v. Elm City Chrysler Ltd.)* 832 A.P.R. 137, (sub nom. *HSBC Bank of Canada v. Elm City Chrysler Ltd.)* 323 N.B.R. (2d) 137 (N.B. C.A.) — referred to

MacKesey v. Royal Bank (1991), [1992] 2 W.W.R. 60, 86 D.L.R. (4th) 637, (sub nom. *Royal Bank v. MacKesey)* 97 Sask. R. 102, (sub nom. *Royal Bank v. MacKesey)* 12 W.A.C. 102, 10 C.B.R. (3d) 146, 1991 CarswellSask 23 (Sask. C.A.) — referred to

Mann v. Northern B.C. Enterprises Ltd. (2005), 11 C.B.R. (5th) 114, 214 B.C.A.C. 193, 353 W.A.C. 193, 49 B.C.L.R. (4th) 132, 2005 BCCA 367, 2005 CarswellBC 1617, 46 C.C.E.L. (3d) 253 (B.C. C.A.) — distinguished

Maple City Ford Sales (1986) Ltd., Re (1998), 39 O.R. (3d) 702, 1998 CarswellOnt 2775, 3 C.B.R. (4th) 217 (Ont. Bktcy.) — referred to

McNeill v. Roe, Hoops & Wong (1996), 39 C.B.R. (3d) 147, 20 B.C.L.R. (3d) 274, (sub nom. *McNeill (Bankrupt), Re)* 71 B.C.A.C. 213, (sub nom. *McNeill (Bankrupt), Re)* 117 W.A.C. 213, 1996 CarswellBC 306 (B.C. C.A.) — referred to

2008 CarswellNB 463, 2008 NBCA 69, 47 C.B.R. (5th) 159, 862 A.P.R. 332, 336 N.B.R. (2d) 332, 299 D.L.R. (4th) 727, 169 A.C.W.S. (3d) 697

Nesi Energy Marketing Canada Inc., Re (1998), 8 C.B.R. (4th) 76, (sub nom. *Nesi Energy Marketing Canada Inc. (Bankrupt), Re)* 233 A.R. 347, [1999] 7 W.W.R. 217, 68 Alta. L.R. (3d) 150, 1998 CarswellAlta 1012, 1998 ABQB 912 (Alta. Q.B.) — referred to

Northland Bank v. Doyle (1992), 11 C.B.R. (3d) 133, 1992 CarswellBC 482 (B.C. S.C.) — considered

Plancher Heritage Ltée / Heritage Flooring Ltd., Re (2004), 2004 NBQB 168, 2004 CarswellNB 358, 3 C.B.R. (5th) 60, 279 N.B.R. (2d) 1 (N.B. Q.B.) — considered

Rea v. Patmore (1999), 1999 CarswellAlta 1033, 13 C.B.R. (4th) 243, 1999 ABQB 1069, 253 A.R. 363 (Alta. Q.B.) — referred to

Royal Bank v. Profor Kedgwick Ltée/Ltd. (2008), 2008 CarswellNB 88, 12 P.P.S.A.C. (3d) 189, 2008 NBQB 78, 43 C.B.R. (5th) 69 (N.B. Q.B.) — referred to

Royal Bank v. Profor Kedgwick Ltée/Ltd. (2008), 2008 CarswellNB 153 (N.B. C.A.) — referred to

Simonelli v. Mackin (2003), 39 C.B.R. (4th) 297, (sub nom. *Simonelli (Bankrupt), Re)* 320 A.R. 330, (sub nom. *Simonelli (Bankrupt), Re)* 288 W.A.C. 330, 2003 CarswellAlta 176, 2003 ABCA 47 (Alta. C.A. [In Chambers]) — considered

Zammit, Re (1998), 1998 CarswellOnt 651, 3 C.B.R. (4th) 193 (Ont. Bktcy.) — considered

518494 Ontario Ltd. (Petrochem), Re (1985), 57 C.B.R. (N.S.) 272, 12 O.A.C. 392, 1985 CarswellOnt 215 (Ont. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 38 — considered

s. 54(2)(d) — referred to

s. 67(1) — referred to

s. 67(1)(d) — considered

s. 69 — considered

s. 69.3(1) [en. 1992, c. 27, s. 36(1)] — referred to

s. 71 — considered

s. 71(2) — referred to

s. 108(1) — referred to

s. 120 — referred to

s. 120(1) — referred to

s. 124(2) — referred to

s. 193 — considered

s. 193(a) — considered

s. 187(9) — considered

s. 187(11) — considered

s. 193(c) — considered

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

Generally — referred to

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

Generally — referred to

R. 3 — referred to

R. 31(2) — considered

2008 CarswellNB 463, 2008 NBCA 69, 47 C.B.R. (5th) 159, 862 A.P.R. 332, 336 N.B.R. (2d) 332, 299 D.L.R. (4th) 727, 169 A.C.W.S. (3d) 697

Rules of Court, N.B. Reg. 82-73

Generally — referred to

R. 1.03(2) — referred to

R. 13 — considered

R. 13.01 — considered

R. 15.02 — referred to

R. 15.02(1) — referred to

R. 62.08 — referred to

APPEAL by shareholder from judgment reported at *Royal Bank v. Profor Kedgwick Ltée/Ltd.* (2007), (sub nom. *Plancher Héritage Ltée/Heritage Flooring Ltd. (Bankrupt), Re)* 320 N.B.R. (2d) 76, (sub nom. *Plancher Héritage Ltée/Heritage Flooring Ltd. (Bankrupt), Re)* 825 A.P.R. 76, 2007 CarswellNB 422, 2007 NBQB 287, 36 C.B.R. (5th) 240 (N.B. Q.B.), dismissing motion allowing shareholder to proceed with action in place of trustee in bankruptcy.

***J.T. Robertson J.A.*:**

I. Introduction

1 Both parties are seeking to acquire a "chose in action" belonging to a bankrupt company. The property in question is the bankrupt company's right to sue its banker for wrongdoing. The right is presently vested in the bankrupt's trustee. However, once the trustee decides not to pursue the action, a creditor of the bankrupt may apply for a court order authorizing that creditor to pursue the action in its own name and at its own expense and risk. This right is provided for under s. 38 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("the *Act*"). Once the order issues, the trustee is required to transfer to the creditor title to the chose in action. Any benefit derived from the lawsuit is applied against the amount owing to the creditor and the costs of litigation. Any surplus belongs to the bankrupt's estate.

2 André Isabelle was a guarantor and minority shareholder of the bankrupt company, Plancher Héritage Ltée / Heritage Flooring Ltd. The guarantee was given to the respondent, The Royal Bank of Canada, as partial security for the $2 million revolving line of credit which the Bank had extended to Heritage Flooring. The other respondent, A.C. Poirier & Associates, is the trustee in bankruptcy of the now bankrupt company. Following the hearing of this appeal, Mr. Isabelle also fell into bankruptcy and once again A.C. Poirier & Associates was appointed trustee. Hence, the style of cause has been amended to reflect this reality. However, for clarity's sake, and unless otherwise noted, I refer to Mr. Isabelle as though he were the appellant.

2008 CarswellNB 463, 2008 NBCA 69, 47 C.B.R. (5th) 159, 862 A.P.R. 332, 336 N.B.R. (2d) 332, 299 D.L.R. (4th) 727, 169 A.C.W.S. (3d) 697

3 This appeal stems from Mr. Isabelle's unsuccessful application (hereafter "motion") for an order authorizing him to initiate a lawsuit against the Bank for wrongdoing tied to events surrounding the bankruptcy of Heritage Flooring. In an earlier decision, another bankruptcy court judge found the Bank guilty of exercising certain remedies against Heritage in contravention of s. 69 of the *Act*. That decision was not appealed to this Court. On the understanding that a guarantor qualifies as a creditor under the *Act*, Mr. Isabelle filed his s. 38 motion, but only after the trustee elected not to pursue the action on behalf of Heritage Flooring. This explains why the Bank sought intervener status and opposed the motion. It does not explain why the Bank brought its own motion under s. 38 with a view to becoming both the plaintiff and defendant in the action that Heritage Flooring could have brought against the Bank but for the assignment in bankruptcy. All of the motions were heard together. While the Bank was granted standing, the motion judge reasoned that it was unnecessary to deal with its request for a s. 38 order because of the dismissal of Mr. Isabelle's motion. The decision under appeal is reported as *Royal Bank v. Profor Kedgwick Ltée/Ltd.* (2007), 320 N.B.R. (2d) 76, [2007] N.B.J. No. 324, 2007 NBQB 287 (N.B. Q.B.).

4 Mr. Isabelle's motion was dismissed on the ground that, as a "shareholder" of Heritage Flooring, he is not a creditor within the meaning of s. 38 of the *Act*. Mr. Isabelle argues that the motion judge erred because the motion was premised on Mr. Isabelle's status as "guarantor" and not as "shareholder". The Bank reluctantly concedes that a guarantor qualifies as a creditor at law. However, the Bank insists that Mr. Isabelle fails to qualify as a creditor within the meaning and scope of s. 38 of the *Act* for no fewer than six reasons, some of which were neither pleaded nor argued in the court below. As well, the Bank opposes the appeal on procedural grounds. It asks for summary dismissal because of Mr. Isabelle's failure to seek and obtain leave to appeal as contemplated by s. 193(e) of the *Act*. With respect to this issue, Mr. Isabelle counters that leave was not required and, if mistaken, asks for leave to be granted *nunc pro tunc*. Mr. Isabelle points out that his Notice of Appeal contains a request for leave as is provided for under Rule 31(2) of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 ("the *BIA Rules*").

5 In my view, leave to appeal should have been sought and obtained prior to the appeal hearing. But I also hold this omission is not fatal and leave should be granted *nunc pro tunc*. As to the Bank's standing, I am of the view that a motion judge retains a narrow discretion to decide whether a creditor and potential defendant should be granted the right to oppose an application brought under s. 38 of the *Act*. This is not to suggest that a potential defendant has an unfettered right to meddle in the affairs of another creditor seeking an order under s. 38. Indeed, these reasons for judgment will stand in the way of those who believe it is permissible for a creditor to be both the plaintiff and defendant in the same action (the so-called "hermaphroditic litigant"). Section 38 was never intended to be used as a litigation tactic for short-circuiting the need to defend a valid cause of action. As to whether the motion judge erred in granting the Bank intervener status, I hold that in the circumstances of this case it is too late to undo what has been done. To revoke the Bank's standing at this late stage would work an injustice on Mr. Isabelle. For this reason, I am not prepared to set aside the motion judge's decision to grant the Bank standing. As to the ultimate issue on appeal, I conclude that, as guarantor, Mr. Isabelle is a creditor within the meaning and scope of s. 38 and that none of the Bank's arguments represents an impediment to granting the order sought. In short, this is a proper case for granting Mr. Isabelle the right to initiate a lawsuit against the Bank with respect to any breach of legal obligations it may have owed Heritage Flooring. This includes not only statutory breaches, such as those tied to s. 69 of the *Act*, but also contractual breaches and breaches of obligations imposed at law or in equity. It follows that the Bank's s. 38 motion to acquire the chose in action must be dismissed.

6 One other matter of contention arises on this appeal and attests to the Bank's unbridled resolve in seeking immunity for breaches of any legal obligations. Fifteen days after the hearing of the present appeal, Mr. Isabelle made an assignment in bankruptcy. Immediately after, while the decision on appeal was still under reserve, and without first discussing the matter with Mr. Isabelle's trustee in bankruptcy or Mr. Isabelle's counsel on appeal, the Bank wrote to this Court informing us that, pursuant

to Rule 13.01 of the *Rules of Court*, the matter was "automatically stayed" because of the assignment in bankruptcy. The Court was then asked "to confirm" this understanding, otherwise the Bank "would be required to seek a date for the hearing of a motion in that regard." I shall address this unorthodox litigation tactic more fully below. For the moment, it is sufficient to note that the Court declined the invitation to provide the Bank with legal advice. After pursuing other litigation tactics without success, the Bank did in fact bring a motion asking that our pending decision be permanently stayed or, alternatively, that we grant an order for security for costs as against Mr. Isabelle's trustee. We dismissed the motion with reasons to follow. The promised reasons commence at para. 51 of these reasons.

7 Frankly, once the facts of this case are laid bare, one must seriously question whether the Bank's litigation strategy is premised on a "scorched earth" policy. The highway to this appeal is littered with too many motions, frivolous arguments and the citation of irrelevant case law with one singular objective: to guarantee the Bank's immunization from lawsuit by anyone who seeks damages for its wrongful conduct. Otherwise, why would the Bank refuse to consent to an order granting a one-day extension of time for perfecting the within appeal and force Mr. Isabelle to pursue a motion in this Court so as to obtain the required extension? In my view, the answer is self-evident.

II. Background

8 Mr. Isabelle was one of four persons who gave a limited guarantee ($150,000) to the Bank with respect to the debts of Plancher Héritage Ltée / Heritage Flooring Ltd., a company in which he was also a minority shareholder. The guarantee was a condition precedent to the Bank granting Heritage Flooring a revolving line of credit. On February 2, 2004, the Bank demanded full payment of the outstanding indebtedness within 15 days. On February 11, 2004, Heritage filed a Notice of Intention to Make a Proposal, pursuant to s. 50.4(1) of the *Act*. With the filing of the Notice of Intention, Heritage Flooring was automatically entitled to a stay, pursuant to s. 69 of the *Act*, with respect to a creditor exercising any remedies. Notwithstanding the prohibition, the Bank subsequently removed all of the monies in Heritage's operating accounts ($205,000) and capped Heritage's credit limit significantly below the amount permitted under the terms of their agreement. In proceedings reported as *Plancher Heritage Ltée / Heritage Flooring Ltd., Re* (2004), 279 N.B.R. (2d) 1, [2004] N.B.J. No. 286, 2004 NBQB 168 (N.B. Q.B.), a judge of the Court of Queen's Bench found that the Royal Bank had unilaterally exercised remedies in breach of s. 69 of the *Act*. As stated earlier that decision was not appealed to this Court. On March 24, 2004, Heritage Flooring filed an assignment in bankruptcy. A.C. Poirier & Associates was appointed trustee in bankruptcy. Subsequently the Bank appointed a receiver under its security agreement. The Bank liquidated more than $2 million in inventory and accounts receivable for less than $900,000. As for the $400,000 left owing, the Bank issued demands for payment to all four guarantors.

9 On April 11, 2005, the Bank commenced an action against all four guarantors. In his Statement of Defence and Counterclaim, Mr. Isabelle pleaded that Heritage Flooring had valid claims against the Bank for breaches of contractual and statutory obligations. Mr. Isabelle also indicated his intention to join Heritage Flooring as a party to the action. The Bank was successful in having several paragraphs of Mr. Isabelle's Statement of Defence struck and, as well, his Counterclaim. The Counterclaim hinged on Mr. Isabelle obtaining an order under s. 38 of the *Act* authorizing him to sue the Bank. Subsequently, Mr. Isabelle filed an Amended Statement of Defence. However, the Bank successfully challenged the amended paragraphs. The motion judge compared the proposed amendments with the paragraphs originally struck and concluded that, as there was no material difference, the amending paragraphs could not stand. Once this occurred, Mr. Isabelle had no defence to the action on the guarantee. Thus, the Bank was granted summary judgment against Mr. Isabelle for the amount of the guarantee plus interest ($175, 343.76). We are told that the judgment with interest has climbed to half a million dollars. The summary judgment de-

cision is reported as *Royal Bank v. Profor Kedgwick Ltée/Ltd.*, [2008] N.B.J. No. 65, 2008 NBQB 78 (N.B. Q.B.).

10 Rather than appealing the summary judgment, Mr. Isabelle sought leave to appeal the decision to strike the paragraphs of the Amended Statement of Defence that would have provided Mr. Isabelle with a defence to the action. The application for leave to appeal was dismissed: *Royal Bank v. Profor Kedgwick Ltée/Ltd.*, [2008] N.B.J. No. 110 (N.B. C.A.). It is a question of fact whether the amending paragraphs were, in essence, the same as those originally struck. At the same time, I am not prepared to endorse the summary judgment decision lest it be cited as authority in subsequent cases. Let me explain my concern.

11 As I read the summary judgment decision, the motion judge concluded that Mr. Isabelle had no valid defence to the action for two reasons. The first rests on the rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189 (Eng. V.-C.). However, that case has nothing to do with guarantors. It addresses whether a shareholder can bring a derivative action on behalf of a company that has endured wrongdoing at the hands of third party. Second, the motion judge concluded that any wrongdoing on the part of the Bank could only be addressed by the trustee in bankruptcy of Heritage Flooring. This understanding of the law is correct if one is seeking damages from the Bank for wrongful conduct. There is no doubt that Mr. Isabelle was seeking damages under his counterclaim which in turn was premised on obtaining an order under s. 38 of the *Act*. But Mr. Isabelle was also attempting to raise valid defences to the Bank's demand for payment under the contract of guarantee. Cases such as *Northland Bank v. Doyle* (1992), 11 C.B.R. (3d) 133, [1992] B.C.J. No. 380 (B.C. S.C.), support the notion that a guarantor such as Mr. Isabelle may have a valid defence to a demand for payment made by the creditor of the principal debtor. In that case, the creditor breached a loan agreement with the principal debtor by an unauthorized use of loan proceeds and the unauthorized withholding of a loan disbursement. In the present case, we have a wrongful appropriation of moneys from a bank account and a wrongful withholding of credit. Yet in *Northland Bank* the wrongful conduct resulted in the discharge of the guarantor of his obligation to the creditor under the contract of guarantee. Whether or not Mr. Isabelle would have been discharged under his contract of guarantee with the Bank is one issue. But to deny him the right to defend the action on the guarantee and to grant summary judgment to the Bank is, with great respect, not a precedent I wish to see cited in this Court.

12 On March 2, 2007, prior to the summary judgment issuing, Mr. Isabelle requested the trustee of Heritage Flooring to commence an action against the Bank. On March 23, 2007, the trustee advised Mr. Isabelle that the inspectors of the bankrupt estate declined the invitation to commence proceedings. On April 2, 2007, Mr. Isabelle filed a "motion" with the Registrar of Bankruptcy seeking authorization to commence an action against the Bank as provided for under s. 38 of the *Act*. In response, and on the same day, the Bank filed a motion asking for an order enjoining the trustee from transferring any cause of action to any creditor, except the Bank. The Bank pleaded that under its security agreement with Heritage Flooring, the Bank was the owner of all of Heritage's after-acquired property including any right of action Heritage possessed as against the Bank. On this basis, the Bank sought the s. 38 order that would have rendered it both plaintiff and defendant in the same action. As well, the Bank pleaded that as an inspector of the bankrupt estate, Mr. Isabelle was prohibited from acquiring the right to sue the Bank because of s. 120 of the *Act*. As well, the Bank asked that all motions be referred to a judge of the Court of Queen's Bench. On the following day, April 3, 2007, the Bank filed yet another motion for leave to intervene with respect to Mr. Isabelle's motion and sought other ancillary relief intended to thwart Mr. Isabelle's motion. On April 4, the Registrar referred all of the motions to the judge whose decision is now under appeal. The motion judge dismissed Mr. Isabelle's motion for the reason noted above, but declined to rule on the Bank's motions. The motion judge was of the view that they were moot having regard to the dismissal of Mr. Isabelle's motion. What the motion judge failed to appreciate was that the Bank was also seeking to acquire Heritage Flooring's right of action against the Bank.

2008 CarswellNB 463, 2008 NBCA 69, 47 C.B.R. (5th) 159, 862 A.P.R. 332, 336 N.B.R. (2d) 332, 299 D.L.R. (4th) 727, 169 A.C.W.S. (3d) 697

III. The Need for Leave to Appeal

13 Prior to the hearing of the scheduled appeal, the Bank brought a motion seeking an order to quash the appeal on the ground that the appellant failed to seek and obtain leave to appeal from a judge of this Court, as contemplated by s. 193 of the *Act*. Since the motion to quash was brought only a few weeks before the scheduled hearing, the motion was referred to the full panel and heard together with the scheduled appeal. Section 193 reads as follows:

Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:	Sauf disposition expressément contraire, appel est recevable à la Cour d'appel de toute ordonnance ou décision d'un juge du tribunal dans les cas suivants:
(a) if the point at issue involves future rights;	(a) le point en litige concerne des droits futurs;
(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;	(b) l'ordonnance ou la décision influera vraisemblablement sur d'autres causes de nature semblable en matière de faillite;
(c) if the property involved in the appeal exceeds in value ten thousand dollars;	(c) les biens en question dans l'appel dépassent en valeur la somme de dix mille dollars;
(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and	(d) la libération est accordée ou refusée, lorsque la totalité des réclamations non acquittées des créanciers dépasse cinq cents dollars;
(e) in any other case by leave of a judge of the Court of Appeal.	(e) dans tout autre cas, avec la permission d'un juge de la Cour d'appel.

14 Mr. Isabelle contends that leave was not required as his appeal falls within s. 193 (a) and (c). The Bank contends otherwise and argues that the appeal falls within s. 193(e). I shall first deal with Mr. Isabelle's arguments.

A. Future Rights - s. 193(a)

15 Mr. Isabelle argues the underlying issue involves a future right within the meaning of s. 193(a) of the *Act*. According to his argument, Heritage Flooring's right to proceed against the Bank is currently vested in the trustee in bankruptcy, and it is only through a successful s. 38 application that Mr. Isabelle would be able to pursue such an action. Thus, according to Mr. Isabelle, since his ability to proceed would only come into existence once the s. 38 order issues, the appeal is one which involves a "future right". In support, counsel for Mr. Isabelle cites *Houlden & Morawetz Bankruptcy and Insolvency Analysis*, I§34(1), which cites *J. McCarthy & Sons Co., Re* (1916), 38 O.L.R. 3, [1916] O.J. No. 4 (Ont. C.A.) for the proposition that "[t]he words 'future rights' should be given a wide and liberal interpretation." The Bank relies heavily on two cases to argue that future rights are not involved in the present appeal. The first in time is *Elias v. Hutchison* (1981), 27 A.R. 1, [1981] A.J. No. 896 (Alta. C.A.), which involved an action against the trustee in bankruptcy that could not be commenced without leave. At paragraphs 15-16 and 22-24, Chief Justice McGillivray acknowledged the lack of clarity concerning "future rights" in rejecting the *McCarthy* analysis:

> I confess to difficulty in perceiving what exactly Parliament sought to do by providing for an appeal without leave in a case involving future rights while requiring leave in cases which do not involve future rights. Indeed, I find the authorities leave me in a state of uncertainty as to what a future right is at all, leave alone what there is about a future right that would require

> a treatment of cases involving future rights different from cases that do not involve future rights. [...]
>
> In the *McCarthy* case, it was said that future rights were involved in giving a creditor leave to sue instead of proving its claim in the bankruptcy. The court said that mode of trial *i.e.* by jury or otherwise, or unrestricted rights of appeal were future rights. If future proceedings involve "future rights" within the meaning of the *Bankruptcy Act*, it is difficult to think of any case in which it could not be said that future rights were involved. I am unable to agree with the decision in the *McCarthy* case.
>
> [...]
>
> A right in a legal sense exists when one is entitled to enforce a claim against another or to resist the enforcement of a claim advanced by another. A present right exists presently; a future right is inchoate in that while it does not exist, it may arise in the future. For the adjective "future" to have any meaning, it cannot refer to that which presently exists. Does the claim alleged against the trustee presently exist? It is a current allegation of existing facts though they may be procedurally blocked by a need to obtain leave to assert the claim.
>
> To give "future" the meaning that includes that which a litigant may obtain by success in litigation in the future is to say that a right of appeal exists in all cases. Any claim advanced is, in that sense, a future right to a judgment which does not yet exist. It would seem to me for clause (a) of section 163 [now 193] to have any meaning that it must refer to rights which could not at the present time be asserted but which will come into existence at a future time.
>
> It is sufficient to say that in my opinion a presently existing right to seek leave to sue a trustee in respect of presently existing facts is not a future right and the appellant does not bring the case within [that subsection].

16 Although the alleged "future right" in this case relates to a cause of action vested in the trustee, rather than to a cause of action against the trustee as in *Elias*, a similar analysis should apply. The s. 38 assignment would not result in a new right "com[ing] into existence at a future time", but would rather assign the trustee's present right. Such was the conclusion in *Zammit, Re* (1998), 3 C.B.R. (4th) 193, [1998] O.J. No. 604 (Ont. Bktcy.), the other case which the Bank cites. Registrar Ferron elaborated on this point at para. 7 of *Zammit*:

> The creditor still advances, not his or her own action but the trustee's claim. If it were otherwise the relief afforded by the section would be substantially curtailed. For example, a proceeding to set aside a fraudulent preference under section 95(1) of the *Bankruptcy and Insolvency Act* is an action reserved to the trustee. The proceeding provides that certain conveyances, payments etc., made under the circumstances set out in the section "be deemed fraudulent and void as against the trustee in bankruptcy". Obviously, no creditor can advance that proceeding unless authorized by section 38. Section 38 does not create a cause of action in the creditor but merely allows the creditor standing in the trustee's place to advance a proceeding vested in the trustee which the trustee for whatever reason declines to take.

17 At the hearing of the appeal, Mr. Isabelle countered with *Braich, Re* (2007), 250 B.C.A.C. 53, [2007] B.C.J. No. 2847, 2007 BCCA 641 (B.C. C.A. [In Chambers]). At para. 8 of that decision, Tysoe J.A., in Chambers, expressed "some reservations about the narrowness" of the *Elias* interpretation of the term 'future rights", although he admitted that it was unnecessary to settle on the precise scope of "future rights". The same is true in the present case. Suffice it to say, the weight of authority

supports the view that a cause of action that presently exists is not a "future right" merely because a court order is required to pursue it. For this reason, Mr. Isabelle's submission with respect to s. 193(a) fails.

B. Property over $10,000 - s. 193(c)

18 In his Notice of Appeal, Mr. Isabelle states that "[t]he refusal to grant the Appellant's s. 38 motion prevents the Appellant from pursuing a claim against the Bank for damages suffered by the bankrupt in excess of $10,000, as contemplated by subsection 193(c) of the [*Act*]." While Mr. Isabelle advanced little argument on this point, he did submit an excerpt from *Houlden & Morawetz Analysis* that referred to cases that appear to support his position. The most recent of these cases is *Galaxy Sports Inc. v. Galaxy Sports Inc. (Trustee of)* (2003), 183 B.C.A.C. 192, [2003] B.C.J. No. 1271, 2003 BCCA 322 (B.C. C.A. [In Chambers]), which found that an appeal as of right existed under s. 193(c) for similarly remote amounts of money. In that case, Galaxy's proposal to its creditors was approved as required by s. 54(2)(d) of the *Act*, but certain of the chair's decisions with respect to admitting or rejecting proofs of claim for the purpose of voting were appealed pursuant to s. 108(1). Concurrently, the trustee sought court approval of the proposal. The motion judge reserved approval of the proposal until the "threshold issue of requisite creditor approval" was resolved. Directions were sought as to whether an appeal as of right existed under s. 193(a) or (c) of the *Act*, or whether leave was required. A key term of the proposal was an action against Galaxy's suppliers for fraudulent misrepresentation and breach of fiduciary duty. The trustee expressed the opinion that the creditors stood to recover $584,000 under the proposal, compared to $62,000 if Galaxy fell into bankruptcy. The Chambers judge, relying on *McNeill v. Roe, Hoops & Wong* (1996), 39 C.B.R. (3d) 147, [1986] B.C.J. No. 284 (B.C. C.A.), endorsed the following as the applicable test under s. 193(c): "the 'property involved in the appeal'... may be determined by comparing the order appealed against the remedy sought in the notice of appeal". Since the speculative difference was greater than $10,000, an appeal as of right existed. This determination was not challenged before a full panel of the Court in *Galaxy Sports Inc., Re* (2003), 45 C.B.R. (4th) 42, [2003] B.C.J. No. 1744, 2003 BCCA 418 (B.C. C.A.). By the same logic, Mr. Isabelle would have an appeal as of right if the property ultimately in jeopardy exceeded $10,000; the immediate award on appeal would not itself need to exceed $10,000.

19 In response to Mr. Isabelle's argument, the Bank refers to Houlden, Morawetz & Sarra, *Bankruptcy and Insolvency Law of Canada*, looseleaf (Toronto: Thomson Carswell, 2007) at I§34 for the proposition that there is no right of appeal under s. 193(c) of the *Act* if the remedy sought is not "appreciable in money." In *Elias*, McGillivray C.J.A., also rejected the appellant's argument that an appeal as of right existed under this subsection, quoting at para. 27 from Justice Rinfret in the expropriation case of *Gatineau Power Co. v. Cross* (1928), [1929] S.C.R. 35, [1928] S.C.J. No. 73 (S.C.C.):

> Thus, the whole matter in controversy, even if traced back to the Commission - and we do not think it should be - is merely the right to have that body entertain an application for authority to expropriate. Such right is not appreciable in money. Still less so is the right of appeal to the Court of King's Bench which is the sole matter in controversy on the projected appeal here. The consequence of the authorization by the Commission might result in a proceeding in which the amount involved would exceed two thousand dollars; but the ultimate award on the expropriation is not the matter in controversy in this appeal; and, as was said in *Lachance v. La Societe de Prets et de Placements de Quebec*:
>
> 'our jurisdiction does not depend on the possible consequences of a possible judgment'.

20 A similar result obtained in *Simonelli v. Mackin* (2003), 320 A.R. 330, [2003] A.J. No. 142, 2003 ABCA 47 (Alta. C.A.

2008 CarswellNB 463, 2008 NBCA 69, 47 C.B.R. (5th) 159, 862 A.P.R. 332, 336 N.B.R. (2d) 332, 299 D.L.R. (4th) 727, 169 A.C.W.S. (3d) 697

[In Chambers]), at para. 24: "... if Simonelli's appeal is successful, the claim will be struck. If it is not, the matter will be heard and decided. Therefore, the "loss" resulting from refusing the application to strike is not an award exceeding $10,000 in value. Rather, the loss is the risk of a determination on the merits."

21 In my respectful view, this Court should follow the lead of *Elias* and *Simonelli*. The purposive analysis in *Elias* with respect to s. 193(a) of the *Act* is equally applicable to s. 193(c): it is difficult to think of a case involving a corporate bankrupt in which the amount ultimately in issue would not exceed $10,000. Consequently, there would be little utility to the other four subsections under s. 193 if such cases were subject to an appeal as of right. Since the issue on appeal in this case does not directly involve an amount in excess of $10,000 there can be no appeal as of right under s. 193(c). The central issue in this case is whether or not the motion judge erred by failing to consider whether the appellant, as a guarantor, is a creditor of the bankrupt. Since the issue on appeal does not involve an amount in excess of $10,000, there can be no appeal as of right under s. 193(c).

C. Seeking Leave — A Bifurcated process? Yes

22 The fact that Mr. Isabelle failed to seek and obtain leave prior to perfecting his appeal does not mean that the appeal should be automatically quashed. It must be decided whether the legislative scheme demands a bifurcated process for dealing with leave applications: that is to say, whether the application for leave to appeal must be dealt with in a separate proceeding and prior to the hearing of the appeal on its merits. The alternative is to permit the leave application to be heard together with the merits of the appeal, as happened in the present case, and as is true of certain appeals launched under the *Criminal Code*. Mr. Isabelle assumed that the alternative procedure was the correct one. In his Notice of Appeal, he asked "for a determination as to whether he may appeal the decision as of right, pursuant to ss. 193(a) and (c) of the *[Act]*, and should it be determined that the Appellant cannot appeal the decision as of right, the Appellant seeks leave to appeal the decision pursuant to s. 193(e) of the [*Act*]". In short, Mr. Isabelle filed a Notice of Appeal which also included a request for leave in the event it was determined that an appeal did not exist as of right. Intuitively, however, one would think that a separate hearing on the leave application is required. Yet there is evidence that suggests otherwise. Let me explain.

23 The procedural route Mr. Isabelle followed would appear to be sanctioned by Rule 31(2) of the *Bankruptcy and Insolvency General Rules*. Rule 31(2) provides that where an appeal is brought under s. 193(e) of the *Act* (that is to say with leave of a judge of this Court), "the notice of appeal must include the application for leave to appeal." Rule 31(2) of the *BIA Rules*, C.R.C., c. 368, prescribes the procedure to follow on an appeal under s. 193(e):

(2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.	(2) En cas d'application de l'alinéa 193e) de la Loi, l'avis d'appel est accompagné de la demande d'autorisation d'appel.

24 Moreover, the Registrar of Bankruptcy for New Brunswick (who is also the Registrar of this Court) has issued a practice directive stating that the Notice of Appeal should contain sufficient particulars to allow a determination as to whether leave is required. The Registrar's Directive is dated February 10, 2004 and titled "Appeals in Bankruptcy". All of this suggests that the leave application and the appeal can be heard together. On the other hand, s. 193(e) of the *Act* speaks unequivocally of the need to obtain "leave from a judge of the Court of Appeal."

2008 CarswellNB 463, 2008 NBCA 69, 47 C.B.R. (5th) 159, 862 A.P.R. 332, 336 N.B.R. (2d) 332, 299 D.L.R. (4th) 727, 169 A.C.W.S. (3d) 697

25 In my view, a bifurcated process for dealing with leave applications and appeals is mandated by the *Act* and to be preferred over one that sees both proceedings being dealt with contemporaneously. There is an obvious reason to justify this approach. On the hearing of most leave applications it is impossible for the applicant not to address the merits of the appeal when arguing the existence of valid grounds for doubting the correctness of the impugned decision. In truth, the arguments made in support of and in opposition to the leave application are the very same arguments to be pursued on the appeal. It is for these reasons that I am prepared to follow the lead of the Ontario Court of Appeal in *518494 Ontario Ltd. (Petrochem), Re* (1985), 12 O.A.C. 392, [1985] O.J. No. 239 (Ont. C.A.) and adopt a general rule requiring leave applications to be dealt with independently of the hearing of the appeal. An appellant who is proceeding on the assumption that leave to appeal is not required should move for leave to appeal before a single judge of this Court *as soon as* the respondent raises the issue of whether leave to appeal is required. In future, this is the safe procedure to be followed; it would prevent a respondent's motion to quash an appeal without a hearing on the merits. I hasten to add that the onus is on the respondent to bring to the Court's attention the appellant's failure to first seek the requisite leave. Otherwise, the court will normally proceed on the basis that leave is not required.

D. The Failure to Seek Leave — Is it fatal? No

26 The question we must now address is whether Mr. Isabelle's failure to obtain leave prior to the hearing of the within appeal is fatal and, hence, the Bank's motion to quash the appeal should be allowed. In support, the Bank cites *Petrochem* and *Hrebecka, Re* (1999), 12 C.B.R. (4th) 47, [1999] O.J. No. 2782 (Ont. C.A.). *Hrebecka, Re* involved a motion to quash before a full panel of the Ontario Court of Appeal and states as follows, in its entirety: "The evidence discloses that the amount in issue is under $10,000, an amount requiring leave pursuant to s. 193 of the *Bankruptcy Act.* No such leave was sought or obtained. The motion is accordingly granted and the appeal is quashed with costs." It appears from this brief decision that the appellant in that case failed to invoke s. 193(e) as was done in this case. *Petrochem* is slightly more detailed, although still distinguishable. The instructive paragraph is the fourth of five:

> In this case the appellant combined its notice of appeal and application for leave as required [by the *Rules*]; but, instead of applying to a single judge for leave, it brought its application for leave and its appeal before a full panel of this Court. This was wrong. The appellant should first have moved before a single judge for leave. It is only if leave to appeal is granted that the appellant can proceed with its appeal. In the future this is the procedure that is to be followed where leave is required under s. 163(e) [now 193(e)].

27 It bears noting that the only ground of appeal involved in *Petrochem* was subsection (e), and that the Court went on to decide the application for leave rather than automatically quashing it for procedural deficiency. In my view, this Court retains the discretion to whether the appeal should be quashed because of the failure to obtain leave. Section 187(9) of the *Act*, under the heading Authority of the Courts, mandates a flexible approach to procedural error:

(9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.	(9) Un vice de forme ou une irrégularité n'invalide pas des procédures en faillite, à moins que le tribunal devant lequel est présentée une opposition à la procédure ne soit d'avis qu'une injustice grave a été causée par ce vice ou cette irrégularité, et qu'une ordonnance de ce tribunal ne puisse remédier à cette injustice.

2008 CarswellNB 463, 2008 NBCA 69, 47 C.B.R. (5th) 159, 862 A.P.R. 332, 336 N.B.R. (2d) 332, 299 D.L.R. (4th) 727, 169 A.C.W.S. (3d) 697

28 This Court also has the authority, under s. 187(11) of the *Act*, to extend time "either before or after the expiration thereof on such terms, if any, as it thinks fit to impose." These provisions are consistent with the approach described in New Brunswick's *Rules of Court* for other types of proceedings, in order to secure "the just, least expensive and most expeditious determination of every proceeding on its merits" (Rule 1.03(2)). The Bank has had sufficient notice of the matters on appeal, so it cannot be said that injustice has resulted from any irregularity. For these reasons, the motion to quash the appeal for failing to obtain leave prior to the hearing of the appeal is dismissed.

E. Should Leave Be Granted, Nunc Pro Tunc? Yes

29 Having regard to the introductory paragraphs of these reasons, it can come as no surprise that I am prepared to grant the required leave. Nonetheless, for the sake of completeness, I will deal with this issue as though no ruling had been made on the merits of the appeal. The case law reveals a number of factors that should be considered, or possible grounds for granting leave: (1) whether the appeal raises an arguable ground, often referred to as a serious issue; (2) whether there is reason to doubt the correctness of the decision; (3) whether the impugned decision raises a question of importance; (4) whether there is conflicting jurisprudence on the point; and (5) whether the granting of leave will unduly delay pending proceedings. It is self-evident that this appeal raises several issues of significance to bankruptcy law and for this reason alone leave should be granted. This would be true even if I had formed the opinion that the motion judge was correct in dismissing Mr. Isabelle's motion. Moreover, the granting of leave does not lead to delay as there can be no underlying proceedings until such time as Mr. Isabelle is granted a s. 38 order. For these reasons, I would grant the requisite leave to appeal, *nunc pro tunc.*

IV. The Issue of Standing - The Bank as Intervener - The Hermaphroditic Litigant

30 The motion judge referred to Rule 3 of the *BIA Rules* and Rule 15.02 of the *Rules of Court* in support of his holding that the Bank should be permitted to intervene. Rule 3 of the *BIA Rules* effectively states that in cases not provided for under the *Act* or *BIA Rules*, the court's practice in civil matters is to be followed. Rule 15.02(1) of the New Brunswick *Rules of Court* provides for "Leave to Intervene" in cases where a person has an interest in the subject matter of the proceeding or may be adversely affected by a judgment in a proceeding. On this basis, the motion judge ruled that he possessed the jurisdiction to grant the Bank intervener status. Regrettably, in a subsequent paragraph of his decision (para. 31), the motion judge goes on to dismiss the request for intervener status when dealing with a number of the Bank's motions that he felt did not need to be addressed as they were no longer germane. In my view, this was a "slip" and, therefore, the contradictory reference must be ignored.

31 Before turning to the question of whether the motion judge retains the discretion to grant intervener status with respect to s. 38 proceedings, I wish to note that there is a difference in law between someone who is granted status as intervener and one who obtains status as a party (see *Bransen Construction Ltd. v. C.J.A., Local 1386* (2002), 249 N.B.R. (2d) 93, [2002] N.B.J. No. 114, 2002 NBCA 27 (N.B. C.A.)). For purposes of deciding this appeal, however, I am going to ignore the distinction and focus on the issue of whether the motion judge erred in granting the Bank standing to oppose Mr. Isabelle's motion for a s. 38 order. My understanding of the law is as follows.

32 Generally, only the trustee need be served with notice of motion (often referred to as an application) brought under s. 38 of the *Act.* Specifically, there is no need to serve the proposed or potential defendant with notice, unless the order is one that would impose an obligation on that party. Otherwise, the creditor need only show that the trustee has refused or neglected to

proceed with the lawsuit (see cases collected in Houlden, Morawetz & Sarra, at C§46). The law goes on to provide that even if the potential defendant has notice of the s. 38 application, he or she has no standing to appear on the application, nor can the potential defendant cross-examine on the material filed in support of the application. Inevitably, *Nesi Energy Marketing Canada Inc., Re* (1998), 233 A.R. 347, [1998] A.J. No. 1203, 1998 ABQB 912 (Alta. Q.B.), is cited in support of these propositions.

33 The general rule is inapplicable when the potential defendant is also a creditor of the bankrupt. The law accepts that notice of the s. 38 application must be given to all creditors so that they have the opportunity to join in the lawsuit, but for a limited purpose and subject to one important condition precedent. Where the defendant in the proposed lawsuit is also a creditor, he or she is entitled to participate in the s. 38 proceedings for the limited purpose of preserving his or her right to share rateably in the spoils of the action, provided the creditor is willing to share in the expense of the proceedings including costs: *B. Donovan Interiors Ltd., Re* (1990), 3 C.B.R. (3d) 196, [1990] N.S.J. No. 447 (N.S. T.D.). It is only within this contrived context that the creditor be both plaintiff and defendant in the same s. 38 lawsuit (see Houlden, Morawetz & Sarra, at C§46 and C§49). Interestingly, there is no requirement to notify the creditors in advance of the application for an order. It is only important that they be given a reasonable opportunity to decide whether or not to participate in the proposed lawsuit (see Houlden, Morawetz & Sarra, at C§46). Above all else the potential defendant cannot be a full plaintiff in the proposed lawsuit.

34 In summary, the law of bankruptcy does not recognize the right of a potential defendant (and creditor of the bankrupt) to become both the plaintiff and the defendant in the same action. For this reason, the concept of the "hermaphroditic litigant" is a misnomer. This understanding of the law is reinforced in an article that counsel for the Bank provided to us on the hearing of the appeal and yet the Bank persisted with its argument that the law fully accepts the concept of the hermaphroditic litigant: David R.M. Jackson "The Hermaphrodite Litigant: Suing Yourself Under Section 38 of the BIA", (2002) 17:2 Nat. Creditor/Debtor Rev. 21. That article does point out that there is some debate among the courts as to the extent to which a potential defendant and creditor of the bankrupt may influence litigation decisions, but none of the cases cited recognize the right of the potential defendant/creditor to acquire the chose in action or to take full control of the litigation.

35 Regrettably, some seem to believe that it is permissible for a potential defendant and creditor of a bankrupt to become the plaintiff in order to eliminate another creditor's right to obtain an assignment of the chose in action from the trustee in bankruptcy. This could be accomplished in one of two ways: either the potential defendant attempts to gain standing in the other creditor's s. 38 application or, in the alternative, the potential defendant brings his or her own s. 38 motion and asks that both motions be heard together. Bluntly stated, these litigation tactics constitute an abuse of legal process. Unfortunately, that reality does not seem to deter some potential defendants.

36 In the present case, the Bank's April 2, 2007 motion was brought under s. 38 and claims the contractual right to be both the plaintiff and the defendant in the lawsuit that would otherwise have been brought by Heritage Flooring against the Bank. This is true notwithstanding the above noted article which clearly states that a creditor/defendant's participation in the underlying lawsuit is severely restricted. But the Bank is not the first potential defendant to engage in such foolish thinking. There is also an unreported New Brunswick decision in which the potential defendant (and creditor of the bankrupt) attempted to acquire intervener status on a s. 38 application brought by another creditor. The potential defendant was seeking to acquire the chose in action for $250,000, thereby preventing the other creditor from pursuing an action for breach of a franchise agreement in which the damages to be claimed were in the "millions". The motion judge rightly refused to hear from the potential defendant (who had not even made a formal motion for intervener status) let alone grant it standing. The application for leave to

appeal to this Court was dismissed (see *John Deere Ltd. v. Toner*, (2008) February 20, No. 12749, leave to appeal dismissed [2008] N.B.J. No. 111 (N.B. C.A.)).

37 Bluntly stated, a potential defendant who is also a creditor of the bankrupt has no right to bring a s. 38 application for the purpose of ensuring that no other creditor obtains an order authorizing that other creditor to initiate a proceeding against the potential defendant. This is why the Bank's April 2, 2007 motion should have been dismissed to the extent that it sought to invoke s. 38 as a basis for asserting the Bank's right to be both plaintiff and defendant in an action that could only be vigorously and honestly pursued by someone adverse in interest to the Bank.

38 To this point, it seems clear that the Bank has no right to standing on Mr. Isabelle's s. 38 motion. But what of the case in which the potential defendant wishes to argue that the applicant is not, for example, a creditor within the meaning and scope of s. 38 and, therefore, the order sought should not issue. If the potential defendant is not given notice of the s. 38 proceedings, and the trustee does not oppose the order, then presumably the potential defendant has the right to raise the issue on a preliminary motion once the lawsuit is filed. This is because the doctrine of "issue estoppel" is inapplicable as the potential defendant, now defendant, was not a party to the s. 38 proceedings. But I am still left with the question whether the law should recognize the right of a motion judge to exercise a narrow discretion and to grant the potential defendant intervener status.

39 In my view, there may be cases in which the potential defendant should be permitted to oppose the granting of the applicant's s. 38 motion rather than deferring the matter until after the action is commenced. Why? Because the potential defendant might well avoid the need to defend a lawsuit that should never have been commenced in the first place. These are the cases in which the potential defendant raises a discrete and genuine issue of law that if decided in favour of the potential defendant might well avoid the need to defend a lawsuit that should never have been commenced in the first place. For this reason, I am prepared to accept that a motion judge should retain a "narrow discretion" to decide whether a potential defendant should be granted standing on the s. 38 motion brought by a creditor. Thus, for example, where a potential defendant contends that the applicant for the motion does not qualify as a creditor within the meaning and scope of s. 38, it makes sense for the potential defendant to intervene in circumstances where there is no other party opposing the s. 38 motion. However, I want to reemphasize that the discretion to grant intervener status is a narrow one and is not to be abused. If there is a scintilla of evidence to suggest that the potential defendant is simply engaging in a litigation tactic intended to wear down the s. 38 applicant, the motion judge should refuse to grant the potential defendant standing. However, if standing is granted, it will be necessary for the motion judge to specify the extent of the intervener's participation (*e.g.* cross-examination on affidavits).

40 Returning to the case at hand, the question is whether the motion judge erred in granting the Bank standing. Had I been the motion judge, I would not have granted the requisite standing. The Bank did more than raise a discrete legal issue. It raised frivolous issues and cited countless cases with one objective in mind — to ensure that the Bank remained immune from liability with respect to alleged and established wrongdoing and at any cost. But I cannot undo what has already been done. It is simply too late to decide whether the motion judge erred in granting the Bank standing. The Bank has already participated fully in the proceedings and nothing is achieved by striking it as a party at this late stage. Indeed, if we were to strike the Bank as a party, there could be no order as to costs. For these reasons, I am not prepared to set aside the motions judge's decision to grant the Bank standing.

A. Is the Guarantor of a Debt of the Bankrupt a Creditor of the Bankrupt? Yes

2008 CarswellNB 463, 2008 NBCA 69, 47 C.B.R. (5th) 159, 862 A.P.R. 332, 336 N.B.R. (2d) 332, 299 D.L.R. (4th) 727, 169 A.C.W.S. (3d) 697

41 The motion judge did not answer the question posed above. Rather, he held that a "shareholder" of a corporate debtor and bankrupt does not qualify as a creditor within the meaning of s. 38 of the *Act*. Given *Grandview Ford Lincoln Sales Ltd., Re*, 22 C.B.R. (4th) 210, [2001] O.J. No. 251 (Ont. Bktcy.), no one challenges the motion judge's ruling. Mr. Isabelle argues, however, that the motion judge erred in failing to appreciate that the motion was premised on his status as "guarantor". The Bank now recognizes the motion judge's error and concedes that, as a general proposition, a guarantor qualifies as a creditor of the bankrupt. This is true under common law principles even if the principal debtor has made no demand for payment or, once a valid demand has been made on the guarantor, no money has been paid pursuant to it. In short, a contingent liability entitles a guarantor to claim status as a creditor: *Bank of Nova Scotia v. Holland* (1979), 32 C.B.R. (N.S.) 153, [1979] O.J. No. 1190 (Ont. S.C.). Moreover, the law is equally clear that the guarantor's contingent claim is a debt provable in bankruptcy, whether or not the guarantor has been called on to pay or has paid. On this point, see generally *Froment, Re* (1925), 5 C.B.R. 765, [1925] 3 D.L.R. 377, [1925] A.J. No. 60 (Alta. S.C.); *B.N.R. Holdings Ltd. v. Royal Bank* (1992), 14 C.B.R. (3d) 233, [1992] B.C.J. No. 198 (B.C. S.C.) and *Maple City Ford Sales (1986) Ltd., Re* (1998), 39 O.R. (3d) 702, [1998] O.J. No. 2714 (Ont. Bktcy.).

42 In summary, a guarantor of the debt of a bankrupt qualifies as a creditor. However, this finding does not answer the question of whether Mr. Isabelle qualifies as a creditor within the meaning and scope of s. 38 of the *Act* and is therefore entitled to an order authorizing him to commence an action against the Bank. In short, this Court must decide whether the s. 38 order sought should issue.

B. Should the Section 38 Order Issue? Yes

43 My analysis begins with some general comments about the conditions precedent to a creditor obtaining an order under s. 38 of the *Act*. The primary requirement is that the creditor must request the trustee to pursue the action and the trustee must neglect or refuse to do so. In the present case, that condition precedent has been satisfied. There is also discussion in the jurisprudence whether the applicant must establish that the proposed lawsuit has merit. In some cases, the threshold test is stated in terms of establishing a "*prima facie*" case. I am not confident that the law should require anything more than the applicant demonstrate "serious issue". It is for the plaintiffs to decide whether they believe they have a valid cause of action that is worth the time and money required. Moreover, to allow the potential defendant to argue on the motion that a *prima facie* case has not been established would undermine the purpose of s. 38 and offend the understanding that the right to intervene is a limited one. In any event, whatever the threshold be, it is clear that it has been met in this case because of the finding of Bank wrongdoing made in other bankruptcy proceedings. The fact of the matter is that by breaching s. 69 of the *Act*, the Bank opened itself to a lawsuit in which the damages, whether compensatory, punitive or both, might well exceed the indebtedness of Mr. Isabelle and Heritage Flooring combined. This is not to suggest that, in an ensuing action between these parties, the allegations of wrongdoing must be tied to the breaches of s. 69. In fact, they may extend to all breaches whether they are contractual, statutory or common law in nature (*e.g.*, insufficient time for repayment).

44 The Bank insists that Mr. Isabelle is not a creditor within the meaning or scope of s. 38 of the *Act* for six reasons. First, the Bank argues that Mr. Isabelle is not entitled to claim status as a creditor because he failed to file a Proof of Claim as required under s. 124(2) and, second, he was prohibited from doing so because of the rule against "double proof. The Bank insists that only if a guarantor has paid the principal creditor in full is that guarantor entitled to prove his or her claim in the bankruptcy of the debtor. Third, the Bank asserts that, pursuant to a separate contract ("Postponement of Claim"), Mr. Isabelle has no right to pursue the cause of action in his own name as any such right is vested in the Bank. Fourth, the Bank insists that Mr. Isabelle's application under s. 38 should be dismissed for want of "specificity". Fifth, the Bank advances the bold argument that there is

no property (chose in action/cause in action) to be transferred to Mr. Isabelle. According to the Bank, because of its security agreement (the "after-acquired-property" clause) with Heritage Flooring any property that would otherwise form part of the bankrupt's estate, including any cause of action that Heritage has as against the Bank, instead belongs to the Bank. Sixth, the Bank invokes s. 120(1) of the *Act.* That provision states that no "inspector" is entitled to acquire for himself any property of the bankrupt estate without the prior approval of the court. The Bank argues that Mr. Isabelle, as an inspector, is not entitled to the order sought.

45 Of the six arguments noted above, only the fifth and sixth are found in the documentary record filed in this Court. Arguments one through four, inclusive, were raised for the first time in the respondent Bank's written submission to this Court. Since appellants submit written argument first, Mr. Isabelle understandably failed to deal with these issues. Moreover, even if the Bank had argued these four points before the motion judge, the Bank should have filed a Notice of Contention as provided for under Rule 62.08 of the *Rules of Court.* Furthermore, even if the Bank had argued these points before the motion judge, on the appeal to this Court, the Bank should have filed a Notice of Contention to the effect that he reached the correct result for reasons that he failed to consider. This was not done to the prejudice of Mr. Isabelle. Understandably, his written submission to this Court, as appellant, failed to deal with these issues. Much time was spent addressing the many issues surrounding the need for leave to appeal. Moreover, Mr. Isabelle cannot be faulted for failing to ask for the right to submit a supplemental submission. There was need to do so in light of the Bank's failure to file a Notice of Contention.

46 While this Court is under no obligation to deal with the four issues not properly raised, I must dispel any perception that they might have altered the outcome of this appeal. The plea of lack of "specificity" is frivolous as is the plea of the rule against "double proof. I have already outlined the general nature of the claim against the Bank. The specifics of the claim will be outlined in the Statement of Claim. As to the rule against double proof, it has no application. That common-sense rule is intended to prevent both the guarantor and the principal debtor from sharing in the proceeds of the estate with respect to a single debt. Those are not the facts of our case. Mr. Isabelle does not seek to be enriched at the expense of other creditors. In any event, had the issue of "Proof of Claim" been properly raised, it would have been a simple matter for this Court to exercise its jurisdiction under s. 187(9) and permit Mr. Isabelle (his trustee in bankruptcy) to file such before commencing his s. 38 action against the Bank. As it presently stands, no objection to Mr. Isabelle's motion was made before the motion judge on this technical ground. The Bank's argument based on the "Postponement of Claim" contract has no application with respect to the liabilities of the Bank to Heritage Flooring. The postponement contract essentially provides that if Heritage Flooring owes money to both the Bank and Mr. Isabelle, the Bank gets paid first. It also provides that all of the liabilities of Heritage Flooring to Mr. Isabelle and all sums payable by the former to the latter are assigned to the Bank. The contract says nothing about monies the Bank may owe to Heritage Flooring for breach of its statutory and contractual obligations and the right of Mr. Isabelle to obtain an assignment of any right of action now vested in the trustee in bankruptcy. Note that if Mr. Isabelle's action against the Bank were to succeed, Heritage Flooring would not be indebted to Mr. Isabelle, the Bank would.

47 Finally, the Bank must recognize that its failure to properly raise the four issues outlined above is not an invitation to raise them in subsequent proceedings. As the Bank sought and obtained legal standing in the court below, that was the proper time for raising the issues and, hence, the Bank is forever foreclosed from raising them in any subsequent proceedings taken pursuant to the order granted under s. 38.

48 The Bank is left with only two arguments in support of its position that a s. 38 order may not issue to Mr. Isabelle. First, the Bank contends that any right Heritage Flooring may have to sue the Bank is the Bank's property, not the trustee's, by virtue

of the Bank's "General Security Agreement" with Heritage Flooring dated January 30, 2001. But for a valid security agreement, all property owned by the bankrupt is vested in the trustee pursuant to s. 71 of the *Act*. But it is equally true that the interest of a secured creditor in the property of the bankrupt never becomes the property of the trustee unless the trustee pays out the claim of the secured creditor. The effect of the pertinent statutory provisions is that the interest of the secured creditor in the bankrupt's property never loses its priority over the claims of other creditors: *MacKesey v. Royal Bank* (1991), 86 D.L.R. (4th) 637, [1991] S.J. No. 572 (Sask. C.A.). Heritage Flooring did execute a security agreement in favour of the Bank, charging all of Heritage's present and after acquired property to the Bank, including all choses in action. From here, the Bank asks us to make a quantum leap by accepting that any right of action that Heritage Flooring acquired against the Bank with respect to the latter's wrong-doing comes within the ambit of the after-acquired-property clause. In other words, the Bank maintains that it owns the right to sue itself. Obviously this cannot be so. If we were to accept the Bank's argument, no debtor would be able to sue a secured creditor for breaching the parties' security agreement, or other legal obligations, so long as that security agreement contained an after-acquired-property clause. I shall say no more of this issue except that a contractual provision drafted with that objective might be struck on the ground of being offensive to public policy.

49 The Bank's other argument is tied to s. 120(1) of the *Act*. That provision states that no "inspector" is entitled to acquire any property of the bankrupt estate without the prior approval of the court. The Bank then argues that: "[i]t is clear that Andre Isabelle is attempting, in his position as Inspector, to act for himself and not for the benefit of the general body of creditors." With great respect, it is not clear to me that Mr. Isabelle is not acting in the best interests of the other creditors. They still have a right to participate in the lawsuit and share in the spoils. Quite properly, Mr. Isabelle points out that if successful against the Bank, in whole or part, Heritage Flooring would be claiming damages (compensatory and punitive) which may well exceed the amount that Heritage owes the Bank. In my view, there is nothing improper about Mr. Isabelle seeking an order under s. 38 even though he is an inspector under the *Act*. Wisely, counsel for Mr. Isabelle notes that court approval may be sought, even at this late stage in the proceedings, having regard to the powers of the court set out in s. 187(9) of the *Act*. If necessary, I would grant the requisite approval, *nunc pro tunc*.

50 In conclusion, the motion judge erred in refusing to grant Mr. Isabelle the order sought under s. 38 of the *Act*. Therefore, the appeal should be allowed and the decision below set aside. The appellant is entitled to an order under s. 38 of the *Act* authorizing him to commence an action for damages against the Bank with respect to any breaches of any legal obligations which the Bank owed Heritage Flooring. This includes not only statutory breaches, such as those tied to s. 69 of the *Act*, but as well contractual breaches and breaches of obligations imposed at law or in equity (*e.g.*, insufficient time to repay loan). It necessarily follows that the Bank's motions aimed at acquiring the same cause of action must be dismissed.

C. The Post-Hearing Motion

51 As noted at the outset, 15 days after the hearing of the present appeal, Mr. Isabelle made an assignment in bankruptcy. Immediately following this event and while the decision on appeal was still under reserve, and without first discussing the matter with Mr. Isabelle's trustee in bankruptcy or Mr. Isabelle's counsel on appeal, counsel for the Bank wrote to the Court informing us, that pursuant to Rule 13.01 of the *Rules of Court*, the matter was "automatically stayed" because of the assignment. Rule 13.01 states, in part, that where at any stage of a "proceeding" the interest or liability of a party is transferred to another party, the proceeding shall be stayed until an order to continue issues. Quaere: Is a decision under reserve a proceeding? The Court was then asked "to confirm" this understanding of the law, otherwise the Bank "would be required to seek a date for the hearing of a motion in that regard." In response, the Court declined the invitation to provide the Royal Bank with legal

advice. The Bank should have first discussed the matter with the trustee and Mr. Isabelle's counsel rather than simply forwarding them a copy of its letter, so the parties could decide what course of action to follow. This was not done. Instead, the correspondence from the Bank to the Registrar reads as a letter of intimidation which brought about the opposite effect. Mr. Isabelle's trustee in bankruptcy and his counsel on appeal each responded with a letter, in what amounts to an informal submission, addressed to the Registrar. Each disputed the Bank's understanding of the law, cited relevant authorities and then asked that this Court deliver its decision in the usual manner. In response, the Bank forwarded an affidavit together with an *ex parte* order to the Registrar of this Court, purportedly drafted in conformity with Rule 13 of the *Rules of Court*.

52 Rule 13 provides that where at any stage of a proceeding the interest or liability of a party is transferred to another person (*e.g.*, the trustee in bankruptcy), the proceeding is stayed until an order to continue issues. Should the party with carriage of a proceeding fail to obtain such an order within 30 days of the transfer, an interested party may do so. In the present case, 30 days had passed since Mr. Isabelle fell into bankruptcy and, hence, the Bank had the right to seek the continuance order. However, the order provided to the Registrar would have given the carriage of the proceedings to the Bank such that it would be both the appellant and respondent. The Registrar refused to sign the order and rightly so. Eventually an order was signed directing that the proceeding be continued with "A.C. Poirier & Associates Inc. as Trustee for the Estate of André Isabelle as appellant". As the Bank did not obtain the order it sought, it brought a motion to permanently stay the rendering of our decision or, alternatively, an order for security of costs. We dismissed both requests with costs and reasons to follow. Here are our reasons.

53 In support of its many arguments, the Bank cites no less than 10 decisions. Only one decision is relevant to the motion for the permanent stay and that decision is contradicted by two others that the Bank failed to bring to our attention. However, the three cases deal with the question of whether, in the absence of a continuance order, a decision under reserve is automatically stayed once one of the parties becomes bankrupt. Since a continuance order issued in this case, it is unnecessary to address the jurisprudence (see *Adams-Eden Furniture Ltd. v. Kansa General Insurance Inc.*, [1995] M.J. No. 314 (Man. Q.B.) aff'd [1995] M.J. No. 258 (Man. Q.B.) and compare with *Hunter Douglas Ltd. v. Kool Vent Awnings Ltd.* (1957), 37 C.B.R. 154, [1958] C.C.S. No. 127 (Que. S.C.) and *Rea v. Patmore* (1999), 253 A.R. 363, [1999] A.J. No. 1288, 1999 ABQB 1069 (Alta. Q.B.)).

54 The Bank had no option but to abandon its argument that the decision under reserve was automatically stayed pursuant to Rule 13.01 of the *Rules of Court*. Any stay that did exist, and this is by no means a given, was lifted with the granting of the continuance order. The Bank then argued that the permanent stay rested on ss. 67(1) and 71 of the *Act*. Section 67(1)(d) states that the property of the bankrupt shall comprise such powers over property as might have been exercised by the bankrupt for his or her own benefit. Section 71 states that the property of the bankrupt passes to the trustee and that the bankrupt ceases to have the capacity to deal with his or her property. It should be readily apparent that these provisions do not operate to prevent this Court from rendering its decision on appeal. This is not to deny that once this Court concludes that a s. 38 order should issue, the right to pursue an action against the Bank then vests in Mr. Isabelle's trustee.

55 The Bank's next argument is that the release of our decision should be stayed on the ground of "mootness". The Bank advanced two reasons. First, it points out that in a document entitled "Statement of Affairs" prepared by Mr. Isabelle with the assistance of his trustee, the value of the s. 38 application is stated as "$0". The Bank seizes upon this fact to argue that the decision under appeal is worthless even if Mr. Isabelle is successful and, hence, there is no live issue between the parties. In his response affidavit, the trustee points out that in those cases where the value of an asset or liability is unknown with any rea-

sonable certainty, it is necessary for the bankrupt to use "$1" or "$0" for the estimated realizable value. This makes good sense and renders the Bank's argument frivolous as is its next argument. The Bank argues that if Mr. Isabelle was a creditor of Heritage Flooring at the time the appeal was heard, he is no longer a creditor as any debt owed to him by Heritage Flooring is an asset in his bankruptcy and has been assigned to his trustee by operation of law. Clearly, Mr. Isabelle does not lose his status as creditor because he is now bankrupt. It just means that his trustee is the one vested with the right to decide what further action should be taken with respect to all of his assets.

56 Next, the Bank argues that a stay should issue because Mr. Isabelle's trustee has not indicated whether he is interested in pursuing an action against the Bank should Mr. Isabelle's appeal succeed. The Bank cites two cases in support of its argument. For the sake of completeness, I will canvass the cases even though they do not remotely support the argument presented. The first decision is *Hall-Chem Inc. v. Vulcan Packaging Inc.* (1994), 21 O.R. (3d) 89, [1994] O.J. No. 2692 (Ont. C.A.). In that case "V" had obtained judgment against "B" for $338,000. B appealed but was ordered to give security. B moved to vary the order but while the motion and appeal were pending he filed an assignment in bankruptcy. B's trustee took the position that both proceedings were stayed under s. 69.3(1) of the *Act*. When the motion came before the Ontario Court of Appeal, the Court held that s. 69.3(1) was not applicable. The applicable section was s. 71(2) which vested B's cause of action in the trustee and it was for the trustee to advise B's counsel and for B's counsel to seek instructions as to whether the trustee intended to abandon or proceed with the appeal. Finally, the Court held that the trustee should have sought an order for continuance as provided for under the equivalent of our Rule 13.02 of the *Rules of Court*.

57 The present case is clearly distinguishable from *Hall-Chem*. In that case, the trustee had to decide whether to pursue the motion and the appeal pending before the Court of Appeal. In the present case, the motion and appeal were already heard prior to Mr. Isabelle falling into bankruptcy. Until our decision issues there is nothing his trustee can do. The trustee is entitled to await the decision of this Court to determine whether it should proceed to sue the Bank based on the totality of the surrounding circumstances. Without knowing the reasons underscoring our decision to grant the order Mr. Isabelle sought, it would be unwise for his trustee to make a decision in the abstract.

58 The Bank also insists that *Mann v. Northern B.C. Enterprises Ltd.* (2005), 46 C.C.E.L. (3d) 253, [2005] B.C.J. No. 1485, 2005 BCCA 367 (B.C. C.A.) is a pivotal case. The essential facts involve a trial judge who had allowed an undischarged bankrupt to represent his company in an action for damages for wrongful dismissal in circumstances where the bankrupt's trustee, who held the shares, was not prepared to take any steps to have the company represented at trial. However, I am unable to appreciate how *Mann* is analogous to the case under appeal. Mr. Isabelle is not a shareholder attempting to represent Heritage Flooring in an action against the Bank. Nor is Mr. Isabelle pursuing the present appeal contrary to the wishes of his trustee. The trustee is simply awaiting a decision of this Court in order to determine what action should be taken. Armed with an order under s. 38 of the *Act*, the trustee must decide whether to exercise Mr. Isabelle's right to sue the Bank. Until that decision is made and until the trustee applies for the order granted on this appeal there are no proceedings pending before any court.

59 It is worth reminding all litigators that effective advocacy does not include the indiscriminate proliferation of issues supported by a plethora of case law. It is not the intended role of an appellate court to sift through countless issues and case law to see whether there is something which "sticks". Such litigation tactics obfuscate the true issues and may ultimately undermine the credibility of all advocates and their client's interests. More often than not, the indiscriminate recitation of cases is looked on as an ineffective means of strengthening a weak case. This is why it is important for counsel to be as judicious in their selection of the case law to be cited in support of an argument as it is important to isolate those issues that legitimately advance the

interests of their client.

60 Ultimately, the Bank conceded that the granting of a stay is a discretionary decision but asked that it be exercised in favour of the Bank because of the prejudice it would suffer should it succeed on the appeal and be awarded costs. Of course, the Bank's argument presumes the trustee will be unable to pay any cost award. In the alternative, the Bank asked for an order for security of costs under Rule 58.10 of the *Rules of Court*. Knowing that my colleagues endorse my reasons for judgment with respect to the disposition of the main appeal, the issues of prejudice and costs are truly moot. That said the law in this Province is clear: (1) an order for security for costs may only issue when it is in the "interests of justice"; and (2) "impecuniosity" is not a sufficient ground for granting such an order (see *Dugas, Re* (2003), 261 N.B.R. (2d) 99, [2003] N.B.J. No. 230 (N.B. C.A.) and *Kennedy v. HSBC Bank Canada* (2007), 323 N.B.R. (2d) 137, [2007] N.B.J. No. 346 (N.B. C.A.)).

61 For these reasons, we dismissed the Bank's post-appeal hearing motion. As the motion was conceived in desperation and nurtured by heaps of irrelevant case law and frivolous arguments, the cost award must reflect these realities. Accordingly, the trustee is entitled to costs of $5,000 on this motion.

VIII. Conclusion

62 In conclusion, I would dismiss the respondent's motion to quash the appeal because of the appellant's failure to obtain leave as required under s. 193(e) of the *Act*. Instead, I would allow the application for leave to appeal, *nunc pro tunc*. As the respondent's motion involved the preparation of extensive written submissions, distinct from those submitted on the main appeal, I would award the appellant costs of $3,500 on this motion. I would also allow the appeal and set aside the motion judge's decision dismissing the appellant's motion brought under s. 38 of the *Act*. The appellant is entitled to an order under s. 38 of the *Act* authorizing him to commence an action for damages against the Bank with respect to a breach of any legal obligation which the Bank owed Heritage Flooring. This includes not only statutory breaches, such as those tied to s. 69 of the *Act*, but as well contractual breaches and breaches of obligations imposed at law or in equity. It necessarily follows that the Bank's motions of April 2, 2007 should be dismissed and the same is true with respect to its motion of April 3, 2007, except with respect to the decision to grant the Bank intervener status. I would award costs of $8,500 to the appellant on the appeal. With respect to the post-hearing motion, the appellant is entitled to costs of $5,000 for the reasons discussed above. In sum, costs of $17,000 are payable forthwith.

Appeal allowed.

END OF DOCUMENT

TAB 3

1997 CarswellAlta 737, 48 C.B.R. (3d) 171, (sub nom. Edo (Canada) Ltd. (Bankrupt), Re) 206 A.R. 295, (sub nom. Edo (Canada) Ltd. (Bankrupt), Re) 156 W.A.C. 295, [1997] A.J. No. 869

C

1997 CarswellAlta 737, 48 C.B.R. (3d) 171, (sub nom. Edo (Canada) Ltd. (Bankrupt), Re) 206 A.R. 295, (sub nom. Edo (Canada) Ltd. (Bankrupt), Re) 156 W.A.C. 295, [1997] A.J. No. 869

Alternative Fuel Systems Inc. v. **Edo** (Canada) Ltd. (Trustee of)

In The Matter of the Bankruptcy of **Edo** (Canada) Limited

Alternative Fuel Systems Inc., Appellant and J. Stephens Allan, Trustee in Bankruptcy of **Edo** (Canada) Limited and Impco Technologies **Inc.**, Respondents

Alberta Court of Appeal [In Chambers]

O'Leary J.A.

Heard: August 20, 1997
Judgment: September 4, 1997
Docket: Calgary Appeal 17298

Counsel: *T.L. Czechowskyj*, for the Appellant.

B.A.R. Smith, Q.C., for the Respondents Trustee in Bankruptcy of Edo (Canada) Limited).

L.B. Robinson, for the Respondent, Impco Technologies Inc.

Subject: Insolvency

Bankruptcy --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge

Appellant company submitted highest bid but respondent's second bid after closure of tenders was accepted — Appellant objected, filed notice of appeal, and moved for declaration that appeal as of right existed — Serious and important question was raised justifying court's discretion to grant leave to appeal — Bankruptcy and Insolvency Act R.S.C. 1985, c. B-3, s. 193(e).

Bankruptcy --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Future rights

Bankruptcy trustee invited tenders for purchase of bankrupt's property — Appellant company submitted highest bid but respondent's second bid after closure of tenders was accepted — Trial judge ordered sale of property to respondent — Appellant objected, filed notice of appeal, and moved for declaration that appeal as of right

existed — No future rights were involved, only existing rights — Leave to appeal was granted on other grounds — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 193(a).

Bankruptcy --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Amount exceeding monetary limit

Bankruptcy trustee invited tenders for purchase of bankrupt's property — Appellant company submitted highest bid but respondent's second bid after closure of tenders was accepted — Trial judge ordered sale of property to respondent — Appellant objected, filed notice of appeal, and moved for declaration that appeal as of right existed — Leave to appeal was granted — Although value exceeded $10,000, no appeal as of right from procedural direction existed — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 193(c).

A trustee in bankruptcy invited tenders for the sale of the bankrupt's equipment. Three bids were received with the appellant company A Inc.'s bid of $770,000 being the highest. The trustee advised A Inc. that it had submitted the highest bid and A Inc. arranged for financing while waiting for the Inspector's approval and a formal agreement. After tenders closed, the respondent company I Inc. realized that its bid had not succeeded and submitted a second tender offer of $1,175,000. The trustee referred the second tender to the Inspector, who did not accept either bid. The trustee applied to court for directions and the court directed that the equipment be sold to I Inc. A Inc. objected and filed a notice of appeal. Its right to appeal without leave was questioned. A Inc. moved for a declaration that leave was not required, or alternatively, for leave to appeal.

Held: Leave to appeal was granted.

A Inc. did not meet the requirement in s. 193(a) which grants a right of appeal where the issue involves future rights. The case at bar did not involve future rights. The section did not contemplate rights that existed, but rather rights that were to come into existence at a future time. The rights affected in the case at bar were existing and not future rights. No future rights of either party were or could be affected.

A Inc. could not rely on s. 193(c) which grants a right of appeal where the property involved has a value exceeding $10,000. An order to sell assets in a certain manner was a procedural direction and could not be appealed as a matter of right even though the assets in question exceeded $10,000 in value. The appeal in the case at bar was essentially a procedural direction.

The court had discretion to grant leave to appeal under s. 193(e). The point that A Inc. wished to raise was one of significance to bankruptcy practice. A Inc. submitted the highest bid. The respondent submitted a second bid after being unsuccessful. A Inc. was made to believe it was the successful tenderer and had taken steps to finance the transaction. The argument of A Inc. was that this was an error in principle even though it would result in a higher dividend to creditors. A further argument was that the public's faith in the tendering system would be undermined if the sale to I Inc. was approved. The circumstances raised a sufficiently serious and important question to justify granting leave.

Cases considered by *O'Leary J.A.*:

Baker, Re (1995), 31 C.B.R. (3d) 184, (sub nom. *Baker (Bankrupt), Re)* 83 O.A.C. 351, 22 O.R. (3d) 376 (Ont. C.A. [In Chambers]) — referred to

Bank of Nova Scotia v. Yoshikuni Lumber Ltd. (1992), 74 B.C.L.R. (2d) 19, 99 D.L.R. (4th) 289, (sub nom. *Bank of Nova Scotia v. Yoshikumi Lumber Ltd. (Receivership))* 20 B.C.A.C. 134, [1993] 2 W.W.R. 695, 16

C.B.R. (3d) 10, (sub nom. *Bank of Nova Scotia v. Yoshikumi Lumber Ltd. (Receivership))* 35 W.A.C. 134 (B.C. C.A.) — referred to

Ditchburn Boats & Aircraft (1936) Ltd., Re, 19 C.B.R. 240, [1938] 3 D.L.R. 751, [1938] O.W.N. 241 (Ont. C.A.) — referred to

Dominion Foundry Co., Re (1965), 8 C.B.R. (N.S.) 74, 51 W.W.R. 679, 52 D.L.R. (2d) 79 (Man. C.A.) — considered

Druker c. Godin, 16 C.B.R. (3d) 281, [1992] R.J.Q. 2546 (Que. S.C.) — referred to

Elias v. Hutchison (1981), 14 Alta. L.R. (2d) 268, 37 C.B.R. (N.S.) 149, 27 A.R. 1, (sub nom. *Catalina Exploration & Development Ltd., Re)* 121 D.L.R. (3d) 95 (Alta. C.A.) — referred to

Pretty Fashion Inc., Re (1951), 31 C.B.R. 217 (Que. S.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 30(1)(a) — referred to

s. 193 — considered

s. 193(a)-(d) — considered

s. 193(e) — considered

MOTION by appellant for ruling that appeal as matter of right existed, or, alternatively, for leave to appeal.

***O'Leary J.A.*:**

1 A judge of the Court of Queen's Bench sitting in bankruptcy ordered that certain equipment of Edo (Canada) Limited, in Bankruptcy, be sold by the estate to Impco Technologies Inc. ("Impco"). Alternative Fuel Systems Inc. ("Alternative") objected and filed a Notice of Appeal. Its right to appeal without leave was questioned and it has moved for a ruling that leave is not required or, alternatively, for leave to appeal.

2 Section 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, says:

193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed

five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

3 The first question is whether Alternative has an appeal as of right under either of sub-clauses (a) or (c), as it claims, or must seek leave under sub-clause (e). A threshold issue is whether I have jurisdiction to decide that question. The Respondent Impco maintains that leave is required and should be denied in these circumstances.

Jurisdiction

4 Section 193(e) confers jurisdiction on a single judge of the Court of Appeal to grant or withhold leave where the matter cannot be brought within one or more sub-clauses (a) to (d) inclusive. There are obviously many cases where the question of whether or not leave to appeal is required must be determined as a preliminary issue. In my view it is implicit in s. 193 that a single judge of the Court has jurisdiction to make that threshold decision. Otherwise, the issue could not be determined except by bringing it before a panel of the Court. If leave were found necessary, it could be granted at that point or the matter referred to a single judge for decision. Such a cumbersome and time-consuming procedure could hardly have been intended. It would be inconsistent with a fundamental goal of the *Act* - the expeditious administration of bankrupt estates. Counsel have not referred me to specific authority on point, however there are reported cases in which single judges have assumed jurisdiction to decide the preliminary issue: See, e.g. *Baker, Re* (1995), 31 C.B.R. (3d) 184 (Ont. C.A. [In Chambers]) (Osborne, J.A.). The only sensible construction of s. 193 is that a single judge of the Court of Appeal can decide the threshold issue of whether leave is required.

5 Is leave to appeal required in these circumstances? If so, should it be granted?

Facts

6 The Trustee invited tenders for the purchase of the bankrupt's equipment. Tenders closed on June 20, 1997. Three bids were received, including one from each of Alternative and Impco. Alternative's tender of $770,000 was the highest. The Trustee advised Alternative that it had submitted the highest bid and both parties proceeded on the assumption that the Inspector would accept the tender. Alternative arranged financing while waiting for the Inspector's approval and the preparation of a formal agreement. After tenders closed and Impco realized it was not the highest bidder, it submitted a second tender or offer in the amount of $1,175,000. The Trustee referred the second Impco tender to the Inspector. He did not accept either bid and the Trustee applied to the Court for directions.

7 The Bankruptcy Judge directed that the equipment be sold to Impco. Reasons for Judgment were not available at the time of this application, however counsel agreed that the Bankruptcy Judge felt he was bound to direct that the equipment be sold so as to realize the greatest amount for the benefit of creditors. He refused to accept a suggestion that Alternative be permitted to submit a further tender or that the tender procedure be repeated.

8 Alternative claims it may appeal the Order as of right pursuant to s. 193(a) as the point at issue involves "future rights", or pursuant to sub-clause (c) as the value of the property involved in the appeal exceeds $10,000.00.

Discussion

(a) future rights

9 The "future rights" referred to in sub-clause (a) are future legal rights, not future commercial advantages or benefits which may be affected by the decision: *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont. C.A.). The words do not contemplate rights which presently exist, but, rather, rights that will come into existence at a future time: *Elias v. Hutchison* (1981), 14 Alta. L.R. (2d) 268, 37 C.B.R. (N.S.) 149 (Alta. C.A.).

10 The decision under appeal does not involve future rights. The Bankruptcy Judge directed a sale of the assets to Impco in accordance with Impco's second tender. The rights affected were present rights - either conferred on Impco or taken from Alternative.

11 No future rights of either were or could be affected. Alternative cannot appeal as of right pursuant to sub-clause (a).

(c) value of property

12 In *Dominion Foundry Co., Re* (1965), 8 C.B.R. (N.S.) 74, 51 W.W.R. 679 (Man. C.A.), it was held that an order to sell assets in a certain manner is a procedural direction and cannot be appealed as of right even though the assets in question exceed $10,000 in value. The Order sought to be appealed here is essentially a procedural direction. Alternative challenges the method by which the equipment is to be sold, namely by-passing the tender procedure. Accordingly, Alternative has no right of appeal under sub-clause (c).

(e) leave to appeal

13 Sub-clause (e) gives no guidance as to the factors to be taken into account in deciding whether leave should be granted or withheld. The authorities have established broad guidelines for deciding the issue. These are summarized in Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada* (3rd edition), Vol. II, at page 7-56:

> The factors to be considered on an application for leave to appeal are (a) whether the point of appeal is of significance to the practice; (b) whether the point raised is of significance to the action itself; (c) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous and (d) whether the appeal will unduly hinder the progress of the action: *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.); *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279, 24 B.C.A.C. 318, 40 W.A.C. 318 (C.A.).
>
> Section 193(e) gives a judge of the Court of Appeal a discretion, but leave should only be granted in the judgment appears to be contrary to law, amounts to an abuse of judicial power, or involves an obvious error, causing prejudice, for which there is no remedy: *MacNab v. B.S. & B. Enterprises Ltd.* (1951), 32 C.B.R. 53 (Que. K.B.); Re Leard (1994), 25 C.B.R. (3d) 210, 114 D.L.R. (4th) 135 (Ont. C.A.). If the order sought to be appealed from is discretionary, leave will not be granted unless the matter is of importance either to the administration of justice generally or to the respective rights of the parties to litigation: *Zurich Indemnity Co. of Canada v. Reemark Rideau Developments Ltd.* (1992), 22 C.B.R. (3d) 291, 84 B.C.L.R. (2d) 283, 18 B.C.A.C. 221, 31 W.A.C. 221 (C.A.).

14 In my opinion, the point Alternative wishes to raise on appeal is one of significance to bankruptcy

practice as well as to the parties. Alternative submitted the highest tender and argues that if the equipment is sold pursuant to the tendering process, it must be sold to it for the amount it tendered. It appears that Impco purported to make its second bid in response to the invitation to tender, but after tenders had closed and it realized its first bid had been unsuccessful. It was made after Alternative had been led to believe that it was the successful tenderer and had taken steps to arrange financing to complete the transaction. Alternative contends that the second tender was really an offer to buy the equipment and the effect of the Order under appeal is to condone "shopping" against Alternative's tender in order to obtain a higher price. It is said this was an error in principle even though it would result in a higher dividend to creditors: *Pretty Fashion Inc., Re* (1951), 31 C.B.R. 217 (Que. S.C.). Further, Alternative claims that the public's faith in the integrity of the tendering system will be undermined if the sale to Impco is approved: *Druker c. Godin* (1992), 16 C.B.R. (3d) 281 (Que. S.C.), *Bank of Nova Scotia v. Yoshikuni Lumber Ltd.* (1992), 16 C.B.R. (3d) 10 (B.C. C.A.). It appears that Alternative has no recourse against either the Trustee or the Inspector as the bid was, by law, subject to acceptance by the Inspector (Act, s. 30(1)(a)).

15 In my view, these circumstances raise a question sufficiently serious and important to justify granting leave.

Conclusion

16 Leave to appeal is granted. The appeal will inevitably result in a delay in realization of the assets of the estate and the payment of dividends to creditors. The parties may have the appeal expedited by consultation with the Deputy Registrar and the List Manager.

Leave granted.

END OF DOCUMENT

PLEADINGS BRIEF

IG/Yoannou Matters

Polley Faith Actions			
Stewart	CV-11-9352-00CL	Statement of Claim issued August 23, 2011	1
		IG Defence dated December 12, 2011	2
Mackay	CV-11-9354-00CL	Statement of Claim issued August 23, 2011	3
		IG Defence dated December 12, 2011	4
Stafford	CV-9355-00CL	Statement of Claim issued August 23, 2011	5
		IG Defence dated December 12, 2011	6
Dolan	CV-11-9358-00CL	Statement of Claim issued August 23, 2011	7
		IG Defence dated December 12, 2011	8
Dickinson Wright Actions			
Marangos	CV-12-9585-00CL	Statement of Claim issued February 2, 2012	9
		IG Defence dated March 8, 2012	10
		Reply dated May 8, 2012	11
		Yoannou Defence dated July 20 2012	12
Sajfert	CV-12-9592-00CL	Statement of Claim issued February 6, 2012	13
		IG Defence dated March 8, 2012	14
		Reply dated May 8, 2012	15
		Yoannou Defence dated [ ]	16
Paliare Roland Action			
Denovellis	CV-12-448872	Statement of Claim issued March 14, 2012	17
		IG Defence dated April 5, 2012	18
Endorsements		Spence, J. December 3, 2013	19
		Morawetz, J. December 12, 2013	20
			21

TAB 4

1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321

1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321

Royal Bank v. **Soundair** Corp.

ROYAL BANK OF CANADA (plaintiff/respondent) v. **SOUNDAIR** CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Ontario Court of Appeal

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman*, for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.

J. T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and *L.E. Ritchie*, for plaintiff/respondent Royal Bank of Canada.

S.F. Dunphy and *G.K. Ketcheson*, for Ernst & Young Inc., receiver of respondent Soundair Corporation.

W.G. Horton, for Ontario Express Limited.

N.J. Spies, for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Receivers --- Conduct and liability of receiver — General conduct of receiver

1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321

Receivers — Sale of debtor's assets — Approval by court — Court appointing receiver to sell airline as going concern — Court considering its position when approving sale recommended by receiver.

S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.

Held:

The appeal was dismissed.

Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.

Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — *referred to*

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131; 39 D.L.R. (4th) 526 (H.C.) — *applied*

Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) (C.A.) — *referred to*

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

Appeal from order approving sale of assets by receiver.

***Galligan J.A.*:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a

corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's

two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers, whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business

decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.), at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it.* It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), at p. 11 [C.B.R.]:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances *at the time existing* it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer, which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit; the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL.* Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

[Emphasis added.] I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

24 I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after 10 months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

25 I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

26 It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the receiver in the OEL offer was not a reasonable one. In *Crown Trust Co. v. Rosenberg*, supra, Anderson J., at p. 113 [O.R.], discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

27 In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.), at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.), at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.), at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or *where there are substantially higher offers which would tend to show that the sale was improvident* will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

31 If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

32 It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the

two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues, while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

35 The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

36 The court appointed the receiver to conduct the sale of Air Toronto, and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

37 It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

38 I am, therefore, of the opinion the the receiver made a sufficient effort to get the best price, and has not acted improvidently.

2. Consideration of the Interests of all Parties

39 It is well established that the primary interest is that of the creditors of the debtor: see *Crown Trust Co. v.*

Rosenberg, supra, and *Re Selkirk*, supra (Saunders J.). However, as Saunders J. pointed out in *Re Beauty Counsellors*, supra at p. 244 [C.B.R.], "it is not the only or overriding consideration."

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg*, supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors*, supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

41 In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the Efficacy and Integrity of the Process by which the Offer was Obtained

42 While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

43 The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to *Re Selkirk*, supra, where Saunders J. said at p. 246 [C.B.R.]:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.
>
> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at p. 476 [D.L.R.], the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 124 [O.R.]:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. *Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.*

[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 109 [O.R.]:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

50 I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide

an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record, and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in order to make a serious bid.

51 The offering memorandum had not been completed by February11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

52 The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

54 Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum, its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver, properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

55 Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested as a possible resolution of this appeal that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within 7 days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum

was unfair to 922, that it would have told the court that it needed more information before it would be able to make a bid.

56 I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

57 It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair, nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

58 There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg*, supra, which I adopt as my own. The first is at p. 109 [O.R.]:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 [O.R.]:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this:

> They created a situation as of March 8th, where the Receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

I agree.

60 The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in

purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. The effect of the support of the 922 offer by the two secured creditors.

61 As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

62 The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But, insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation, the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work, or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

63 There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

64 The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtor's assets.

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6 million cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if

the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

67 The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act*, R.S.O. 1980, c. 137, and the *Environmental Protection Act*, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

71 I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-client scale. I would make no order as to the costs of any of the other parties or intervenors.

McKinlay J.A.:

72 I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co.*

v. Rosenberg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process, the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

***Goodman J.A.* (dissenting):**

74 I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto, two competing offers were placed before Rosenberg J. Those two offers were that of OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by CCFL and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada. Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to, nor am I aware of, any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.), Berger J. said at p. 30 [C.B.R.]:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. that the offer of 922 is superior to that of OEL. He concluded that the 922 offer

is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds, it is difficult to take issue with that finding. If, on the other hand, he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

78 I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3 million to $4 million. The bank submitted that it did not wish to gamble any further with respect to its investment, and that the acceptance and court approval of the OEL offer in effect supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur, but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial down payment on closing.

79 In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.R.]:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

81 It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

82 It is my further view that any negotiations which took place between the only two interested creditors in de-

ciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers, nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest, and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

83 I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.), Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.), Saunders J. heard an application for court approval of the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron*, supra, quoted by Galligan J.A. in his reasons. In *Cameron*, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements, a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 [C.B.R.]:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

86 The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of indi-

vidual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada, with CCFL, had not bargained in good faith, and that the receiver had knowledge of such lack of good faith. Indeed, on his appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase, which was eventually refused by the receiver, that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing, Air Canada may have been playing "hardball," as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position, as it was entitled to do.

90 Furthermore, there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event, although it is clear that 922, and through it CCFL and Air Canada, were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

92 I would also point out that rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was *no unconditional* offer before it.

93 In considering the material and evidence placed before the court, I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922

is concerned, and improvident insofar as the two secured creditors are concerned.

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

95 As a result of due negligence investigations carried out by Air Canada during the months of April, May and June of 1990, Air Canada reduced its offer to $8.1 million conditional upon there being $4 million in tangible assets. The offer was made on June 14, 1990, and was open for acceptance until June 29, 1990.

96 By amending agreement dated June 19, 1990, the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement, the receiver had put itself in the position of having a firm offer in hand, with the right to negotiate and accept offers from other persons. Air Canada, in these circumstances, was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990, Air Canada served a notice of termination of the April 30, 1990 agreement.

97 Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990, in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

98 This statement, together with other statements set forth in the letter, was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto [to] Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990, the receiver was of the opinion that the fair value of Air Toronto was between $10 million and $12 million.

99 In August 1990, the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 In December 1990, the receiver was approached by the management of Canadian Partner (operated by OEL)

for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991, culminating in the OEL agreement dated March 8, 1991.

101 On or before December 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

102 During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

103 By late January, CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

105 It was not until March 1, 1991, that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at that time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL), it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid, and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime, by entering into the letter of intent with OEL, it put itself in a position where it could not negotiate with CCFL or provide the information requested.

106 On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

107 By letter dated March 1, 1991, CCFL advised the receiver that it intended to submit a bid. It set forth the

essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an inter-lender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control, and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition, although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

109 In effect, the agreement was tantamount to a 45-day option to purchase, excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of 3 months, notwithstanding the fact that it knew CCFL

was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted, and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

113 In his reasons, Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed, and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was acceptable in form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard, as it contained a condition with respect to financing terms and conditions "*acceptable to them.*"

114 It should be noted that on March 13, 1991, the representatives of 922 first met with the receiver to review its offer of March 7, 1991, and at the request of the receiver, withdrew the inter-lender condition from its offer. On March 14, 1991, OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991, to submit a bid, and on April 5, 1991, 922 submitted its offer with the inter-lender condition removed.

115 In my opinion, the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes proximately two thirds of the contemplated sale price, whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3 million to $4 million.

116 In *Re Beauty Counsellors of Canada Ltd.*, supra, Saunders J. said at p. 243 [C.B.R.]:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only

creditors who can benefit from the sale of Air Toronto.

118 I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver, in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J., the stated preference of the two interested creditors was made quite clear. He found as fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard, and it is his primary duty to protect the interests of the creditors. In my view, it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL, and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors, who have already been seriously hurt, more unnecessary contingencies.

119 Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer, and the court should so order.

120 Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

121 I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result, the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction, and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique, having regard to the circumstances of this case. In my opinion, the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers, and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

122 Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991, and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price, nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent that it knew that CCFl was interested in purchasing Air Toronto.

123 I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver, and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim

to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

125 For the above reasons I would allow the appeal one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-client basis. I would make no order as to costs of any of the other parties or intervenors.

Appeal dismissed.

END OF DOCUMENT

TAB 5

2002 CarswellSask 178, 2002 SCC 33, 2002 CarswellSask 179, [2002] S.C.J. No. 31, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 286 N.R. 1, REJB 2002-29758, J.E. 2002-617

2002 CarswellSask 178, 2002 SCC 33, 2002 CarswellSask 179, [2002] S.C.J. No. 31, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 286 N.R. 1, REJB 2002-29758, J.E. 2002-617

Housen v. Nikolaisen

Paul Housen, Appellant v. Rural Municipality of Shellbrook No. 493, Respondent

Supreme Court of Canada

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: October 2, 2001
Judgment: March 28, 2002[FN*]
Docket: 27826

Proceedings: reversing [2000] 4 W.W.R. 173, 50 M.V.R. (3d) 70, 189 Sask. R. 51, 216 W.A.C. 51, 9 M.P.L.R. (3d) 126 (Sask. C.A.); reversed in part (1997), 161 Sask. R. 241, [1998] 5 W.W.R. 523, 44 M.P.L.R. (2d) 203 (Sask. Q.B.)

Counsel: *Gary D. Young, Q.C., Denis I. Quon, M. Kim Anderson*, for Appellant

Michael Morris, G.L. Gerrand, Q.C., for Respondent

Subject: Public; Civil Practice and Procedure; Torts

Highways and streets --- Maintenance and repair — Duty to repair — To what duty extends — Traffic signs and signals

Plaintiff's appeal from order dismissing action against municipality was allowed — Road must be kept in such reasonable state of repair that users exercising ordinary care might travel upon it with safety — Accident occurred at dangerous part of road where sign warning motorists should have been placed — Even though impaired, driver was not driving recklessly such that he would have missed or ignored sign, if erected.

Municipal law --- Municipal liability — Negligence — General principles

Plaintiff's appeal from order dismissing action against municipality was allowed — Road must be kept in such reasonable state of repair that users exercising ordinary care might travel upon it with safety — Municipality knew or should have known of disrepair of road and was liable under s. 192 of Rural Municipality Act, 1989 — Accident occurred at dangerous part of road where sign warning motorists should have been placed — Rural

Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Rues et autoroutes --- Entretien et remise en état — Obligation de remettre en état — Étendue de l'obligation — Panneaux de signalisation et signaux

Accueil du pourvoi interjeté par le demandeur à l'encontre de l'ordonnance rejetant son action contre la municipalité — Chemin doit être tenu dans un état raisonnable d'entretien afin que les utilisateurs devant l'emprunter, en prenant des précautions normales, puissent y circuler en sécurité — Accident a eu lieu sur une portion dangereuse d'un chemin où il aurait dû y avoir un panneau avertissant les automobilistes du danger — Même si le conducteur avait les facultés affaiblies, il ne conduisait pas d'une façon téméraire qui l'aurait empêché de voir, ou qui lui aurait permis de faire abstraction, d'un panneau, s'il y en avait eu un.

Droit municipal --- Responsabilité municipale — Négligence — Principes généraux

Accueil du pourvoi interjeté par le demandeur à l'encontre de l'ordonnance rejetant son action contre la municipalité — Chemin doit être tenu dans un état raisonnable d'entretien afin que les utilisateurs devant l'emprunter, en prenant des précautions normales, puissent y circuler en sécurité — Municipalité connaissait ou aurait dû connaître le mauvais état du chemin; elle était donc responsable en vertu de l'art. 192 de The Rural Municipality Act, 1989 — Accident a eu lieu sur une partie dangereuse d'un chemin où il aurait dû y avoir un panneau avertissant les automobilistes du danger — Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

The plaintiff was a passenger in a motor vehicle driven by N. The vehicle was involved in an accident, which rendered the plaintiff a quadriplegic. At trial, N was found negligent in taking the curve in the rural road at an excessive rate of speed while impaired. The evidence established that N had travelled the road three times in the same direction in the preceding 18 to 20 hours. The municipality was also found to be at fault for breaching its duty to keep the road in a reasonable state of repair as required by s. 192 of *The Rural Municipality Act, 1989*. The trial judge held that it was reasonable to expect the municipality to erect and maintain a sign warning motorists of the hazard. The trial judge found that the plaintiff was 15 per cent contributorily negligent, the driver was 50 per cent liable and the municipality was 35 per cent liable. The Court of Appeal overturned the trial judge's finding that the municipality was negligent and dismissed the plaintiff's action against it. The plaintiff appealed.

Held: The appeal was allowed.

Per Iacobucci and Major JJ. (McLachlin C.J.C., L'Heureux-Dubé and Arbour JJ. concurring): The standard of review to be applied by an appellate court to the decision of the trial judge is that of palpable and overriding error. Palpable means "plainly seen". The standard of review for questions of law is that of correctness and for findings of fact is that of palpable and overriding error. There is a presumption of fitness in favour of the trial judge. The bases for deferring to the findings of fact of the trial judge are to limit the number, length and cost of appeals, to promote the autonomy and integrity of trial proceedings and to recognize the expertise of the trial judge and his or her advantageous position. The standard of palpable and overriding error also applies to the inferences of fact drawn by the trial judge. Questions of mixed fact and law which are findings of negligence should also be accorded great deference, except those which amount to an incorrect statement of the legal standard.

The municipality has a statutory obligation to keep the road in such a reasonable state of repair that those

requiring to use it might, exercising ordinary care, travel upon it with safety. The trial judge considered the conduct of an ordinary or reasonable motorist approaching the curve in the road. The trial judge's reliance on the evidence of some witnesses as opposed to others was insufficient proof that she forgot, ignored or misconceived the evidence. The trial judge apportioned negligence between the driver and the municipality in a way that entailed a consideration of the ordinary driver. The trial judge did not adopt the de facto speed limit of 80 km/h as the speed of the ordinary motorist approaching the curve. The trial judge implicitly found that the curve could not be taken safely at greater than 60 km/h on a dry road and 50 km/h on a wet road. She did not commit a palpable and overriding error.

Section 192(3) of *The Rural Municipality Act, 1989* required the plaintiff to show that the municipality knew or should have known of the disrepair of the road before it could be found to have breached its duty of care under the Act. The issue was one of mixed fact and law. The existence of the prior accidents was simply a factor in finding that the municipality should have been put on notice with respect to the condition of the road. The trial judge based her conclusion on the perspective of a prudent municipal councillor and drew the inference that the municipality should have been aware of the permanent feature of the road which presented a hazard. The burden of proof was not shifted to the municipality. The municipality did not rebut the inference that it ought to have been aware of the danger. The trial judge's findings of fact on causation were reasonable and did not reach the level of a palpable and overriding error. The accident occurred at a dangerous part of the road where a warning sign should have been erected; driver N's degree of impairment increased his risk of not reacting even if there had been a sign; even so, N was not driving so recklessly that he would have been expected to miss or ignore a warning sign. The trial judge's judgment should be restored.

Per Bastarache J. (dissenting) (Gonthier, Binnie and LeBel JJ. concurring): The trial judge erred in law by failing to apply the correct standard of care to the municipality. The appellate court was entitled to conclude that inferences of fact made by the trial judge were clearly wrong. There is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by her and concluding that the inference was not reasonably supported by those facts. A trial judge's conclusions on questions of mixed fact and law in negligence actions need not be accorded deference in every case. The municipality's duty of care is limited to a duty to repair to a standard which permits drivers exercising ordinary care to proceed with safety. The mere existence of a hazard does not give rise to a duty to erect a sign. The fact that the hazard was hidden did not automatically give rise to the conclusion that it would pose a risk to a reasonable driver, nor did the expert testimony relied on support that finding. The trial judge's factual findings did not support the conclusion that the municipality was in breach of its duty. A more in-depth analysis of the state of the road was required. The Court of Appeal was correct in finding that the road was obviously not designed to accommodate travel at a general speed of 80 km/h or that drivers would be somehow fooled by the dual nature of the road. The trial judge made both errors of law and palpable and overriding errors of fact in determining that the municipality should have known of the alleged state of disrepair of the road. The trial judge failed to determine whether knowledge should be imputed to the municipality from the perspective of what a prudent municipal councillor should have known. The municipality did not have actual knowledge of prior accidents, which had occurred on different portions of the road than the subject location. The mere occurrence of an accident did not indicate a duty to post a sign. The evidence indicated that the accident occurred as a result of N's level of impairment and not from any failure on the municipality's part. As the legislature had clearly imposed a statutory duty of care on the municipality, it was not necessary to find a common law duty of care. It was only reasonable to expect a municipality to foresee accidents which occurred as a result of the conditions of the road, not the conditions of the driver. The appeal should be dismissed.

Le demandeur est devenu quadriplégique après avoir été passager dans un véhicule à moteur, conduit par N, impliqué dans un accident. Lors du procès, il a été décidé que N avait fait preuve de négligence en abordant la courbe du chemin rural à une vitesse excessive alors qu'il avait les facultés affaiblies. La preuve a démontré que N avait emprunté trois fois ce chemin dans la même direction durant les 18 à 20 heures précédant l'accident. Il a aussi été décidé que la municipalité était fautive parce qu'elle avait manqué à son obligation de tenir la route dans un état raisonnable d'entretien tel qu'il était exigé par l'art. 192 de *The Rural Municipality Act, 1989*. La juge de première instance a statué qu'il était raisonnable de s'attendre à ce que la municipalité pose et maintienne en place des panneaux avertissant les automobilistes du danger. La juge a attribué 15 pour cent de la responsabilité au demandeur en raison de sa négligence concourante, 50 pour cent au conducteur et 35 pour cent à la municipalité. La Cour d'appel a infirmé la conclusion de la juge de première instance selon laquelle la municipalité avait été négligente et elle a rejeté l'action intentée contre celle-ci par le demandeur. Ce dernier a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Iacobucci, Major, JJ. (McLachlin, J.C.C., L'Heureux-Dubé, Arbour, JJ., souscrivant): La norme de contrôle devant être appliquée par une cour d'appel à l'égard d'une décision du juge de première instance est celle de l'erreur manifeste et dominante. Manifeste signifie « évidente ». La norme de contrôle applicable aux questions de droit est la décision correcte; celle applicable aux conclusions de fait, l'erreur manifeste et dominante. Il existe en faveur du juge une présomption d'aptitude à juger. On doit faire preuve de retenue à l'égard des conclusions de fait tirées par la juge dans le but de: diminuer le nombre d'appels, leur durée et leur coût; favoriser l'autonomie et l'intégrité des procédures judiciaires; et reconnaître la compétence du juge de première instance ainsi que sa position avantageuse. La norme de l'erreur manifeste et dominante s'applique aussi aux inférences de fait tirées par le juge de première instance. Il faut aussi faire preuve d'une grande retenue à l'égard des questions mixtes de fait et de droit qui sont des conclusions de négligence, sauf à l'égard de celles qui sont équivalentes à une formulation incorrecte de la norme juridique.

La municipalité avait une obligation légale de tenir le chemin dans un état raisonnable d'entretien afin que les utilisateurs devant l'emprunter, en prenant des précautions normales, puissent y circuler en sécurité. La juge de première instance a examiné le comportement d'un automobiliste normal ou raisonnable qui s'approche de la courbe du chemin. Le fait qu'elle ait retenu le témoignage de certains témoins seulement n'était pas suffisant pour démontrer qu'elle avait oublié, négligé ou mal interprété la preuve. La juge de première instance a réparti la responsabilité entre le conducteur et la municipalité d'une façon qui tenait compte du conducteur normal. Elle n'a pas accepté la limite de vitesse de facto de 80 km/h comme la vitesse de l'automobiliste normal qui s'approche de la courbe. La juge a implicitement conclu que la courbe ne pouvait être empruntée de façon sécuritaire à une vitesse plus grande que 60 km/h sur une route sèche et 50 km/h sur une route mouillée. Elle n'a pas commis d'erreur manifeste et dominante.

Selon l'art. 192(3) de *The Rural Municipality Act, 1989*, le demandeur devait prouver que la municipalité connaissait ou devait connaître le mauvais état de la route pour qu'il soit décidé que celle-ci avait manqué à son obligation de diligence prévue à la Loi. Il s'agissait d'une question mixte de fait et de droit. L'existence d'accidents antérieurs ne constituait qu'un des facteurs ayant mené à la conclusion que la municipalité aurait dû être avertie de l'état de la route. La conclusion de la juge de première instance était fondée sur le point de vue d'un conseiller municipal prudent et la juge a tiré l'inférence que la municipalité aurait dû connaître la caractéristique permanente du chemin qui était dangereuse. Le fardeau de preuve n'est pas devenu celui de la municipalité. La municipalité n'a pas réussi à repousser l'inférence qu'elle aurait dû connaître le danger. Les

conclusions de fait de la juge de première instance relativement au lien de causalité étaient raisonnables et ne constituaient pas une erreur manifeste et dominante. L'accident a eu lieu sur une partie dangereuse du chemin, à un endroit où il aurait dû y avoir un panneau d'avertissement; le niveau de facultés affaiblies du conducteur, N, a augmenté le risque qu'il ne puisse réagir même s'il y avait eu un panneau; et, encore là, N ne conduisait pas de façon si téméraire que l'on aurait pu s'attendre à ce qu'il ne voie pas le panneau d'avertissement ou à ce qu'il l'ignore. Le jugement rendu par la juge de première instance devrait être rétabli.

Bastarache, J. (dissident) (Gonthier, Binnie, LeBel, JJ., souscrivant): La juge de première instance a commis une erreur de droit lorsqu'elle n'a pas appliqué la bonne norme de diligence raisonnable à l'égard de la municipalité. Le tribunal d'appel avait le droit de conclure que les inférences de fait tirées par la juge de première instance était évidemment erronées. Il n'y avait aucune différence entre conclure qu'il était « déraisonnable » ou « manifestement erroné » pour un juge de tirer une inférence des faits qu'il a retenus et conclure que l'inférence n'était pas raisonnablement appuyée par ces faits-là. Il n'est pas nécessaire de faire preuve de retenue, dans tous les cas, à l'égard des conclusions du juge de première instance relatives aux questions mixtes de fait et de droit dans le cadre d'actions en négligence. L'obligation de diligence de la municipalité ne se limite qu'à un devoir de réparer, qui lui-même se limite à une norme permettant aux conducteurs faisant preuve de précautions normales de voyager en sécurité. La simple existence d'un danger ne donne pas lieu à une obligation de poser un panneau. Le fait qu'il s'agissait d'un danger caché ne soulevait pas automatiquement la conclusion qu'il poserait un risque pour le conducteur raisonnable et cette conclusion n'était pas non plus soulevée par le témoignage d'expert qui l'appuyait. Les conclusions de fait de la juge de première instance n'appuyaient pas la conclusion que la municipalité avait manqué à son obligation. Il aurait été nécessaire de faire une analyse plus poussée de l'état du chemin. La Cour d'appel a conclu à bon droit que le chemin n'était évidemment pas conçu pour y voyager à une vitesse générale de 80 km/h ou que les conducteurs seraient induits en erreur par la nature hybride du chemin. La juge de première instance a fait des erreurs de droit et des erreurs de fait manifestes et dominantes lorsqu'elle a décidé que la municipalité aurait dû connaître le mauvais état allégué du chemin. La juge n'a pas décidé s'il fallait prêter à la municipalité la connaissance requise en considérant cette question du point de vue d'un conseiller municipal prudent. La municipalité n'avait pas une connaissance réelle des accidents antérieurs, lesquels avaient eu lieu à des endroits différents sur le chemin de celui concerné. Le simple fait qu'un accident ait eu lieu n'établissait pas qu'il y avait une obligation de poser un panneau. La preuve démontrait que l'accident avait eu lieu à cause du niveau de facultés affaiblies de N et non à cause d'un manquement de la municipalité. Puisque le législateur avait clairement imposé dans la loi une obligation de diligence à la municipalité, il n'était pas nécessaire de conclure à l'existence d'une telle obligation en vertu de la common law. Il était raisonnable de s'attendre à ce qu'une municipalité prévoie les accidents qui peuvent avoir lieu à cause des conditions de la route et non à cause de l'état du chauffeur. Le pourvoi devrait être rejeté.

Cases considered by *Iacobucci, Major JJ.*:

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

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

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

Consolboard Inc. v. MacMillan Bloedel (Sask.) Ltd., [1981] 1 S.C.R. 504, 56 C.P.R. (2d) 145, 35 N.R. 390,

122 D.L.R. (3d) 203, 1981 CarswellNat 582F (S.C.C.) — referred to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases considered by *Bastarache J.*:

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

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

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

v. Nova Scotia Pharmaceutical Society (No. 2)) 114 N.S.R. (2d) 91, 1992 CarswellNS 15, 313 A.P.R. 91, 1992 CarswellNS 353, [1992] S.C.J. No. 67 (S.C.C.) — considered

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

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

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

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

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

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

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

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

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

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

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

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

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

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

considered

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Statutes considered by *Iacobucci, Major JJ.*:

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

Generally — referred to

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

Generally — considered

s. 192 — considered

s. 192(3) — considered

Statutes considered by *Bastarache J.*:

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

Generally — referred to

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

Generally — referred to

s. 33(1) — considered

s. 33(2) — considered

s. 44(1) — considered

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

Generally — referred to

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

Generally — considered

s. 192 — considered

s. 192(1) — considered

s. 192(2) — considered

s. 192(3) — considered

Words and phrases considered

PALPABLE

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

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

Termes et locutions cités

MANIFESTE

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

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

APPEAL by plaintiff from judgment reported at 2000 SKCA 12, 2000 CarswellSask 50, [2000] 4 W.W.R. 173, 50 M.V.R. (3d) 70, 189 Sask. R. 51, 216 W.A.C. 51, 9 M.P.L.R. (3d) 126, [2000] S.J. No. 58 (Sask. C.A.), allowing appeal by municipality from finding of liability for negligence.

POURVOI du demandeur à l'encontre du jugement publié à 2000 SKCA 12, 2000 CarswellSask 50, [2000] 4 W.W.R. 173, 50 M.V.R. (3d) 70, 189 Sask. R. 51, 216 W.A.C. 51, 9 M.P.L.R. (3d) 126, [2000] S.J. No. 58 (Sask. C.A.), qui a accueilli le pourvoi de la municipalité à l'encontre de la conclusion l'ayant déclarée responsable vu sa négligence.

Iacobucci, Major JJ.:

I. Introduction

1 A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

2 Authority for this abounds particularly in appellate courts in Canada and abroad (see *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (Ont. C.A.); *Schwartz v. R.*, [1996] 1 S.C.R. 254 (S.C.C.); *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 (S.C.C.); *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60 (S.C.C.)). In addition scholars, national and

international, endorse it (see C. A. Wright in "The Doubtful Omniscience of Appellate Courts" (1957), 41 *Minn. L. Rev.* 751, at p. 780; and the Honourable R. P. Kerans in *Standards of Review Employed by Appellate Courts* (1994); and American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts* (1995), at pp. 24-25).

3 The role of the appellate court was aptly defined in *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (B.C. C.A.), at p. 204, where it was stated:

> The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

4 While the theory has acceptance, consistency in its application is missing. The foundation of the principle is as sound today as 100 years ago. It is premised on the notion that finality is an important aim of litigation. There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result. Their role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge.

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

6 The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal to reverse the trial judge the "palpable and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.

II. The Role of the Appellate Court in the Case at Bar

7 Given that an appeal is not a retrial of a case, consideration must be given to the applicable standard of review of an appellate court on the various issues which arise on this appeal. We therefore find it helpful to discuss briefly the standards of review relevant to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

A. Standard of Review for Questions of Law

8 On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: *Kerans*, *supra*, at p. 90.

9 There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. The importance of this principle was recognized by this Court in *Woods Manufacturing Co. v. R.*, [1951] S.C.R. 504 (S.C.C.), at p. 515:

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously

> respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced ... should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.

A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by *Kerans*, *supra*, at p. 5:

> The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.

Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

B. Standard of Review for Findings of Fact

10 The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802 (S.C.C.), at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12 (S.C.C.), at para. 42; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.) , at para. 57. While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.

11 A fundamental reason for *general* deference to the trial judge is the presumption of fitness — a presumption that trial judges are just as competent as appellate judges to ensure that disputes are resolved justly. Kerans, *supra*, at pp. 10-11, states that:

> If we have confidence in these systems for the resolution of disputes, we should assume that those decisions are just. The appeal process is part of the decisional process, then, only because we recognize that, despite all effort, errors occur. An appeal should be the exception rather than the rule, as indeed it is in Canada.

12 With respect to findings of fact in *particular*, in *Gottardo Properties*, *supra*, Laskin J.A. summarized the purposes underlying a deferential stance as follows (at para. 48):

> Deference is desirable for several reasons: to limit the number and length of appeals, to promote the autonomy and integrity of the trial or motion court proceedings on which substantial resources have been expended, to preserve the confidence of litigants in those proceedings, to recognize the competence of the trial judge or motion judge and to reduce needless duplication of judicial effort with no corresponding improvement in the quality of justice.

Similar concerns were expressed by La Forest J. in *Schwartz*, *supra*, at para. 32:

> It has long been settled that appellate courts must treat a trial judge's findings of fact with great deference. The rule is principally based on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony at trial. ... Others have also pointed out additional judicial policy concerns to justify the rule. Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact; see R. D. Gibbens, "Appellate Review of Findings of Fact" (1992), 13 *Adv. Q.* 445, at pp. 445-48; *Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191, at p. 204.

See also in the context of patent litigation, *Consolboard Inc. v. MacMillan Bloedel (Sask.) Ltd.*, [1981] 1 S.C.R. 504 (S.C.C.), at p. 537.

13 In *Anderson v. Bessemer (City)*, 470 U.S. 564 (U.S. N.C. 1985), at pp. 574 -75, the United States Supreme Court also listed numerous reasons for deferring to the factual findings of the trial judge:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than a 'tryout on the road.'" ... For these reasons, review of factual findings under the clearly-erroneous standard — with its deference to the trier of fact — is the rule, not the exception.

14 Further comments regarding the advantages possessed by the trial judge have been made by R. D. Gibbens in "Appellate Review of Findings of Fact" (1992), 13 *Adv. Q.* 445, at p. 446:

> The trial judge is said to have an expertise in assessing and weighing the facts developed at trial. Similarly, the trial judge has also been exposed to the entire case. The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.

The corollary to this recognized advantage of trial courts and judges is that appellate courts are *not* in a favourable position to assess and determine factual matters. Appellate court judges are restricted to reviewing written transcripts of testimony. As well, appeals are unsuited to reviewing voluminous amounts of evidence. Finally, appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole.

15 In our view, the numerous bases for deferring to the findings of fact of the trial judge which are discussed in the above authorities can be grouped into the following three basic principles.

(1) Limiting the Number, Length and Cost of Appeals

16 Given the scarcity of judicial resources, setting limits on the scope of judicial review is to be encouraged. Deferring to a trial judge's findings of fact not only serves this end, but does so on a principled basis. Substantial resources are allocated to trial courts for the purpose of assessing facts. To allow for wide-ranging review of the trial judge's factual findings results in needless duplication of judicial proceedings with little, if any improvement in the result. In addition, lengthy appeals prejudice litigants with fewer resources, and frustrate the goal of providing an efficient and effective remedy for the parties.

(2) Promoting the Autonomy and Integrity of Trial Proceedings

17 The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.

(3) Recognizing the Expertise of the Trial Judge and His or Her Advantageous Position

18 The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

C. Standard of Review for Inferences of Fact

19 We find it necessary to address the appropriate standard of review for factual inferences because the reasons of our colleague suggest that a lower standard of review may be applied to the inferences of fact drawn by a trial judge. With respect, it is our view, that to apply a lower standard of review to inferences of fact would be to depart from established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact.

20 Our colleague acknowledges that, in *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.), this Court determined that a trial judge's inferences of fact and findings of fact should be accorded a similar degree of deference. The relevant passage from *Geffen* is the following (*per* Wilson J., at pp. 388-89):

> It is by now well established that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it is established that the trial judge made some palpable and overriding error which affected his assessment of the facts. ... Even where a finding of fact is not contingent upon credibility, this Court has maintained a non-interventionist approach to the review of trial court findings. ...
>
> And even in those cases where a finding of fact is neither inextricably linked to the credibility of the testifying witness nor based on a misapprehension of the evidence, the rule remains that appellate review should be limited to those instances where a manifest error has been made. Hence, in *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, this Court refused to overturn a trial judge's finding that certain goods were defective, stating at pp. 84-85 that it is wrong for an appellate court to set aside a trial judgment where the only point at issue is the interpretation of the evidence as a whole (citing *Métivier v. Cadorette*, [1977] 1 S.C.R. 371).

This view has been reiterated by this Court on numerous occasions: see *Palsky v. Humphrey*, [1964] S.C.R. 580

(S.C.C.), at p. 583; *Schwartz, supra*, at para. 32; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at p. 426, *per* La Forest J.; *Toneguzzo-Norvell, supra*. The United States Supreme Court has taken a similar position: see *Anderson, supra*, at p. 577.

21 In discussing the standard of review of the trial judge's inferences of fact, our colleague states, at para. 103, that:

> In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. ... While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact. [Emphasis added.]

With respect, we find two problems with this passage. First, in our view, the standard of review is not to verify that the inference can be *reasonably supported* by the findings of fact of the trial judge, but whether the trial judge made a *palpable and overriding* error in coming to a factual conclusion based on accepted facts, which implies a stricter standard.

22 Second, with respect, we find that by drawing an analytical distinction between factual findings and factual inferences, the above passage may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.

23 We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the *inference-drawing process itself* is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. As we discuss below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.

24 In addition, in distinguishing inferences of fact from findings of fact, our colleague states, at para. 102, that deference to findings of fact is "principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand", a rationale which does not bear on factual inferences. With respect, we disagree with this view. As we state above, there are numerous reasons for showing deference to the factual findings of a trial judge, many of which are equally applicable to all factual conclusions

of the trial judge. This was pointed out in *Schwartz*, *supra*. After listing numerous policy concerns justifying a deferential approach to findings of fact, at para. 32 La Forest J. goes on to state:

> This explains why the rule [that appellate courts must treat a trial judge's findings of fact with great deference] applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge. [Emphasis added.]

Recent support for deferring to all factual conclusions of the trial judge is found in *Toneguzzo-Norvell*, *supra*. McLachlin J. (as she then was) for a unanimous Court stated, at pp. 121-22:

> A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.
>
> . . . . .
>
> I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of facts does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge. [Emphasis added.]

We take the above comments of McLachlin J. to mean that, although the same high standard of deference applies to the entire range of factual determinations made by the trial judge, where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged. This does not, however, imply that there is a lower standard of review where witness credibility is not in issue, or that there are not numerous policy reasons supporting deference to all factual conclusions of the trial judge. In our view, this is made clear by the underlined portion of the above passage. The essential point is that making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review.

25 Although the trial judge will always be in a distinctly privileged position when it comes to assessing the credibility of witnesses, this is not the *only* area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both. As such, we respectfully disagree with our colleague's view that the *principal* rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on *all* conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge — that of palpable and overriding error.

D. Standard of Review for Questions of Mixed Fact and Law

26 At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual. Because of this similarity, the two types of questions are sometimes confounded. This confusion was pointed out by A. L. Goodhart in "Appeals on Questions of Fact" (1955), 71 *L.Q.R.* 402, at p. 405:

> The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."

In the case at bar, there are examples of both types of questions. The issue of whether the municipality ought to have known of the hazard in the road involves weighing the underlying facts and making factual findings as to the knowledge of the municipality. It also involves applying a legal standard, which in this case is provided by s. 192(3), to these factual findings. Similarly, the finding of negligence involves weighing the underlying facts, making factual conclusions therefrom, and drawing an inference as to whether or not the municipality failed to exercise the legal standard of reasonable care and therefore was negligent.

27 Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In *Southam*, *supra*, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> ... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

28 However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: *Southam*, *supra*, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in *Southam*, *supra*, at para. 37:

> ... the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition

> approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

29 When the question of mixed fact and law at issue is a finding of negligence, this Court has held that a finding of negligence by the trial judge should be deferred to by appellate courts. In *Jaegli Enterprises Ltd. v. Ankenman*, [1981] 2 S.C.R. 2 (S.C.C.), at p. 4, Dickson J. (as he then was) set aside the holding of the British Columbia Court of Appeal that the trial judge had erred in his finding of negligence on the basis that "it is wrong for an appellate court to set aside a trial judgment where there is not palpable and overriding error, and the only point at issue is the interpretation of the evidence as a whole" (see also *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78 (S.C.C.)).

30 This more stringent standard of review for findings of negligence is appropriate, given that findings of negligence at the trial level can also be made by juries. If the standard were instead correctness, this would result in the appellate court assessing even jury findings of negligence on a correctness standard. At present, absent misdirection on law by the trial judge, such review is not available. The general rule is that courts accord great deference to a jury's findings in civil negligence proceedings:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

McLean v. McCannell, [1937] S.C.R. 341 (S.C.C.), at p. 343; see also *Dubé v. Labar*, [1986] 1 S.C.R. 649 (S.C.C.), at p. 662, and *Canadian National Railway v. Muller* (1933), [1934] 1 D.L.R. 768 (S.C.C.). To adopt a correctness standard would change the law and undermine the traditional function of the jury. Therefore, requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury reinforces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury.

31 Where, however, the erroneous finding of negligence of the trial judge rests on an incorrect statement of the legal standard, this can amount to an error of law. This distinction was pointed out by Cory J. in *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670 (S.C.C.), at pp. 690-91:

> The definition of the standard of care is a mixed question of law and fact. It will usually be for the trial judge to determine, in light of the circumstances of the case, what would constitute reasonable conduct on the part of the legendary reasonable man placed in the same circumstances. In some situations a simple reminder may suffice while in others, for example when a very young child is the passenger, the driver may have to put the seat belt on the child himself. In this case, however, the driver took no steps whatsoever to ensure that the child passenger wore a seat belt. It follows that the trial judge's decision on the issue amounted to a finding that there was no duty at all resting upon the driver. This was an error of law.

Galaske, supra, is an illustration of the point made in *Southam, supra*, of the potential to extricate a purely legal question from what appears to be a question of mixed fact and law. However, in the absence of a legal error or a palpable and overriding error, a finding of negligence by a trial judge should not be interfered with.

32 We are supported in our conclusion by the analogy which can be drawn between inferences of fact and questions of mixed fact and law. As stated above, both involve drawing inferences from underlying facts. The difference lies in whether the inference drawn relates to a legal standard or not. Because both processes are intertwined with the weight assigned to the evidence, the numerous policy reasons which support a deferential stance to the trial judge's inferences of fact, also, to a certain extent, support showing deference to the trial judge's inferences of mixed fact and law.

33 Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review. This nuance was recognized by this Court in *St-Jean c. Mercier*, 2002 SCC 15 (S.C.C.), at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (*Southam*, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. [Emphasis added.]

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

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

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

36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult

to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, *supra*, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

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

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

A. The Appropriate Standard of Review

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

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

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

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

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

15:

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

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

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

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

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.
>
> There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the *maximum* speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be *safely* negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet.
>
> ... where the existence of that bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation. [Italics in original; underlining added.]

([1998] 5 W.W.R. 523, at paras. 84-86)

42 In our view, this passage indicates that the trial judge did consider how a motorist exercising ordinary care would approach the curve in question. The implication of labelling the curve a "hidden hazard" which is "not readily apparent to users of the road", is that the danger is of the type that cannot be anticipated. This in turn implies that, even if the motorist exercises ordinary care, he or she will not be able to react to the curve. As well, the trial judge referred explicitly to the conduct of a motorist exercising ordinary care: "it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a *motorist, exercising ordinary care*, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86 (emphasis added)).

43 With respect to the *speed* of a motorist approaching the curve, there is also an indication that the trial judge considered the conduct of an ordinary motorist. First, she stated that she accepted the evidence of Mr. Anderson and Mr. Werner with respect to the finding that the curve constituted a hazard to the public. The evidence given by these experts suggests that between 60 and 80 km/h is a reasonable speed to drive parts of this road, and at that speed, the curve presents a hazard. Their evidence also indicates their general opinion that the curve was a hazardous one. Mr. Anderson refers to the curve being difficult to negotiate at "normal speeds". Also, Mr. Anderson states that "if you're not aware that this curve is there, the sharp course of the curve, and you enter too far into it before you realize that the curve is there, then you have to do a tighter radius than 118 metres in order to get back on track to be able to negotiate the second curve". He also states that "you could be lulled into thinking you've got an 80 km/h road until you are too far into the tight curve to able to respond".

44 The Court of Appeal found that, given the nature and condition of Snake Hill Road, the contention that this rural road would be taken at 80 km/h by the ordinary motorist was untenable. However, it is clear from the trial judge's reasons that she did not take 80 km/h as the speed at which the ordinary motorist would approach the curve. Instead she found, based on expert evidence, that "this curve cannot be *safely* negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet" (para. 85 (emphasis in original)). From this finding, coupled with the finding that the curve was hidden and unexpected, the logical conclusion is that the trial judge found that a motorist exercising ordinary care could easily be deceived into approaching the curve at speeds in excess of the safe speed for the curve, and subsequently be taken by surprise. Therefore, the trial judge found that the curve was hazardous to the *ordinary motorist* and it follows that she applied the correct standard of care.

45 In our respectful view, our colleague errs in agreeing with the Court of Appeal's finding that the trial judge should have addressed the conduct of the ordinary motorist more fully (para. 47). At para. 42, he writes:

> A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question.

And later, he states, "In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road" (para. 48). With respect, requiring the trial judge to have made this specific inquiry in her reasons is inconsistent with *Van de Perre*, *supra*, which makes it clear that an omission or a failure to discuss a factor in depth is not, in and of itself, a basis for interfering with the findings of the trial judge and reweighing the evidence. As we note above, it is clear that although the trial judge may not have conducted an extensive review of this element of the *Partridge*

test, she did indeed consider this factor by stating the correct test, then applying this test to the facts.

46 We note that in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses. However, her reliance on the evidence of Mr. Anderson and Mr. Werner is insufficient proof that she "forgot, ignored, or misconceived" the evidence. The full record was before the trial judge and we can presume that she reviewed all of it, absent further proof that the trial judge forgot, ignored or misapprehended the evidence, leading to an error in law. It is open to a trial judge to prefer the evidence of some witnesses over others: *Toneguzzo-Norvell*, *supra*, at p. 123. Mere reliance by the trial judge on the evidence of some witnesses over others cannot on its own form the basis of a "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre*, *supra*, at para. 15). This is in keeping with the narrow scope of review by an appellate court applicable in this case.

47 A further indication that the trial judge considered the conduct of an ordinary motorist on Snake Hill Road is her finding that both Mr. Nikolaisen and the municipality breached their duty of care to Mr. Housen, and that the defendant Nikolaisen was 50 percent contributorily negligent. Since a finding of negligence implies a failure to meet the ordinary standard of care, and since Mr. Nikolaisen's negligence related to his driving on the curve, to find that Mr. Nikolaisen's conduct on the curve failed to meet the standard of the ordinary driver implies a consideration of that ordinary driver on the curve. The fact that the trial judge distinguished the conduct of Mr. Nikolaisen in driving negligently on the road from the conduct of the municipality in negligently failing to erect a warning sign is evidence that the trial judge kept the municipality's legal standard clearly in mind in its application to the facts, and that she applied this standard to the *ordinary* driver, not the *negligent* driver.

48 To summarize, in the course of her reasons, the trial judge first stated the requisite standard of care from *Partridge*, *supra*, relating to the conduct of the ordinary driver. She then applied that standard to the facts referring again to the conduct of the ordinary driver. Finally, in light of her finding that the municipality breached this standard, she apportioned negligence between the driver and the municipality in a way which again entailed a consideration of the ordinary driver. As such, we are overwhelmingly drawn to the conclusion that the conduct of the ordinary driver was both considered and applied by the trial judge.

49 Thus, we conclude that the trial judge did not commit an error of law with respect to the municipality's standard of care. On this matter, we disagree with the basis for the re-assessment of the evidence undertaken by our colleague (paras. 122-142) and regard this re-assessment to be an unjustified intrusion into the finding of the trial judge that the municipality breached its standard of care. This finding is a question of mixed law and fact which should not be overturned absent a palpable and overriding error. As discussed below, it is our view that no such error exists, as the trial judge conducted a reasonable assessment based on her view of the evidence.

C. The Trial Judge Did Not Commit A Palpable or Overriding Error

50 Despite this high standard of review, the Court of Appeal found that a palpable and overriding error was made by the trial judge. With respect, this finding was based on the erroneous presumption that the trial judge accepted 80 km/h as the speed at which an ordinary motorist would approach the curve, a presumption which our colleague also adopts in his reasons (para. 133).

51 As discussed above, the trial judge's finding was that an ordinary motorist could approach the curve in excess of 60 km/h in dry conditions, and 50 km/h in wet conditions, and that at such speeds the curve was

hazardous. The trial judge's finding was not based on a particular speed at which the curve would be approached by the ordinary motorist. Instead, she found that, because the curve was hidden and sharper than would be anticipated, a motorist exercising ordinary care could approach it at greater than the speed at which it would be safe to negotiate the curve.

52 As we explain in greater detail below, in our opinion, not only is this assessment far from reaching the level of a palpable and overriding error, in our view, it is a sensible and logical way to deal with large quantities of conflicting evidence. It would be unrealistic to focus on some exact speed at which the curve would likely be approached by the ordinary motorist. The findings of the trial judge in this regard were the result of a reasonable and practical assessment of the evidence as a whole.

53 In finding a palpable and overriding error, Cameron J.A. relied on the fact that the trial judge adopted the expert evidence of Mr. Anderson and Mr. Werner which was premised on a *de facto* speed limit of 80 km/h taken from *The Highway Traffic Act*, S.S. 1986, c. H-3.1. However, whether or not the experts based their testimony on this limit, the trial judge did not adopt that limit as the speed of the ordinary motorist approaching the curve. Again, the trial judge found that the curve could not be taken safely at greater than 60 km/h dry and 50 km/h wet, and there is evidence in the record to support this finding. For example, Mr. Anderson states:

> If you don't anticipate the curve and you get too far into it before you start to do your correction then you can get into trouble even at, probably at 60. Fifty you'd have to be a long ways into it, but certainly at 60 you could.

It is notable too that both Mr. Anderson and Mr. Werner would have recommended installing a sign, warning motorists of the curve, with a posted limit of 50 km/h.

54 Although clearly the curve could not be negotiated safely at 80 km/h, it could also not be negotiated safely at much slower speeds. It should also be noted that the trial judge did not adopt the expert testimony of Mr. Anderson and Mr. Werner *in its entirety*. She stated: "There is a portion of Snake Hill Road that is a hazard to the public. *In this regard* I accept the evidence of Mr. Anderson and Mr. Werner" (para. 85 (emphasis added)). It cannot be assumed from this that she accepted a *de facto* speed limit of 80 km/h especially when one bears in mind (1) the trial judge's statement of the safe speeds of 50 and 60 km/h, and (2) the fact that both these experts found the road to be unsafe at much lower speeds than 80 km/h.

55 Given that the trial judge did not base her standard of care analysis on a *de facto* speed limit of 80 km/h, it then follows that the Court of Appeal's finding of a palpable and overriding error cannot stand.

56 Furthermore, the narrowly defined scope of appellate review dictates that a trial judge should not be found to have misapprehended or ignored evidence, or come to the wrong conclusions merely because the appellate court diverges in the inferences it draws from the evidence and chooses to emphasize some portions of the evidence over others. As we are of the view that the trial judge committed no error of law in finding that the municipality breached its standard of care, we are also respectfully of the view that our colleague's re-assessment of the evidence on this issue (paras. 52-65) is an unjustified interference with the findings of the trial judge, based on a difference of opinion concerning the inferences to be drawn from the evidence and the proper weight to be placed on different portions of the evidence. For instance, in the opinion of our colleague, based on some portions of the expert evidence, a reasonable driver exercising ordinary care would approach a rural road at 50 km/h or less, because a reasonable driver would have difficulty seeing the sharp radius of the curve and oncoming traffic (para. 52). However, the trial judge, basing her assessment on *other* portions of the expert

evidence, found that the nature of the road was such that a motorist could be deceived into believing that the road did not contain a sharp curve and thus would approach the road normally, unaware of the hidden danger.

57 We are faced in this case with conflicting expert evidence on the issue of the correct speed at which an ordinary motorist would approach the curve on Snake Hill Road. The differing inferences from the evidence drawn by the trial judge and the Court of Appeal amount to a divergence on what weight should be placed on various pieces of conflicting evidence. As noted by our colleague, Mr. Sparks was of the opinion that "[if] you can't see around the corner, then, you know, drivers would have a fairly strong signal ... that due care and caution would be required". Similar evidence of this nature was given by Mr. Nikolaisen, and indeed even by Mr. Anderson and Mr. Werner. This is contrasted with evidence such as that given by Mr. Anderson and Mr. Werner that a reasonable driver would be "lulled" into thinking that there is an 80 km/h road ahead of him or her.

58 As noted by McLachlin J. in *Toneguzzo-Norvell, supra*, at p. 122 and mentioned above, "the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact". In that case, a unanimous Court found that the Court of Appeal erred in interfering with the trial judge's factual findings, on the basis that it was open to the trial judge to place less weight on certain evidence and accept other, conflicting evidence which the trial judge found to be more convincing (*Toneguzzo-Norvell, supra,* at pp. 122-23). Similarly, in this case, the trial judge's factual findings concerning the proper speed to be used on approaching the curve should not be interfered with. It was open to her to choose to place more weight on certain portions of the evidence of Mr. Anderson and Mr. Werner, where the evidence was conflicting. Her assessment of the proper speed was a reasonable inference based on the evidence and does not reach the level of a palpable and overriding error. As such, the trial judge's findings with respect to the standard of care should not be overturned.

IV. Knowledge of the Municipality

59 We agree with our colleague that s. 192(3) of *The Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1, requires the plaintiff to show that the municipality knew or should have known of the disrepair of Snake Hill Road before the municipality can be found to have breached its duty of care under s. 192. We also agree that the evidence of the prior accidents, in and of itself, is insufficient to impute such knowledge to the municipality. However, we find that the trial judge did not err in her finding that the municipality knew or ought to have known of the disrepair.

60 As discussed, the question of whether the municipality knew or should have known of the disrepair of Snake Hill Road is a question of mixed fact and law. The issue is legal in the sense that the municipality is held to a legal standard of knowledge of the nature of the road, and factual in the sense of whether it had the requisite knowledge on the facts of this case. As we state above, absent an isolated error in law or principle, such a finding is subject to the "palpable and overriding" standard of review. In this case, our colleague concludes that the trial judge erred in law by failing to approach the question of knowledge from the perspective of a prudent municipal councillor, and holds that a prudent municipal councillor could not be expected to become aware of the risk posed to the ordinary driver by the hazard in question. He also finds that the trial judge erred in law by failing to recognize that the burden of proving knowledge rested with the plaintiff. With respect, we disagree with these conclusions.

61 The hazard in question is an unsigned and unexpected sharp curve. In our view, when a hazard is, like

this one, a permanent feature of the road which has been found to present a risk to the ordinary driver, it is open to the trial judge to draw an inference, on this basis alone, that a prudent municipal councillor ought to be aware of the hazard. In support of his conclusion on the issue of knowledge, our colleague states that the municipality's knowledge is inextricably linked to the standard of care, and ties his finding on the question of knowledge to his finding that the curve did not present a hazard to the ordinary motorist (para. 72). We agree that the question of knowledge is closely linked to the standard of care, and since we find that the trial judge was correct in holding that the curve presented a hazard to the ordinary motorist, from there it was open to the trial judge to find that the municipality ought to have been aware of this hazard. We further note that as a question of mixed fact and law this finding is subject to the "palpable and overriding" standard of review. On this point, however, we restrict ourselves to situations such as the one at bar where the hazard in question is a permanent feature of the road, as opposed to a temporary hazard which reasonably may not come to the attention of the municipality in time to prevent an accident from occurring.

62 In addition, our colleague relies on the evidence of the lay witnesses, Craig and Toby Thiel, who lived on Snake Hill Road, and who testified that they had not experienced any difficulties with it (para. 72). With respect, we find three problems with this reliance. First, since the curve was found to be a hazard based on its hidden and unexpected nature, relying on the evidence of those who drive the road on a daily basis does not, in our view, assist in determining whether the curve presented a hazard to the ordinary motorist, or whether the municipality ought to have been aware of the hazard. In addition, in finding that the municipality ought to have known of the disrepair, the trial judge clearly chose not to rely on the above evidence. As we state above, it is open for a trial judge to prefer some parts of the evidence over others, and to re-assess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court.

63 As well, since the question of knowledge is to be approached from the perspective of a prudent municipal councillor, we find the evidence of lay witnesses to be of little assistance. In *Ryan*, *supra*, at para. 28, Major J. stated that the applicable standard of care is that which "would be expected of an ordinary, reasonable and prudent person *in the same circumstances*" (emphasis added). Municipal councillors are elected for the purpose of managing the affairs of the municipality. This requires some degree of study and of information gathering, above that of the average citizen of the municipality. Indeed, it may in fact require consultation with experts to properly meet the obligation to be informed. Although municipal councillors are not experts, to equate the "prudent municipal councillor" with the opinion of lay witnesses who live on the road is incorrect in our opinion.

64 It is in this context that we view the following comments of the trial judge, at para. 90:

> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.

From this statement, we take the trial judge to have meant that, given the occurrence of prior accidents on this low-traffic road, the existence of permanent residents, and the type of drivers on the road, the municipality did not take the reasonable steps it should have taken in order to ensure that Snake Hill Road did not contain a hazard such as the one in question. Based on these factors, the trial judge drew the inference that the

municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question. This factual inference, grounded as it was on the trial judge's assessment of the evidence, was in our view, far from reaching the requisite standard of palpable and overriding error, proper.

65 Although we agree with our colleague that the circumstances of the prior accidents in this case do not provide a direct basis for the municipality to have had *knowledge* of the particular hazard in question, in the view of the trial judge, they should have *caused the municipality to investigate* Snake Hill Road, which in turn would have resulted in actual knowledge. In this case, far from causing the municipality to investigate, the evidence of Mr. Danger, who had been the municipal administrator for 20 years, was that, until the time of the trial, he was not even aware of the three accidents which had occurred between 1978 and 1988 on Snake Hill Road. As such, we do not find that the trial judge based her conclusion on any perspective other than that of a prudent municipal councillor, and therefore that she did not commit an error of law in this respect. Moreover, we do not find that she imputed knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road. The existence of the prior accidents was simply a factor which caused the trial judge to find that the municipality should have been put on notice with respect to the condition of Snake Hill Road (para. 90).

66 We emphasize that, in our view, the trial judge did not shift the burden of proof to the municipality on this issue. Once the trial judge found that there was a permanent feature of Snake Hill Road which presented a hazard to the ordinary motorist, it was open to her to draw an inference that the municipality ought to have been aware of the danger. Once such an inference is drawn, then, unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. In our view, this is what the trial judge did in the above passage when she states: "I am not satisfied that the R.M. has established that *in these circumstances* it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing" (para. 90 (emphasis added)). The fact that she drew such an inference is clear from the fact that this statement appears directly after her finding that the municipality ought to have known of the hazard based on the listed factors. Thus, it is our view that the trial judge did not improperly shift the burden of proof onto the municipality in this case.

67 As well, although the circumstances of the prior accidents in this case do not provide strong evidence that the municipality ought to have known of the hazard, proof of prior accidents is not a necessary condition to a finding of breach of the duty of care under s. 192 of *The Rural Municipality Act, 1989*. If this were so, the first victim of an accident on a negligently maintained road would not be able to recover, whereas subsequent victims in identical circumstances would. Although under s. 192(3) the municipality cannot be held responsible for disrepair of which it could not have known, it is not sufficient for the municipality to wait for an accident to occur before remedying the disrepair, and, in the absence of proof by the plaintiff of prior accidents, claim that it could not have known of the hazard. If this were the case, not only would the first victim of an accident suffer a disproportionate evidentiary burden, but municipalities would also be encouraged not to collect information pertaining to accidents on its roads, as this would make it more difficult for the plaintiff in a motor vehicle accident to prove that the municipality knew or ought to have known of the disrepair.

68 Although in this case the trial judge emphasized the prior accidents that the plaintiff did manage to prove, in our view, it is not necessary to rely on these accidents in order to satisfy s. 192(3). For the plaintiff to provide substantial and concrete proof of the municipality's knowledge of the state of disrepair of its roads, is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and in our view, it was reasonable for the trial judge to draw an inference of knowledge

from her finding that there was an ongoing state of disrepair.

69 To summarize our position on this issue, we do not find that the trial judge erred in law either by failing to approach the question from the perspective of a prudent municipal councillor, or by improperly shifting the burden of proof onto the defendant. As such, it would require a palpable and overriding error in order to overturn her finding that the municipality knew or ought to have known of the hazard, and, in our view, no such error was made.

V. Causation

70 We agree with our colleague's statement at para. 82 that the trial judge's conclusions on the cause of the accident was a finding of fact: *Cork v. Kirby MacLean Ltd.*, [1952] 2 All E.R. 402 (Eng. C.A.), at p. 407, quoted with approval in *Horsley v. MacLaren* (1969), 4 D.L.R. (3d) 557 (Ont. H.C.), at p. 566. Thus, this finding should not be interfered with absent palpable and overriding error.

71 The trial judge based her findings on causation on three points (at para. 101):

> (1) the accident occurred at a dangerous part of the road where a sign warning motorists of the hidden hazard should have been erected;
>
> (2) even if there had been a sign, Mr. Nikolaisen's degree of impairment did increase his risk of not reacting, or reacting inappropriately, to a sign;
>
> (3) even so, Mr. Nikolaisen was not driving recklessly such that one would have expected him to have missed or ignored a warning sign. Moments before, on departing the Thiel residence, he had successfully negotiated a sharp curve which he could see and which was apparent to him.

The trial judge concluded that, on a balance of probabilities, Mr. Nikolaisen would have reacted and possibly avoided an accident, if he had been given advance warning of the curve. However she also found that the accident was partially caused by the conduct of Mr. Nikolaisen, and apportioned fault accordingly, with 50 percent to Mr. Nikolaisen and 35 percent to the Rural Municipality (para. 102).

72 As noted above, this Court has previously held that "an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre, supra*, at para.15). In the present case, it is not clear from the trial judge's reasons which portions of the evidence of Mr. Laughlin, Craig and Toby Thiel and Paul Housen she relied upon, or to what extent. However, as we have already stated, the full evidentiary record was before the trial judge and, absent further proof that the omission in her reasons was due to her misapprehension or neglect of the evidence, we can presume that she reviewed the evidence in its entirety and based her factual findings on this review. This presumption, absent sufficient evidence of misapprehension or neglect is consistent with the high level of error required by the test of "palpable and overriding" error. We reiterate that it is open to the trial judge to prefer the testimony of certain witnesses over others and to place more weight on some parts of the evidence than others, particularly where there is conflicting evidence: *Toneguzzo-Norvell, supra*, at pp. 122-23. The mere fact that the trial judge did not discuss a certain point or certain evidence in depth is not sufficient grounds for appellate interference: *Van de Perre, supra*, at para.15.

73 For these reasons, we do not feel it appropriate to review the evidence of Mr. Laughlin and the lay

witnesses *de novo*. As we concluded earlier, the trial judge's finding of fact that a hidden hazard existed at the curve should not be interfered with. The finding of a hidden hazard that requires a sign formed part of the basis of her findings concerning causation. As her conclusions on the existence of a hidden hazard had a basis in the evidence, her conclusions on causation grounded in part on the hidden hazard finding also had a basis in the evidence.

74 As for the silence of the trial judge on the evidence of Mr. Laughlin, we observe only that the evidence of Mr. Laughlin appears to be general in nature and thus of limited utility. Mr. Laughlin admitted that he could only provide general comments on the effects of alcohol on motorists, but could not provide specific expertise on the actual effect of alcohol on an individual driver. This is significant, as the level of tolerance of an individual driver plays a key role in determining the actual effect of alcohol on the motorist; an experienced drinker, although dangerous, will probably perform better on the road than an inexperienced drinker. It is noteworthy that the trial judge believed the evidence of Mr. Anderson that Mr. Nikolaisen's vehicle was travelling at the relatively slow speed of between 53 to 65 km/h at the time of impact with the embankment. It was also permissible for the trial judge to rely on the evidence of lay witnesses that Mr. Nikolaisen had successfully negotiated an apparently sharp curve moments before the accident, rather than relying on the evidence of Mr. Laughlin, which was of a hypothetical and unspecific nature. Indeed, the hypothetical nature of Mr. Laughlin's evidence reflects the entire inquiry into whether Mr. Nikolaisen would have seen a sign and reacted, or the precise speed that would be taken by a reasonable driver upon approaching the curve. The abstract nature of such inquiries supports deference to the factual findings of the trial judge, and is consistent with the stringent standard imposed by the phrase "palpable and overriding error".

75 Therefore we conclude that the trial judge's factual findings on causation were reasonable and thus do not reach the level of a palpable and overriding error, and therefore should not have been interfered with by the Court of Appeal.

VI. Common Law Duty of Care

76 As we conclude that the municipality is liable under *The Rural Municipality Act, 1989*, we find it unnecessary to consider the existence of a common law duty in this case.

VII. Disposition

77 As we stated at the outset, there are important reasons and principles for appellate courts not to interfere improperly with trial decisions. Applying these reasons and principles to this case, we would allow the appeal, set aside the judgment of the Saskatchewan Court of Appeal, and restore the judgment of the trial judge, with costs throughout.

***Bastarache J.*:**

I — Introduction

78 This appeal arises out of a single-vehicle accident which occurred on July 18, 1992, on Snake Hill Road, a rural road located in the Municipality of Shellbrook. The appellant, Paul Housen, a passenger in the vehicle, was rendered a quadriplegic by the accident. At trial, the judge found that the driver of the vehicle, Douglas Nikolaisen, was negligent in travelling Snake Hill Road at an excessive rate of speed and in operating his

vehicle while impaired. The trial judge also found the respondent, the Municipality of Shellbrook, to be at fault for breaching its duty to keep the road in a reasonable state of repair as required by s. 192 of *The Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1. The Court of Appeal overturned the trial judge's finding that the respondent municipality was negligent. At issue in this appeal is whether the Court of Appeal had sufficient grounds to intervene in the decision of the lower court. The respondent has also asked this Court to overturn the trial judge's finding that the respondent knew or ought to have known of the alleged disrepair of Snake Hill Road and that the accident was caused in part by the negligence of the respondent. An incidental question is whether a common law duty of care exists alongside the statutory duty imposed on the respondent by s. 192.

79 I conclude that the Court of Appeal was correct to overturn the trial judge's finding that the respondent was negligent. Though I would not interfere with the trial judge's factual findings on this issue, I find that she erred in law by failing to apply the correct standard of care. I would also overturn the trial judge's conclusions with regard to knowledge and causation. In coming to the conclusion that the respondent knew or should have known of the alleged disrepair of Snake Hill Road, the trial judge erred in law by failing to consider the knowledge requirement from the perspective of a prudent municipal councillor and by failing to be attentive to the fact that the onus of proof was on the appellant. In addition, the trial judge drew an unreasonable inference by imputing knowledge to the respondent on the basis of accidents that occurred on other segments of the road while motorists were travelling in the opposite direction. The trial judge also erred with respect to causation. She misapprehended the evidence before her, drew erroneous conclusions from that evidence and ignored relevant evidence. Finally, I would not interfere with the decision of the courts below to reject the appellant's argument that a common law duty existed. It is unnecessary to impose a common law duty of care where a statutory duty exists. Moreover, the application of common law negligence principles would not affect the outcome in these proceedings.

II — Factual Background

80 The sequence of events which culminated in this tragic accident began to unfold some 19 hours before its occurrence on the afternoon of July 18, 1992. On July 17, Mr. Nikolaisen attended a barbeque at the residence of Craig and Toby Thiel, located on Snake Hill Road. He arrived in the late afternoon and had his first drink of the day at approximately 6:00 p.m. He consumed four or five drinks before leaving the Thiel residence at approximately 10:00 or 10:30 p.m. After returning home for a few hours, Mr. Nikolaisen proceeded to the Sturgeon Lake Jamboree, where he met up with the appellant. At the jamboree, Mr. Nikolaisen consumed eight or nine double rye drinks and several beers. The appellant was also drinking during this event. The appellant and Mr. Nikolaisen partied on the grounds of the jamboree for several hours. At approximately 4:30 a.m., the appellant left the jamboree with Mr. Nikolaisen. After travelling around the back roads for a period of time, they returned to the Thiel residence. It was approximately 8:00 a.m. The appellant and Mr. Nikolaisen had several more drinks over the course of the morning. Mr. Nikolaisen stopped drinking two or three hours before leaving the Thiel residence with the appellant at approximately 2:00 p.m.

81 A light rain was falling when the appellant and Mr. Nikolaisen left the Thiel residence, travelling eastbound with Mr. Nikolaisen behind the wheel of a Ford pickup truck. The truck swerved or "fish-tailed" as it turned the corner from the Thiel driveway onto Snake Hill Road. As Mr. Nikolaisen continued on his way over the course of a gentle bend some 300 metres in length, gaining speed to an estimated 65 km/h, the truck again fish-tailed several times. The truck went into a skid as Mr. Nikolaisen approached and entered a sharper right turn. Mr. Nikolaisen steered into the skid but was unable to negotiate the curve. The left rear wheel of the truck contacted an embankment on the left side of the road. The vehicle travelled on the road for approximately 30

metres when the left front wheel contacted and climbed an 18-inch embankment on the left side of the road. This second contact with the embankment caused the truck to enter a 360-degree roll with the passenger side of the roof contacting the ground first.

82 When the vehicle came to rest, the appellant was unable to feel any sensation. Mr. Nikolaisen climbed out the back window of the vehicle and ran to the Thiel residence for assistance. Police later accompanied Mr. Nikolaisen to the Shellbrook Hospital where a blood sample was taken. Expert testimony estimated Mr. Nikolaisen's blood alcohol level to be between 180 and 210 milligrams in 100 millilitres of blood at the time of the accident, well over the legal limits prescribed in *The Highway Traffic Act, 1989*, S.S. 1986, c. H-3.1, and the *Criminal Code*, R.S.C. 1985, c. C-46.

83 Mr. Nikolaisen had travelled on Snake Hill Road three times in the 24 hours preceding the accident, but had not driven it on any earlier occasions. The road was about a mile and three quarters in length and was flanked by highways to the north and to the east. Starting at the north end, it ran south for a short distance, dipped between open fields, then curved to the southeast and descended in a southerly loop down and around Snake Hill, past trees, bush and pasture, to the bottom of the valley. There it curved sharply to the southeast as it passed the Thiels' driveway. Once it passed the driveway, it curved gently to the south east for about 300 metres, then curved more distinctly to the south. It was on this stretch that the accident occurred. From that point on, the road crossed a creek, took another curve, then ascended a steep hill to the east, straightened out, and continued east for just over half a mile, past tree-lined fields and another farm site, to an approach to the highway.

84 Snake Hill Road was established in 1923 and was maintained by the respondent municipality for the primary purpose of providing local farmers access to their fields and pastures. It also served as an access road for the two permanent residences and one veterinary clinic located on it. The road at its northernmost end, coming off the highway, is characterized as a "Type C" local access road under the provincial government's scheme of road classification. This means that it is graded, gravelled and elevated above the surrounding land. The portion of the road east of the Thiel residence, on which the accident occurred, is characterized as "Type B" bladed trail, essentially a prairie trail that has been bladed to remove the ruts and to allow it to be driven on. Bladed trails follow the path of least resistance through the surrounding land and are not elevated or gravelled. The province of Saskatchewan has some 45,000 kilometres of bladed trails.

85 According to the provincial scheme of road classification, both bladed trails and local access roads are "non designated", meaning that they are not subject to the Saskatchewan Rural Development Sign Policy and Standards. On such roads, the council of the rural municipality makes a decision to post signs if it becomes aware of a hazard or if there are several accidents at one specific spot. Three accidents had occurred on Snake Hill Road between 1978 and 1987. All three accidents occurred to the east of the site of the Nikolaisen rollover, with drivers travelling westbound. A fourth accident occurred on Snake Hill Road in 1990 but there was no evidence as to where it occurred. There was no evidence that topography was a factor in any of these accidents. The respondent municipality had not posted signs on any portion of Snake Hill Road.

III — Relevant Statutory Provisions

86 *The Rural Municipality Act, 1989*, S.S. 1989-90, c. R-261

> **192.**(1) Every Council shall keep in a reasonable state of repair all municipal roads, dams and reservoirs and the approaches to them that have been constructed or provided by the municipality or by any person with the permission of the council or that have been constructed or provided by the province, having regard to

the character of the municipal road, dam or reservoir and the locality in which it is situated or through which it passes.

. . . . .

2. Where the council fails to carry out its duty imposed by subsections (1) and (1.1), the municipality is, subject to *The Contributory Negligence Act*, civilly liable for all damages sustained by any person by reason of the failure.

3. Default under subsections (1) and (1.1) shall not be imputed to a municipality in any action without proof by the plaintiff that the municipality knew or should have known of the disrepair of the municipal road or other thing mentioned in subsections (1) and (1.1).

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

33.(1) Subject to the other provisions of this Act, no person shall drive a vehicle on a highway:

(a) at a speed greater than 80 kilometres per hour; or

(b) at a speed greater than the maximum speed indicated by any signs that are erected on a highway.

(2) No person shall drive a vehicle on a highway at a speed greater than is reasonable and safe in the circumstances.

44.(1) No person shall drive a vehicle on a highway without due care and attention.

IV — Judicial History

***A. Saskatchewan Court of Queen's Bench*, [1998] 5 W.W.R. 523**

87 Wright J. found the respondent negligent in failing to erect a sign to warn motorists of the sharp right curve on Snake Hill Road, which she characterized as a "hidden hazard". She also found Mr. Nikolaisen negligent in travelling Snake Hill Road at an excessive speed and in operating his vehicle while impaired. The appellant was held to be contributorily negligent in accepting a ride with Mr. Nikolaisen. Fifteen percent of the fault was apportioned to the appellant, and the remainder was apportioned jointly and severally 50 percent to Mr. Nikolaisen and 35 percent to the respondent.

88 Wright J. found that s. 192 of *The Rural Municipality Act, 1989* imposed a statutory duty of care on the respondent toward persons travelling on Snake Hill Road. She then considered whether the respondent met the standard of care as delineated in s. 192 and the jurisprudence interpreting that section. She referred specifically to *Partridge v. Langenburg (Rural Municipality)*, [1929] 3 W.W.R. 555 (Sask. C.A.), in which it was stated at p. 558 that "the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety". She also cited *Shupe v. Pleasantdale (Rural Municipality)*, [1932] 1 W.W.R. 627 (Sask. C.A.), at p. 630: "[R]egard must be had to the locality... the situation of the road therein, whether required to be used by many or by few; ... to the number of roads to be kept in repair; to the means at the disposal of the council for that purpose, and the requirements of the public who use the road." Relying on

Galbiati v. Regina (City) (1971), [1972] 2 W.W.R. 40 (Sask. Q.B.), Wright J. observed that although the Act does not mention an obligation to erect warning signs, the general duty of repair nevertheless includes the duty to warn motorists of a hidden hazard.

89 Having laid out the relevant case law, Wright J. went on to discuss the character of the road. Relying primarily on the evidence of two experts at trial, Mr. Anderson and Mr. Werner, she found that the sharp right turning curve was a hazard that was not readily apparent to the users of the road. From their testimony she concluded (at para. 85):

> It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the *maximum* speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be *safely* negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet. [Emphasis in original.]

Wright J. then noted that, while it would not be reasonable to expect the respondent to construct the road to a higher standard or to clear all of the bush away, it was reasonable to expect the respondent to erect and maintain a warning or regulatory sign "so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86).

90 Wright J. then considered s. 192(3) of the Act, which provides that there is no breach of the statutory standard of care unless the municipality knew or should have known of the danger. Wright J. observed that between 1978 and 1990, there were four accidents on Snake Hill Road, three of which occurred "in the same vicinity" as the Nikolaisen rollover, and two of which were reported to the authorities. On the basis of this information, she held that "[i]f the R.M. [Rural Municipality] did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known" (para.90). Wright J. also found significant the relatively low volume of traffic on the road, the fact that there were permanent residences on the road, and the fact that the road was frequented by young and perhaps less experienced drivers.

91 In respect to causation, Wright J. found that it was probable that a warning sign would have enabled Mr. Nikolaisen to take corrective action to maintain control of his vehicle despite the fact of his impairment. She concluded (at para. 101):

> Mr. Nikolaisen's degree of impairment only served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him.

92 Wright J. also addressed the appellant's argument that the municipality was in breach of a common law duty of care which was not qualified or limited by any of the restrictions set out under s. 192. She held that *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (S.C.C.), and the line of authority both preceding and following that decision did not apply to the case before her given the existence of the statutory duty of care. She also found that any qualifying words in s. 192 of the Act pertained to the standard of care and did not impose limitations on the statutory duty of care.

***B. Saskatchewan Court of Appeal*, [2000] 4 W.W.R. 173, 2000 SKCA 12**

93 On appeal, Cameron J.A., writing for a unanimous court, dealt primarily with the trial judge's finding that the respondent's failure to place a warning sign or regulatory sign at the site of the accident constituted a breach of its statutory duty of road repair. He did not find it necessary to rule on the issue of causation given his conclusion that the trial judge erred in finding the respondent negligent.

94 Cameron J.A. characterized the trial judge's conclusion that the respondent had breached the statutory duty of care as a matter of mixed fact and law. He noted that an appellate court is not to interfere with a trial judge's findings of fact unless the judge made a "palpable and overriding error" which affected his or her assessment of the facts. With respect to errors of law, however, Cameron J.A. remarked that the ability of an appellate court to overturn the finding of the trial judge is "largely unbounded". Regarding errors of mixed fact and law, Cameron J.A. noted that these are typically subject to the same standard of review as findings of fact. One exception to this, according to Cameron J.A., occurs where the trial judge identifies the correct legal test, yet fails to apply one branch of that test to the facts at hand. As support for this proposition, Cameron J.A. cited (at para. 41) Iacobucci J. in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 39:

> [I]f a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made and error of law.

95 Turning to the applicable law in this case, Cameron J.A. acknowledged that the standard of care set out in the Act and the jurisprudence interpreting it requires municipalities to post warning signs to warn of hazards that prudent drivers, using ordinary care, would be unlikely to appreciate. Based on the jurisprudence, Cameron J.A. set out (at para. 50) an analytical framework to be used in order to assess if a municipality has breached its duty in this regard. This framework requires the judge:

> 1. To determine the character and state of the road at the time of the accident. This, of course, is a matter of fact that entails an assessment of the material features of the road where the accident occurred, as well as those factors going to the maintenance standard, namely the location, class of road, patterns of use, and so on.
>
> 2. To assess the issue of whether persons requiring to use the road, exercising ordinary car [sic], could ordinarily travel upon it safely. This is essentially a reasonable person test, one concerned with how a reasonable driver on that particular road would have conducted himself or herself. It is necessary in taking this step to take account of the various elements noted in the authorities referred to earlier, namely the locality of the road, the character and class of the road, the standard to which the municipality could reasonably have been expected to maintain the road, and so forth. These criteria fall to be balanced in the context of the question: how would a reasonable driver have driven upon this particular road? Since this entails the application of a legal standard to a given set of facts, it constitutes a question of mixed fact and law.
>
> 3. To determine either tha[t] the road was in a reasonable state of repair or that it was not, depending upon the assessment made while using the second step. If it is determined that the road was not in a reasonable state of repair, then it becomes necessary to go on to determine whether the municipality knew or should

have known of the state of disrepair before imputing liability.

96 According to Cameron J.A., the trial judge did not err in law by failing to set out the proper legal test. She did, however, make an error in law of the type identified by Iacobucci J. in *Southam*, *supra*. In his view, when applying the law to the facts of the case, the trial judge failed to assess the manner in which a reasonable driver, exercising ordinary care, would ordinarily have driven on the road, and the risk, if any, that the unmarked curve might have posed for the ordinary driver. As noted by Cameron J.A., the trial judge "twice alluded to the matter, but failed to come to grips with it".

97 Cameron J.A. also found that the trial judge had made a "palpable and overriding" error of fact in determining that the respondent had breached the standard of care. According to Cameron J.A., the trial judge's factual error stemmed from her reliance on the expert testimony of Mr. Werner and Mr. Anderson. Cameron J.A. found that the evidence of both experts was based on the fundamental premise that the ordinary driver could be expected to travel the road at a speed of 80 km/h. In his view, this premise was misconceived and unsupported by the evidence.

98 Cameron J.A. concluded that although the trial judge was free to accept the evidence of some witnesses over others, she was not free to accept expert testimony that was based on an erroneous factual premise. According to Cameron J.A., had that trial judge found that a prudent driver, exercising ordinary care for his or her safety, would not ordinarily have driven this section of Snake Hill Road at a speed greater than 60 km/h, then she would have had to conclude that no hidden hazard existed since the curve could be negotiated safely at this speed.

99 Cameron J.A. agreed with the trial judge that a common law duty of care was not applicable in this case. His remarks in this respect are found at para. 44 of his reasons:

> Concerning the duty of care, it might be noted that unlike statutory provisions empowering municipalities to maintain roads, but imposing no duty upon them to do so, the duty in this instance owes its existence to a statute, rather than the neighbourhood principle of the common law: *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (S.C.C.). The duty is readily seen to extend to all who travel upon the roads.

V — Issues

100

A. Did the Court of Appeal properly interfere with the trial judge's finding that the respondent was in breach of its statutory duty of care?

B. Did the trial judge err in finding the respondent knew or should have known of the alleged danger?

C. Did the trial judge err in finding that the accident was caused in part by the respondent's negligence?

D. Does a common law duty of care coexist alongside the statutory duty of care?

VI — Analysis

A. Did the Court of Appeal Properly Interfere with the Decision at Trial?

(1) The Standard of Review

101 Although the distinctions are not always clear, the issues that confront a trial court fall generally into three categories: questions of law, questions of fact, and questions of mixed law and fact. Put briefly, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests (*Southam, supra*, at para. 35).

102 Of the three categories above, the highest degree of deference is accorded to the trial judge's findings of fact. The Court will not overturn a factual finding unless it is palpably and overridingly, or clearly wrong (*Southam, supra*, at para. 60; *Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802 (S.C.C.) , at p. 808; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 (S.C.C.), at p. 121). This deference is principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand, and is therefore better able to choose between competing versions of events (*Schwartz v. R.*, [1996] 1 S.C.R. 254 (S.C.C.), at para. 26). It is however important to recognize that the making of a factual finding often involves more than merely determining the who, what, where and when of the case. The trial judge is very often called upon to draw inferences from the facts that are put before the court. For example, in this case, the trial judge inferred from the fact of accidents having occurred on Snake Hill Road that the respondent knew or should have known of the hidden danger.

103 This Court has determined that a trial judge's inferences of fact should be accorded a similar degree of deference as findings of fact (*Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.)). In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. I respectfully disagree with the majority's view that inferences can be rejected only where the inference-drawing process itself is deficient: see *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), at para. 45:

> When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact": *Lester (W. W.)(1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at p. 669 *per* McLachlin J.

An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. My colleagues recognize themselves that a judge is often called upon to make inferences of mixed law and fact (para. 26). While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact.

104 My colleagues take issue with the above statement that an appellate court will verify whether the making of an inference can reasonably be supported by the trial judge's findings of fact, a standard which they believe to be less strict than the "palpable and overriding" standard. I do not agree that a less strict standard is implied. In my view there is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by him or her and concluding that the inference was

not reasonably supported by those facts. The distinction is merely semantic.

105 By contrast, an appellate court reviews a trial judge's findings on questions of law not merely to determine if they are reasonable, but rather to determine if they are correct; *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.), at p. 833; *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.), at p. 647; R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at p. 90). The role of correcting errors of law is a primary function of the appellate court; therefore, that court can and should review the legal determinations of the lower courts for correctness.

106 In the law of negligence, the question of whether the conduct of the defendant has met the appropriate standard of care is necessarily a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts. As stated by Kerans, *supra*, at p. 103, "[t]he evaluation of facts as meeting or not meeting a legal test is a process that involves law-making. Moreover, it is probably correct to say that *every* new attempt to apply a legal rule to a set of facts involves some measure of interpretation of that rule, and thus more law-making"(emphasis in original).

107 In a negligence case, the trial judge is called on to decide whether the conduct of the defendant was reasonable under all the circumstances. While this determination involves questions of fact, it also requires the trial judge to assess what is reasonable. As stated above, in many cases, this will involve a policy-making or "law-setting" role which an appellate court is better situated to undertake (Kerans, *supra*, at pp. 5-10). For example, in this case, the degree of knowledge that the trial judge should have imputed to the reasonably prudent municipal councillor raised the policy consideration of the type of accident-reporting system that a small rural municipality with limited resources should be expected to maintain. This law-setting role was recognized by the United States Supreme Court in *Bose Corp. v. Consumers Union of U.S. Inc.*, 466 U.S. 485 (U.S. Mass. 1984) , at note 17, within the context of an action for defamation:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes — in terms of impact on future cases and future conduct — are too great to entrust them finally to the judgment of the trier of fact.

108 My colleagues assert that the question of whether or not the standard of care was met by the defendant in a negligence case is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law (para. 36). I disagree. In many cases, it will not be possible to "extricate" a purely legal question from the standard of care analysis applicable to negligence, which is a question of mixed fact and law. In addition, while some questions of mixed fact and law may not have "any great precedential value" (*Southam*, *supra*, at para. 37), such questions often necessitate a normative analysis that should be reviewable by an appellate court.

109 Consider again the issue of whether the municipality knew or should have known of the alleged danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality having regard to the duties of the ordinary, reasonable and prudent municipal councillor. If the trial judge applies a different legal standard, such as the reasonable person standard, it is an error of law. Yet even if the trial judge correctly identifies the applicable legal standard, he or she may still err in the process of assessing the facts through the lens of that legal standard. For example, there may exist evidence that an accident had previously occurred on the portion of the road on which the relevant accident occurred. In the course of considering whether or not that fact satisfies the legal test for knowledge the trial judge must make a number of normative assumptions. The trial judge must consider whether the fact that one accident had previously occurred in the same location would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the ordinary, reasonable and prudent councillor would have been alerted to the previous accident by an accident-reporting system. In my view, the question of whether the fact of a previous accident having occurred fulfills the applicable knowledge requirement is a question of mixed fact and law and it is artificial to characterize it as anything else. As is apparent from the example given, the question may also raise normative issues which should be reviewable by an appellate court on the correctness standard.

110 I agree with my colleagues that it is not possible to state as a general proposition that all matters of mixed fact and law are reviewable according to the standard of correctness: citing *Southam*, *supra*, at para. 37 (para. 28). I disagree, however, that the dicta in *Southam* establishes that a trial judge's conclusions on questions of mixed fact and law in a negligence action should be accorded deference in every case. This Court in *St-Jean c. Mercier*, 2002 SCC 15 (S.C.C.), a medical negligence case, distinguished *Southam* on the issue of the standard applicable to questions of mixed fact and law where the tribunal has no particular expertise. Gonthier J., writing for a unanimous Court, stated at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (*Southam*, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. Such is the standard for medical negligence. There is no issue of expertise of a specialized tribunal in a particular field which may go to the determination of facts and be pertinent to defining an appropriate standard and thereby call for some measure of deference by a court of general appeal (*Southam*, *supra*, at para. 45; and *Nova Scotia Pharmaceutical Society*, *supra*, at p. 647).

111 I also disagree with my colleagues that *Jaegli Enterprises Ltd. v. Ankenman*, [1981] 2 S.C.R. 2 (S.C.C.), is authority for the proposition that when the question of mixed fact and law at issue is a finding of negligence, that finding should be deferred to by appellate courts. In that case the trial judge found that the conduct of the defendant ski instructor met the standard of care expected of him. Moreover, the trial judge found that the accident would have occurred regardless of what the ski instructor had done (*Jaegli Enterprises Ltd. v. Ankenman* (1978), 95 D.L.R. (3d) 82 (B.C. S.C.)). Seaton J.A. of the British Columbia Court of Appeal disagreed with the trial judge that the ski instructor had met the applicable standard of care (*Jaegli Enterprises Ltd. v. Ankenman* (1980), 112 D.L.R. (3d) 297 (B.C. C.A.)). Seaton J.A. recognized nevertheless that the "final question" was whether "the instructor's failure to remain was a cause of the accident". On the issue of causation,

a question of fact, Sexton J.A. clearly substituted his opinion for that of the trial judge's without regard to the appropriate standard of review. His concluding remarks on the issue of causation at p. 308 highlight his lack of deference to the trial judge's conclusion on causation:

> On balance, I think that the evidence supports the plaintiff's claim against the instructor, that his conduct in leaving the plaintiff below the crest was one of the causes of the accident.

112 This Court, which restored the finding of the trial judge, did not clearly state whether it did so on the basis that the appellate court was wrong to interfere with the trial judge's finding of negligence or whether it did so because the appellate court wrongly interfered with the trial judge's conclusions on causation. The reasons suggest the latter. The only portion of the trial judgment that this Court referred to was the finding on causation. Dickson J. (as he then was) remarks at p. 4:

> At the end of a nine-day trial Mr. Justice Meredith, the presiding judge, delivered a judgment in which he very carefully considered all of the evidence and concluded that the accident had been caused solely by Larry LaCasse and that the plaintiffs should recover damages, in an amount to be assessed, against LaCasse. The claims against Paul Ankenman, Jaegli Enterprises Limited and the other defendants were dismissed with costs.

113 The Court went on to cite a number of cases, some of which did not involve negligence (see *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78 (S.C.C.)), for the general proposition that "it [is] wrong for an appellate court to set aside a trial judgment where [there is not palpable and overriding error, and] the only point at issue [was] the interpretation of the evidence as a whole" (p. 84). Given that the Court focussed on the issue of causation, a question of fact alone, I do not think that *Jaegli* establishes that a finding of negligence by the trial judge should be deferred to by appellate courts. In my view, the Court in *Jaegli* merely affirmed the longstanding principle that an appellate court should not interfere with a trial judge's finding of fact absent a palpable and overriding error.

(2) Error of Law in the Reasons of the Court of Queen's Bench

114 The standard of care set out in s. 192 of *The Rural Municipality Act, 1989*, as interpreted within the jurisprudence, required the trial judge to examine whether the portion of Snake Hill Road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Having identified the correct legal test, the trial judge nonetheless failed to ask herself whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident occurred. To neglect entirely one branch of a legal test when applying the facts to the test is to misconstrue the law (*Southam, supra*, at para. 39). The Saskatchewan Court of Appeal was therefore right to characterize this failure as an error of law and to consider the factual findings made by the trial judge in light of the appropriate legal test.

115 The long line of jurisprudence interpreting s. 192 of *The Rural Municipality Act* and its predecessor provisions clearly establishes that the duty of the municipality is to keep the road "in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety" (*Partridge, supra*, at p. 558; *Levey v. Rodgers (Rural Municipality)*, [1921] 3 W.W.R. 764 (Sask. C.A.), at p. 766; *Diebel Estate v. Pinto Creek (Rural Municipality) No. 75* (1996), 149 Sask. R. 68 (Sask. Q.B.), at pp. 71-72). Legislation in several other provinces establishes a similar duty of care and courts in these provinces have interpreted it in a similar fashion (*Jennings v. Cronsberry*, [1966] S.C.R. 532 (S.C.C.), at p. 537; *Parkland No. 31 (County) v. Stetar* (1974), [1975] 2 S.C.R. 884 (S.C.C.), at p. 892; *Fafard v. Quebec (City)* (1917), 39 D.L.R. 717 (S.C.C.),

at p. 718). This Court, in *Jennings*, *supra*, interpreting a similar provision under the Ontario *Highway Improvement Act*, R.S.O. 1960, c. 171, remarked at p. 537 that: "[i]t has been repeatedly held in Ontario that where a duty to keep a highway in repair is imposed by statute the body upon which it is imposed must keep the highway in such a condition that travellers using it with ordinary care may do so with safety."

116 There is good reason for limiting the municipality's duty to repair to a standard which permits drivers exercising ordinary care to proceed with safety. As stated by this Court in *Fafard*, *supra*, at p. 718: "[a] municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety." Correspondingly, appellate courts have long held that it is an error for the trial judge to find a municipality in breach of its duty merely because a danger exists, regardless of whether or not that danger poses a risk to the ordinary user of the road. The type of error to be guarded against was described by Wetmore C.J. in *Williams v. North Battleford (Town)* (1911), 4 Sask. L.R. 75 (Sask. C.A.) (Court en banc), at p. 81:

> The question in an action of this sort, whether or not the road is kept in such repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, is, it seems to me, largely one of fact ... I would hesitate about setting aside a finding of fact of the trial Judge if he had found the facts necessary for the determination of the case, but he did not so find. He found that the crossing was a "dangerous spot without a light, and that if the utmost care were used no accident might occur, but it was not in such proper or safe state as to render such accident unlikely to occur." He did not consider the question from the standpoint of whether or not those requiring to use the road might, using ordinary care, pass to and fro upon it in safety. The mere fact of the crossing being dangerous is not sufficient ... [Emphasis added.]

117 From the jurisprudence cited above, it is clear that the mere existence of a hazard or danger does not in and of itself give rise to a duty on the part of the municipality to erect a sign. Even if a trial judge concludes on the facts that the conditions of the road do, in fact, present a hazard, he or she must still go on to assess whether that hazard would present a risk to the reasonable driver exercising ordinary care. The ordinary driver is often faced with inherently dangerous driving conditions. Motorists drive in icy or wet conditions. They drive at night on country roads that are not well lit. They are faced with obstacles such as snow ridges and potholes. These obstacles are often not in plain view, but are obscured or "hidden". Common sense dictates that motorists will, however, exercise a degree of caution when faced with dangerous driving conditions. A municipality is expected to provide extra cautionary measures only where the conditions of the road and the surrounding circumstances do not signal to the driver the possibility that a hazard is present. For example, the ordinary driver expects a dirt road to become slippery when wet. By contrast, paved bridge decks on highways are often slick, though they appear completely dry. Consequently, signs will be posted to alert drivers to this unapparent possibility.

118 The appellant in this case argued, at paras. 26-27 of his factum, that the trial judge did, in fact, assess whether a reasonable driver using ordinary care would find the portion of Snake Hill Road on which the accident occurred to pose a risk. He points in particular to the trial judge's comments at paras. 85-86 that:

> There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard ...
>
> ... where the existence of ... bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so

> that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation. [Emphasis added.]

119 The appellant's argument suggests that the trial judge discharged her duty to apply the facts to the law merely by restating the facts of the case in the language of the legal test. This was not, however, sufficient. Although it is clear from the citation above that the trial judge made a factual finding that the portion of Snake Hill Road on which the accident occurred presented drivers with a hidden hazard, there is nothing in this portion of her reasons to suggest that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. The finding that a hazard, or even that a hidden hazard, exists does not automatically give rise to the conclusion that the reasonable driver exercising ordinary care could not travel through it safely. A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question. My colleagues state that it was open to the trial judge to draw an inference of knowledge of the hazard simply because the sharp curve was a permanent feature of the road (para. 61). Here again, there is nothing in the reasons of the trial judge to suggest that she drew such an inference or to explain how such an inference accorded with the legal requirements concerning the duty of care.

120 Nor did the trial judge consider the question in any other part of her reasons. Her failure to do so becomes all the more apparent when her analysis (or lack thereof) is compared to that in cases in which the courts applied the appropriate method. The Court of Appeal referred to two such cases by way of example. In *Nelson v. Waverley (Rural Municipality No. 44)* (1988), 65 Sask. R. 260 (Sask. Q.B.), the plaintiff argued that the defendant municipality should have posted signs warning of a ridge in the middle of the road that resulted from the grading of the road by the municipality. The trial judge concluded that if the driver had exercised ordinary care, he could have travelled along the roadway with safety. Instead, he drove too fast and failed to keep an adequate look-out considering the maintenance that was being performed on the road. In *Diebel Estate, supra*, the issue was whether the municipality had a duty under s. 192 to post a sign warning motorists that a rural road ended abruptly in a T-intersection. The question of how a reasonable driver exercising ordinary care would have driven on that road was asked and answered by the trial judge in the following passage at p. 74:

> His [the expert's] conclusions as to stopping are, however, mathematically arrived at and never having been on the road, from what was described in the course of the trial, I would think the intersection could be a danger at night to a complete stranger to the area, depending on one's reaction time and the possibility of being confused by what one saw rather than recognizing the T intersection to be just that. On the other hand I would think a complete stranger in the area would be absolutely reckless to drive down a dirt road of the nature of this particular road at night at 80 kilometres per hour. [Emphasis added.]

121 The conclusion that Wright J. erred in failing to apply a required aspect of the legal test does not automatically lead to a rejection of her factual findings. This Court's jurisdiction to review questions of law entitles it, where an error of law has been found, to take the factual findings of the trial judge as they are, and to assess these findings anew in the context of the appropriate legal test.

122 In my view, neither Wright J.'s factual findings nor any other evidence in the record that she might have considered had she asked the appropriate question, support the conclusion that the respondent was in breach of its duty. The portion of Snake Hill Road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the conditions of Snake Hill Road in general and the conditions with which motorists were confronted at the exact location of the accident signalled to the reasonable motorist that

caution was needed. Motorists who appropriately acknowledged the presence of the several factors which called for caution would have been able to navigate safely the so-called "hidden hazard" without the benefit of a road sign.

123 The question of how a reasonable driver exercising ordinary care would have driven on Snake Hill Road necessitates a consideration of the nature and locality of the road. A reasonable motorist will not approach a narrow gravel road in the country in the same way that he or she will approach a paved highway. It is reasonable to expect a motorist to drive more slowly and to pay greater attention to the potential presence of hazards when driving on a road that is of a lower standard, particularly when he or she is unfamiliar with it.

124 While the trial judge in this case made some comments regarding the nature of the road, I agree with the Court of Appeal's findings that "[s]he might have addressed the matter more fully, taking into account more broadly the terrain through which the road passed, the class and designation of the road in the scheme of classification, and so on ... " (para. 55). Instead, the extent of her analysis of the road was limited to the following comments, found at para. 84 of her reasons:

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.

125 In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road. The trial judge's analysis focussed almost entirely on the use of the road, without considering the sort of conditions it presented to drivers. It is perhaps not surprising that the trial judge did not engage in this fuller analysis, given that she did not turn her mind to the question of how a reasonable driver would have approached the road. Had she considered this question, she likely would have engaged in the type of assessment that was made by the Court of Appeal at para. 13 of its judgment:

> The road, about 20 feet in width, was classed as "a bladed trail," sometimes referred to as "a land access road," a classification just above that of "prairie trail". As such, it was not built up, nor gravelled, except lightly at one end of it, but simply bladed across the terrain following the path of least resistance. Nor was it in any way signed.

Given the fact that Snake Hill Road is a low standard road, in a category only one or two levels above a prairie trail, one can assume that a reasonable driver exercising ordinary care would approach the road with a certain degree of caution.

126 Having considered the character of the road in general, and having concluded that by its very nature it warranted a certain degree of caution, it is nonetheless necessary to consider the material features of the road at the point at which the accident occurred. Even on roads which are of a lower standard, a reasonable driver exercising due caution may be caught unaware by a particularly dangerous segment of the road. That was, in fact, the central argument that the appellant put forward in this case. According to the appellant's "dual nature" theory, at para. 8 of his factum, the fact that the curvy portion of Snake Hill Road where the accident occurred was flanked by straight segments of road created a risk that a motorist would be lulled into thinking that the curves could be taken at speeds greater than that at which they could actually be taken.

127 While it is not clear from her reasons that the trial judge accepted the appellant's "dual nature" theory, it appears that her conclusion that the municipality did not meet the standard of care required by it was based largely on her observation of the material features of the road at the location of the Nikolaisen rollover. Relying on the evidence of two experts, Mr. Anderson and Mr. Werner, she found the portion of the road on which the accident occurred to be a "hazard to the public". In her view, the limited sight distance created by the presence of uncleared bush precluded a motorist from being forewarned of the impending sharp right turn immediately followed by a left turn. Based on expert testimony, she concluded that the curve could not be negotiated at speeds greater than 60 km/h under favourable conditions, or 50 km/h under wet conditions.

128 Again, I would not reject the trial judge's factual finding that the curve presented motorists with an inherent hazard. The evidence does not, however, support a finding that a reasonable driver exercising ordinary care would have been unable to negotiate the curve with safety. As I explained earlier, the municipality's duty to repair is implicated only when an objectively hazardous condition exists, *and* where it is determined that a reasonable driver arriving at the hazard would be unable to provide for his or her own security due to the features of the hazard.

129 I agree with the trial judge that part of the danger posed by the presence of bushes on the side of the road was that a driver would not be able to predict the radius of the sharp right-turning curve obscured by them. In my view, however, the actual danger inherent in this portion of the road was that the bushes, together with the sharp radius of the curve, prevented an eastbound motorist from being able to see if a vehicle was approaching from the opposite direction. Given this latter situation, it is highly unlikely that any reasonable driver exercising ordinary care would approach the curve at speeds in excess of 50 km/h, a speed which was found by the trial judge to be a safe speed at which to negotiate the curve. Since a reasonable driver would not approach this curve at speeds in excess of which it could safely be taken, I conclude that the curve did not pose a risk to the reasonable driver.

130 One need only refer to the series of photographs of the portion of Snake Hill Road on which the accident occurred to appreciate the extent to which visual clues existed which would alert a driver to approach the curve with caution [Respondent's Record, Vol. II, at pp. 373-76]. The photographs, which indicate what the driver would have seen on entering the curve, show the presence of bush extending well into the road. From the photographs, it is clear that a motorist approaching the curve would not fail to appreciate the risk presented by the curve, which is simply that it is impossible to see around it and to gauge what may be coming in the opposite direction. In addition, the danger posed by the inability to see what is approaching in the opposite direction is somewhat heightened by the fact that this road is used by farm operators. At trial, the risk was described in the following terms by Mr. Sparks, an engineer giving expert testimony:

> ... if you can't, if you can't see far enough down the road to, you know, if there's somebody that's coming around the corner with a tractor and a cultivator and you can't see around the corner, then, you know, drivers would have a fairly strong signal, in my view, that due care and caution would be required.

131 The expert testimony relied on by the trial judge does not support a finding that the portion of Snake Hill Road on which the accident occurred would pose a risk to a reasonable driver exercising ordinary care. When asked at trial whether motorists, exercising reasonable care, would enter the curve at a slow speed because they could not see what was coming around the corner, Mr. Werner agreed that he, himself, drove the corner "at a slower speed" and that it would be prudent for a driver to slow down given the limited sight distance. Similarly, Mr. Anderson admitted to having taken the curve at 40-45 km/h the first time he drove it because he

"didn't want to get into trouble with it". When asked if the reason he approached the curve at that speed was because he could not see around it, he replied in the affirmative: "[t]hat's why I approached it the way I did."

132 Perhaps most tellingly, Mr. Nikolaisen himself testified that he could not see if a vehicle was coming in the opposite direction as he approached the curve. The following exchange which occurred during counsel's cross-examination of Mr. Nikolaisen at trial is instructive:

> Q. ... You told my learned friend, Mr. Logue, that your view of the road was quite limited, that is correct? The view ahead on the road is quite limited, is that right?
>
> A. As in regards to travelling through the curves, yes, that's right, yeah.
>
> Q. Yes. And you did not know what was coming as you approached the curve, that is correct?
>
> A. That's correct, yes.
>
> Q. There might be a vehicle around that curve coming towards you or someone riding a horse on the road, that is correct?
>
> A. Or a tractor or a cultivator or something, that's right.
>
> Q. Or a tractor or a cultivator. You know as a person raised in rural Saskatchewan that all of those things are possibilities, that is right?
>
> A. That's right, yeah, that is correct.

133 Nor do I accept the appellant's submission that the "dual nature" of the road had the effect of lulling drivers into taking the curve at an inappropriate speed. This theory rests on the assumption that the motorists would drive the straight portions of the road at speeds of up to 80 km/h, leaving them unprepared to negotiate suddenly appearing curves. Yet, while the default speed limit on the road was 80 km/h, there was no evidence to suggest that a reasonable driver would have driven any portion of the road at that speed. While Mr. Werner testified that a driver "would be permitted" to drive at a maximum of 80 km/h, since this was the default (not the posted) speed limit, he later acknowledged that bladed trails in the province are not designed to meet 80 km/h design criteria. I agree with the Court of Appeal that the evidence is that "Snake Hill Road was self-evidently a dirt road or bladed trail" and that it "was obviously not designed to accommodate travel at a general speed of 80 kilometres per hour". As I earlier remarked, the locality of the road and its character and class must be considered when determining whether the reasonable driver would be able to navigate it safely.

134 Furthermore, the evidence at trial did not suggest that drivers were somehow fooled by the so-called "dual nature" of the road. The following exchange between counsel for the respondent and Mr. Werner at trial is illustrative of how motorists would view the road:

> Q. Now, Mr. Werner, would you not agree that the change in the character of this road as you proceeded from east to west was quite obvious?
>
> A. It was straight, and then you came to a hill, and you really didn't know what might lie beyond the hill.

Q. That's right. But I mean, the fact that the road went from being straight and level to suddenly there was a hill and you couldn't see — you could see from the point of the top of the hill that the road didn't continue in a straight line, couldn't you?

A. Yes, you could, from the top of the hill, it's a very abrupt hill, yes.

Q. And as you proceeded down though the hill it became quite obvious, did it not, that the character of the road changed?

A. Yes, it changed, yes.

Q. Now you were faced with something other than a straight road?

A. M'hm. Yes.

Q. Now you were on — and at some point along there the surface of the road changed, did it not?

A. Yes.

Q. And, of course, the road was no longer, I use the term built-up to refer to a road that has grade and it has some drainage. As you proceeded from west to east, you realized, you could see, it was obvious that this was not longer a built-up road?

A. It was a road essentially that was cut out of the topography and had no ditches, and there was an abutment or shoulder right to the driving surface. It was different than the first part.

Q. Yes. And all those differences were obvious, were they not?

A. Well, I — they were clear, satisfactorily clear to me, yes. [Emphasis added.]

135 Although they may be compelling factors in other cases, in this case the "dual nature" of the road, the radius of the curve, the surface of the road, and the lack of superelevation do not support the conclusion of the trial judge. The question of how a reasonable driver exercising ordinary care would approach this road demands common sense. There was no necessity to post a sign in this case for the simple reason that any reasonable driver would have reacted to the presence of natural cues to slow down. The law does not require a municipality to post signs warning motorists of hazards that pose no real risk to a prudent driver. To impose a duty on the municipality to erect a sign in a case such as this is to alter the character of the duty owed by a municipality to drivers. Municipalities are not required to post warnings directed at drunk drivers and thereby deal with their inability to react to the cues that alert the ordinary driver to the presence of a hazard.

136 My colleagues assert that the trial judge properly considered all aspects of the applicable legal test, including whether the curve would pose a risk to the reasonable driver exercising ordinary care. They say that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. Secondly, they note that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Thirdly, the fact that the trial judge apportioned negligence to Nikolaisen indicates, in their view, that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter (para. 40).

137 I respectfully disagree that it is explicit in the trial judge's reasons that she considered whether the portion of the road on which the accident occurred posed a risk to the ordinary driver exercising reasonable care. As I explained above, the fact that the trial judge restated the legal test in the form of a conclusion in no way suggests that she turned her mind to the issue of whether the ordinary driver would have found the curve to be hazardous.

138 Nor do I agree that a discussion of the conduct of an ordinary motorist in the situation was somehow "implicit" in the trial judge's reasons. In my view, it is highly problematic to presume that a trial judge made factual findings on a particular issue in the absence of any indication in the reasons as to what those findings were. While a trial judge is presumed to know the law, he or she cannot be presumed to have reached a factual conclusion without some indication in the reasons that he or she did in fact come to that conclusion. If the reviewing court is willing to presume that a trial judge made certain findings based on evidence in the record absent any indication in the reasons that the trial judge actually made those findings, then the reviewing court is precluded from finding that the trial judge misapprehended or neglected evidence.

139 In my view, my colleagues have throughout their reasons improperly presumed that the trial judge reached certain factual findings based on the evidence despite the fact that those findings were not expressed in her reasons. On the issue of whether the curve presented a risk to the ordinary driver, my colleagues note that "in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses" (para. 46). The problem with this statement is that although the trial judge relied on the evidence of Mr. Anderson and Mr. Werner to conclude that the portion of Snake Hill Road on which the accident occurred was a hazard, it is impossible from her reasons to discern what, if any, evidence she relied on to reach the conclusion that the curve presented a risk to the ordinary driver exercising reasonable care. In the absence of any indication that she considered this issue, I am not willing to presume that she did.

140 My colleagues similarly presume findings of fact when discussing the knowledge of the municipality. On this issue, they reiterate that "it is open for a trial judge to prefer some parts of the evidence over others, and to reassess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court." (para. 62). At para. 64 of their reasons, my colleagues review the findings of the trial judge on the issue of knowledge and conclude that the trial judge "drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question". I think that it is improper to conclude that the trial judge made a finding that the municipality's system of road inspection was inadequate in the absence of any indication in her reasons that she reached this conclusion. My colleagues further suggest that the trial judge did not impute knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road (para. 65) They even state that it was not necessary for the trial judge to rely on the accidents in order to satisfy s. 192(3) (para. 67). This, in my view, is a reinterpretation of the trial judge's findings that stands in direct contradiction to the reasons that were provided by her. The trial judge discusses other factors pertaining to knowledge *only* to heighten the significance that she attributes to the fact that accidents had previously occurred on other portions of the road (at para. 90):

> If the R.M did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers.

141 My colleagues refer to the decision of *Van de Perre v. Edwards*, 2001 SCC 60 (S.C.C.), in which I stated that "an omission [in the trial judge's reasons] is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (para. 15). This case is however distinguishable from *Van de Perre*, *supra*. In *Van de Perre*, the appellate court improperly substituted its own findings of fact for the trial judge's clear factual conclusions on the basis that the trial judge had not considered all of the evidence. By contrast, in this case my colleagues assert that this Court should not interfere with the "findings of the trial judge" even where no findings were made and where such findings must be presumed from the evidence. The trial judge's failure in this case to reach any conclusion on whether the ordinary driver would have found the portion of the road on which the accident occurred hazardous, in my view, gives rise to the reasoned belief that she ignored the evidence on the issue in a way that affected her conclusion.

142 Finally, I do not agree that the trial judge's conclusion that Mr. Nikolaisen was negligent equates to an assessment of whether a motorist exercising ordinary care would have found the curve on which the accident occurred to be hazardous. It is clear from the trial judge's reasons that she made a factual finding that the curve could be driven safely at 60 km/h in dry conditions and 50 km/h in wet conditions and that Mr. Nikolaisen approached the curve at an excessive speed. As earlier stated, what she failed to consider was whether the ordinary driver exercising reasonable care would have approached the curve at a speed at which it could be safely negotiated, or, stated differently, whether the curve posed a real danger to the ordinary driver.

B. Did the Trial Judge Err in Finding that the Respondent Municipality Knew or Should Have Known of the Danger Posed by the Municipal Road?

143 Pursuant to s. 192(3) of the *The Rural Municipality Act, 1989*, fault is not to be imputed to the municipality in the absence of proof by the plaintiff that the municipality "knew or should have known of the disrepair".

144 The trial judge made no finding that the respondent municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to the respondent on the basis that it should have known of the danger. This is apparent in her findings on knowledge at paras. 89-91 of her reasons:

> Breach of the statutory duty of care imposed by section 192 of *The Rural Municipality Act, 1989*, *supra*, cannot be imputed to the R.M. unless it knew of or ought to have known of the state of disrepair on Snake Hill Road. Between 1978 and 1990 there were four accidents on Snake Hill Road. Three of these accidents occurred in the same vicinity as the Nikolaisen rollover. The precise location of the fourth accident is unknown. While at least three of these accidents occurred when motorists where travelling in the opposite direction of the Nikolaisen vehicle, they occurred on that portion of Snake Hill Road which is the most dangerous — where the road begins to curve, rather than where it is generally straight and flat. At least two of these accidents were reported to authorities.
>
> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing. [Emphasis

added.]

I find that by failing to erect and maintain a warning and regulatory sign on this portion of Snake Hill Road the R.M. has not met the standard of care which is reasonable in the circumstances. Accordingly, it is in breach of its duty of care to motorists generally, and to Mr. Housen in particular.

145 Whether the municipality should have known of the disrepair (here, the risk posed in the absence of a sign) involves both questions of law and questions of fact. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.), at para. 28). The question is then answered through the trial judge's assessment of the facts of the case.

146 I find that the trial judge made both errors of law and palpable and overriding errors of fact in determining that the respondent municipality should have known of the alleged state of disrepair. She erred in law by approaching the question of knowledge from the perspective of an expert rather than from the perspective of a prudent municipal councillor. She also erred in law by failing to appreciate that the onus of proving that the municipality knew or should have known of the alleged disrepair remained on the plaintiff throughout. The trial judge clearly erred in fact by drawing the unreasonable inference that the respondent municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of Snake Hill Road.

147 The trial judge's failure to determine whether knowledge should be imputed to the municipality from the perspective of what a prudent municipal councillor should have known is implicit in her reasons. The respondent could not be held, for the purposes of establishing knowledge under the statutory test, to the standard of an expert analysing the curve after the accident. Yet this is precisely what the trial judge did. She relied on the expert evidence of Mr. Anderson and Mr. Werner to reach the conclusion that the curve presented a hidden hazard. She also implicitly accepted that the risk posed by the curve was not one that would be readily apparent to a lay person. This is evident in the portion of her judgment where she accepts as a valid excuse for not filing a timely claim against the respondent the appellant counsel's explanation that he did not believe the respondent to be at fault until expert opinions were obtained. The trial judge stated in this regard: "[i]t was only later when expert opinions were obtained that serious consideration was given to the prospect that the nature of Snake Hill Road might be a factor contributing to the accident" (para. 64). Her failure to consider the risk to the prudent driver is also apparent when one considers that she ignored the evidence concerning the way in which the two experts themselves had approached the dangerous curve (see para. 54 above).

148 Had the trial judge considered the question of whether the municipality should have known of the alleged disrepair from the perspective of the prudent municipal councillor, she would necessarily have reached a different conclusion. There was no evidence that the road conditions which existed posed a risk that the respondent should have been aware of. The respondent had no particular reason to inspect that segment of the road for the presence of hazards. It had not received any complaints from motorists respecting the absence of signs on the road, the lack of superelevation on the curves, or the presence of trees and vegetation which grew up along the sides of the road.

149 In addition, the question of the respondent's knowledge is linked inextricably to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is a duty to repair. The trial judge

should not have expected the respondent in this case to have knowledge of the road conditions that existed at the site of the Nikolaisen rollover since that road condition simply did not pose a risk to the reasonable driver. In addition to the evidence that was discussed above in the context of the standard of care, this conclusion is supported by the testimony of the several lay witnesses that testified at trial. Craig Thiel, a resident on the road, testified that he was not aware that Snake Hill Road had a reputation of being a dangerous road, and that he himself had never experienced difficulty with the portion of the road on which the accident occurred. His wife, Toby, also testified that she had experienced no problems with the road.

150 The trial judge also clearly erred in fact by imputing knowledge to the municipality on the basis of the four accidents that had previously occurred on Snake Hill Road. While her factual findings regarding the accidents themselves have a sound basis in the evidence, these findings simply do not support her conclusion that a prudent municipal councillor ought to have known that a risk existed for the normal prudent driver. As such, the trial judge erred in drawing an unreasonable inference from the evidence that was before her. As stated above, the standard of review for inferences of fact is, above all, one of reasonableness. This is reflected in the following passage from *Kolesar v. Jeffries* (1977), [1978] 1 S.C.R. 491 (S.C.C.), at pp. 503-4:

> ... "it is a well-known principle that appellate tribunals should not disturb findings of fact made by a trial judge if there were credible evidence before him upon which he could reasonably base his conclusion". [Emphasis added.]

151 As I stated above, there was no evidence to suggest that the respondent had actual knowledge that accidents had previously occurred on Snake Hill Road. To the contrary, Mr. Danger, the administrator of the municipality, testified that the first he heard of the accidents was at the trial.

152 Implicit in the trial judge's reasons, then, was the expectation that the municipality should have known about the accidents through an accident-reporting system. The appellant put forward that argument explicitly before this Court, placing significant emphasis on the fact that respondent "has no regularized approach to gathering this information, whether from councillors or otherwise". The argument suggests that, had the municipality established a formal system to find out whether accidents had occurred on a given road, it would have known that accidents had occurred on Snake Hill Road and would have taken the appropriate corrective action to ensure that the road was safe for travellers.

153 I find the above argument to be flawed in two important respects. First, the argument that the other accidents on Snake Hill Road were relevant in this case is based on the assumption that there was an obligation on the respondent municipality to have a "regularized" accident-reporting system, and that the informal system that was in place was somehow deficient. In my view, the appellant did not meet its onus to show that the system relied on by the municipality to discharge its obligations under s. 192 of the Act was deficient. The evidence shows that, prior to 1988, there was no formal system of accident reporting in place. There was, nonetheless, an informal system whereby the municipal councillors were responsible for finding out if there were road hazards. Information that hazards existed came to the attention of the councillors via complaints, and from their own familiarity with the roads within the township under their jurisdiction. The trial judge made a palpable error in finding that this informal system was deficient in the absence of any evidence of the practice of other municipalities at the time that the accidents occurred and what might have been a reasonable system, particularly given the fact that the rural municipality in question had only six councillors. There is no evidence that a rural municipality of this type requires the sort of sophisticated information-gathering process that may be required in a city, where accidents occur with greater frequency and where it is less likely that word of mouth

will suffice to bring hazards to the attention of the councillors.

154 The respondent municipality now has a more formalized system of accident reporting. Since 1988, Saskatchewan Highways and Transportation annually provides the municipalities with a listing of all motor vehicle accidents which occur within the municipality and which are reported to the police. While I agree that this system may provide the municipality with a better chance of locating hazards in some circumstances, I do not accept that the adoption of this system is relevant on the facts of this case. Only one accident, which occurred in 1990, was reported to the respondent under this system. The appellant adduced no evidence to suggest that this accident occurred at the same location as the Nikolaisen rollover, or that this accident occurred as a result of the conditions of the road rather than the negligence of the driver.

155 Secondly, and perhaps more importantly, it was simply illogical for the trial judge to infer from the fact of the earlier accidents that the respondent should have known that the site of the Nikolaisen rollover posed a risk to prudent drivers. The three accidents, which took place in 1978, 1985, and 1987, occurred on different curves, while the vehicles involved were proceeding in the opposite direction. The accidents of 1978 and 1987 occurred on the first right-turning curve in the road with the drivers travelling westbound, at the bottom of the hill. The accident in 1985 took place on the next curve in the road with the driver also travelling westbound, again on a different curve from the one where the Nikolaisen rollover took place. If anything, these accidents signal that the municipality should have been concerned with the curves that were, when travelling westbound, to the east of the site of the Nikolaisen rollover. The evidence disclosed no accidents that had occurred at the precise location of the accident that is the subject of this case.

156 Furthermore, the mere occurrence of an accident does not in and of itself indicate a duty to post a sign. In many cases, accidents happen not because of the conditions of the road, but rather because of the negligence of the driver. Illustrative in this regard is Mr. Agrey's accident on Snake Hill Road in 1978. Mr. Agrey testified that, just prior to the accident, he had turned his attention away from the road to talk to one of the passengers in the vehicle. Another passenger shouted to him to "look out", but by the time he was alerted it was too late to properly navigate the turn. Mr. Agrey was charged and fined for his carelessness. As was discussed in the context of the standard of care, a municipality is not obligated to make safe the roads for all drivers, regardless of the care and attention that they are exercising when driving. It need only keep roads in such a state of repair as will allow a reasonable driver exercising ordinary care to drive with safety.

157 In addition to the substantial errors discussed above, I would also note that, in my view, the trial judge was inattentive to the onus of proof on this issue. When reviewing the evidence pertaining to other accidents on Snake Hill Road, the trial judge remarked: "Cst. Forbes does not recall any other accident on Snake Hill Road during her time at the Shellbrook RCMP Detachment, from 1987 until 1996. Cpl. Healey had heard of one other accident. *Forbes and Healy are only two of nine members of the RCMP Detachment at Shellbrook*" (emphasis added). By this comment, the trial judge seems to imply that there may have been more accidents on Snake Hill Road that had been reported and that the respondent should have known about this. With all due respect to the trial judge, if there had been accidents other than the ones that were raised at trial, it was up to the appellant to bring evidence of these accidents forward, either by calling the R.C.M.P. members to whom they had been reported, or by calling those who were involved in the accidents, or by any other available means. Furthermore, the significance that the trial judge attributed to the other accidents that occurred on Snake Hill Road was dependent on her assumption that the respondent should have had a formal accident-reporting system in place. The respondent did not bear the onus of demonstrating that it was not obliged to have such a system; there was, rather, a positive onus on the appellant to demonstrate that such a system was required and that the informal

reporting system was inadequate.

C. Did the Trial Judge Err in Finding that the Accident was Caused in Part by the Failure of the Respondent Municipality to Erect a Sign Near the Curve?

158 The trial judge's findings on causation are found at para. 101 of her judgment, where she states:

> I find that this accident occurred as a result of Mr. Nikolaisen entering the curve on Snake Hill Road at a speed slightly in excess of that which would allow successful negotiation. The accident occurred at the most dangerous segment of Snake Hill Road where a warning or regulatory sign should have been erected and maintained to warn motorists of an impending and hidden hazard. Mr. Nikolaisen's degree of impairment only served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him. I am satisfied on a balance of probabilities that had Mr. Nikolaisen been forewarned of the curve, he would have reacted and taken appropriate corrective action such that he would not have lost control of his vehicle when entering the curve.

159 The trial judge's above findings in respect to causation represent conclusions on matters of fact. Consequently, this Court will only interfere if it finds that in coming to these conclusions she made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence, or drew erroneous conclusions from it (*Toneguzzo-Norvell*, *supra*, at p. 121).

160 In coming to her conclusion on causation, the trial judge made several of the types of errors that this Court referred to in *Toneguzzo-Norvell*. To the extent that the trial judge relied on the evidence of Mr. Laughlin, the only expert to have testified on the issue of causation, I find that she either misunderstood his evidence or drew erroneous conclusions from it. The only other testimony in respect to causation was anecdotal evidence pertaining to Mr. Nikolaisen's level of impairment provided by Craig Thiel, Toby Thiel and Paul Housen. Although their testimonies provided some evidence in respect to causation, for reasons I will discuss, it was not evidence on which the trial judge could reasonably rely. Nor do I find that the trial judge was entitled to rely on evidence that Mr. Nikolaisen successfully negotiated the curve from the Thiel driveway onto Snake Hill Road. The inference that the trial judge drew from this fact was unreasonable and ignored evidence that Mr. Nikolaisen swerved even on this curve. In addition, the trial judge clearly erred by ignoring other relevant evidence in respect to causation, in particular the fact that Mr. Nikolaisen had driven on the road three times in the 18 to 20 hours preceding the accident.

161 I cannot agree with the trial judge that the testimony of Mr. Laughlin, a forensic alcohol specialist employed by the R.C.M.P, supports the finding that Mr. Nikolaisen would have reacted to a sign forewarning of the impending right-turning curve on which the accident occurred. The preponderance of Mr. Laughlin's testimony establishes that persons at the level of impairment which Mr. Nikolaisen was found to be at when the accident occurred would be unlikely to react to a warning sign. In addition, Mr. Laughlin's testimony points overwhelmingly to the conclusion that alcohol was the causal factor which led to this accident. The trial judge erred by misapprehending one comment in Mr. Laughlin's testimony and ignoring the significance of his testimony when taken as a whole.

162 Based on blood samples obtained by Constable Forbes approximately three hours after the accident occurred, Mr. Laughlin predicted that Mr. Nikolaisen's blood alcohol level at the time of the accident ranged

from 180 to 210 milligrams percent. Mr. Laughlin commented at length on the effect that this level of blood alcohol could be expected to have on a person's ability to drive, testifying:

> Well, My Lady, this alcohol level that I've calculated here is a very high alcohol level. The critical mental faculties that are important in operating a motor vehicle will be impaired by the alcohol. And any skill that depends on these mental faculties will be affected. These include anticipation, judgment, attention, concentration, the ability to divide attention among two or more areas of interest. Because these are affected to such a degree, it would be unsafe for anybody to operate a motor vehicle with this level of alcohol in their body.

When asked about his knowledge of research pertaining to the effects of alcohol on the risk of being involved in an automobile accident, Mr. Laughlin had this to say:

> ... At this level the moderate user of alcohol risk of causing crash is tremendously high, probably 100 times that of a sober driver, or even higher. And in some cases at this level, I've seen scientific literature indicating that the risk of causing a fatal crash is 2 to 300 times that of a sober driver. ... if an impaired person is an experienced drinker there — it won't be that high. However, there will be an increased risk compared to a sober state. ... But above 100 milligrams percent, regardless of tolerance, a person will be impaired with respect to driving ability.

Following these comments, Mr. Laughlin discussed the ability of a severely impaired person to react to the presence of a hazard when driving:

> My Lady, I would like to add that the driving task is a demanding one and involves many multi-various tasks occurring at the same time. The hazard for a person under the influence of alcohol is it takes longer to notice a hazard or danger if one should occur; it takes longer to decide what corrective action is appropriate, and it takes longer to execute that decision and the person may tend to make incorrect decisions. So there is increased risk in that process. As well, if the impairment has progressed to the point where the motor skills are affected, the execution of that decision is impaired. So it's not a very graceful attempt at a corrective action. As well, some people tend to make more risks under the influence of alcohol. They do not apply sound reasoning and judgment. They are not able to properly assess the impairment of their driving skills, they are not able to properly assess the risk, not able to properly assess the changing road and weather conditions and adjust for that. But even if they do recognize those as hazards, they may tend to take more risks than a sober driver would.

163 The above comments support the conclusion that the accident occurred as a result of Mr. Nikolaisen's impairment and not as a result of any failure on the part of the respondent. Indeed, when the portions of Mr. Laughlin's testimony that the trial judge relied on are considered in their context, they do not support her conclusion that Mr. Nikolaisen would have been able to react to a sign had one been posted. When asked by counsel whether it was possible for an individual with Mr. Nikolaisen's blood alcohol level to perceive and react to a road sign, Mr. Laughlin responded:

> Yes, it's possible that a person will see and react to it and maybe react properly. It's possible that they will react improperly or may miss it altogether. I think what's key here is that at this level of alcohol, it's more likely that the person under this level of alcohol will either miss the sign or not react properly compared to the sober driver. That the driver with this level of alcohol will make more mistakes than will the sober driver. [Emphasis added.]

In the passage above, it is clear that Mr. Laughlin is merely admitting that anything is possible, while solidly expressing the view that drivers at this level of intoxication are more likely to not react to a sign or other warning. This view is also apparent in the following passage, in which Mr. Laughlin expands on the ability of an intoxicated driver to react to signs and other road conditions:

> What happens with respect to perception under the influence of alcohol is a driver tends to concentrate on the central field of vision, and miss certain indicators on the periphery, that's called tunnel vision. As well, drivers tend to concentrate on the lower part of that central field of view and therefore they don't have a very long preview distance in the course of operating a motor vehicle and looking down the road. And so studies indicate that under the influence of alcohol drivers tend to miss more signs, warnings, indicators, especially those in the peripheral field of view or farther down the road. [Emphasis added.]

164 In argument before this Court, the appellant emphasized that although Mr. Laughlin was the only expert to testify with respect to causation, lay witnesses testified that Mr. Nikolaisen was not visibly impaired prior to leaving the Thiel residence. It is not clear from the trial judge's reasons that she relied on testimony to this effect given by Craig Thiel, Toby Thiel and Paul Housen. To the extent that she did rely on such evidence to establish that the accident was caused in part by the respondent's negligence, I find this reliance to be unreasonable. Whereas the lay witnesses in this case were qualified to give their opinion on whether they, as ordinary drivers, could safely negotiate the segment of Snake Hill Road on which the accident occurred, they were not qualified to assess the degree of Mr. Nikolaisen's impairment. The reason for their lack of qualification in this regard was explained by Mr. Laughlin in the following response to counsel's question on whether it is possible to draw a conclusion from the fact that an individual does not exhibit any impairment of their motor skills and speech:

> ... No, Your Honour, because, My Lady, when you're looking at motor skill impairment or for signs of motor skill impairment, you're looking for signs of intoxication, not impairment. Remember I mentioned that the first components affected by alcohol are cognitive and mental faculties. These are all important in driving. However, it is very difficult when you look at an individual who has been consuming alcohol to tell that they have impaired in attention or divided attention, or concentration, or concentration, or judgment. So as an indicator of impairment, motor skills are not reliable. And if you think about the Criminal Code process, they've been abandoned 30 years ago as a useful indicator of impairment. No longer do we rely on police officers subjective assessment of person's motor skills to determine impairment. [Emphasis added.]

165 It is also clear from the trial judge's reasons that she relied to some extent on evidence that Mr. Nikolaisen successfully negotiated the curve at the point where the driveway to the Thiel residence intersected the road. I agree with the respondent that this fact is simply not relevant. The ability of Mr. Nikolaisen to negotiate this curve does not establish that his driving ability was not impaired. As noted by the respondent, at para. 101 of its factum, he may have been driving more slowly at this point, or he may simply have been lucky. More importantly, this evidence contributes nothing to the issue of whether or not Mr. Nikolaisen would have reacted to a sign on the curve where the accident occurred, had one been present. There was no sign on the curve one faces upon leaving the driveway, just as there was no sign on the curve where the accident took place.

166 At any rate, the trial judge's reliance on Mr. Nikolaisen's successful negotiation of the curve at the location of the Thiel driveway ignores relevant evidence that he had swerved or "fish-tailed" when leaving the Thiel residence. A reasonable inference to be drawn from this evidence is that while Mr. Nikolaisen was able to negotiate this curve, he did not do so free from difficulty. While this evidence may not be significant in and of itself, it should have been enough to alert the trial judge to the problems inherent in the inference she drew from

his ability to navigate this earlier curve.

167 In addition to ignoring the relevant evidence of the fish-tail marks, the trial judge failed to consider the relevance of the fact that Mr. Nikolaisen had travelled Snake Hill Road three times in the 18 to 20 hours preceding the accident. In her review of the evidence, she noted at para. 8 of her reasons that: "Mr. Nikolaisen was unfamiliar with Snake Hill Road. While he had in the preceding 24 hours travelled the road three times, only once was in the same direction that he was travelling upon leaving the Thiel residence."

168 I simply cannot see how the trial judge found accidents which occurred when motorists were travelling in the opposite direction relevant to the issue of the respondent's knowledge of a risk to motorists while at the same time suggesting that the fact that Mr. Nikolaisen had driven the road in the opposite direction twice was irrelevant to the issue of whether or not he would have recognized that the curve posed a risk or that he would have reacted to a warning sign. This discrepancy aside, I find the fact that Mr. Nikolaisen had travelled Snake Hill Road in the same direction when he left the Thiel residence to go to the Jamboree the evening before the accident highly relevant to the causation issue. The finding that the outcome would have been different had Mr. Nikolaisen been forewarned of the curve ignores the fact that he already knew that the curve was there. I agree with the respondent that the obvious reason Mr. Nikolaisen was unable to safely negotiate the curve on the afternoon of the 18th, despite having negotiated this curve and others without difficulty in the preceding 18 to 20 hours was the combined effect of his drinking, lack of sleep and lack of food.

169 In conclusion on the issue of causation, I wish to clarify that the fact that the trial judge referred to some evidence to support her findings on this issue does not insulate those findings from review by this Court. The standard of review for findings of fact is reasonableness, not absolute deference. Such a standard entitles the appellate court to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion. The logic of this approach was aptly explained by Kerans, *supra*, in the following passage at p. 44:

> The key to the problem is whether the reviewer is to look merely for "evidence to support" the finding. Some evidence might indeed support the finding, but other evidence may point overwhelmingly the other way. A court might be able to say that reliance on the "some" in the face of the "other" was not what the reasonable trier of fact would do; indeed, it might say that, in all the circumstances it was convinced that to rely on the one in the face of the other was quite unreasonable. To say that "some evidence" is enough, then, without regard to that "other evidence" is to turn one's back on review for reasonableness.

D. Did the Courts Below Err in Finding that no Common Law Duty of Care Exists Alongside the Statutory Duty Imposed Under Section 192 of the Act?

170 The appellant urges this Court to find that a common law duty of care exists alongside the statutory duty of care imposed on the respondent by s. 192 of *The Rural Municipality Act, 1989*. According to the appellant, the application of the common law duty of care would free the Court from the need to focus on how a reasonable driver exercising ordinary care would have navigated the road in question. The appellant submits that the Court would instead apply the "classic reasonableness formulation" which, in its view, would require the Court to take into account the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost of preventing that harm. The appellant argues that the respondent would be held liable under this test.

171 The courts below rejected the above argument when it was put to them by the appellant. I would not

interfere with their ruling on this issue for the reason that it is unnecessary for this Court to impose a common law duty of care where a statutory one clearly exists. In any event, the application of the common law test would not affect the outcome in these proceedings.

172 I agree with the respondent's submissions that in this case, where the legislature has clearly imposed a statutory duty of care on the respondents, it would be redundant and unnecessary to find that a common law duty of care exists. The two-part test to establish a common law duty of care set out in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.), simply has no application where the legislature has defined a statutory duty. As was stated by this Court in *Brown v. British Columbia (Minister of Transportation & Highways)*, [1994] 1 S.C.R. 420 (S.C.C.), at p. 424:

> ... if a statutory duty to maintain existed as it does in some provinces, it would be unnecessary to find a private law duty on the basis of the neighbourhood principle in *Anns v. Merton London Borough Council*, [1978] A.C. 728. Moreover, it is only necessary to consider the policy/operational dichotomy in connection with the search for a private law duty of care.

All of the authorities cited by the appellant as support for the imposition of an independent common law duty of care can be distinguished from the case at hand on the basis that no statutory duty of care existed (*Just*, *supra*; *Brown*, *supra*; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445 (S.C.C.); *Ryan*, *supra*).

173 In addition, I find that the outcome in this case would not be different if the case were determined according to ordinary negligence principles. First, were the Court to engage in a common law analysis, it would still look to the statutory standard of care as laid out in *The Rural Municipality Act, 1989*, as interpreted by the case law in order to assess the scope of liability owed by the respondent to the appellant. As this Court stated in *Ryan*, *supra*, at para. 29:

> Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

174 Moreover, even under the common law analysis, this Court would be called upon to question the type of hazards that the respondent, in this case, ought to have foreseen. Whatever the approach, it is only reasonable to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver.

175 The Courts have long restricted the standard of care under the statutory duty to require municipalities to repair only those hazards which would pose a risk to the reasonable driver exercising ordinary care. Compelling reasons exist to maintain this interpretation. The municipalities within the province of Saskatchewan have some 175,000 kilometres of roads under their care and control, 45,000 kilometres of which fall within the "bladed trail" category. These municipalities, for the most part, do not boast large, permanent staffs with extensive time and budgetary resources. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard. Accordingly, it is a change that I would not be prepared to make.

VII — Disposition

2002 CarswellSask 178, 2002 SCC 33, 2002 CarswellSask 179, [2002] S.C.J. No. 31, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 286 N.R. 1, REJB 2002-29758, J.E. 2002-617

176 In the result, the judgment of the Saskatchewan Court of Appeal is affirmed and the appeal is dismissed with costs.

Appeal allowed.

Pourvoi accueilli.

FN* A corrigendum issued by the court on May 29, 2002 has been incorporated herein.

END OF DOCUMENT