COURT OF APPEAL FILE NO. CA44448

COURT OF APPEAL

ON APPEAL FROM the order of Madame Justice Fitzpatrick of the British Columbia Supreme Court pronounced on the 1st of May, 2017

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

AND:

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

AND:

IN THE MATTER A PLAN OF COMPROMISE AND ARRANGEMENT OF NEW WALTER ENERGY CANADA HOLDINGS, INC., NEW WALTER CANADIAN COAL CORP., NEW BRULE COAL CORP., NEW WILLOW CREE COAL CORP., NEW WOLVERINE COAL CORP., AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS
(RESPONDENTS)

AND:

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

APPELLANT

BOOK OF AUTHORITIES OF THE RESPONDENT, WALTER CANADA GROUP
VOLUME 1 of 3

United Mine Workers of America 1974 Pension Plan and Trust

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TAB 1

British Columbia Court of Appeal
B.G. Preeco (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.
Date: 1989-05-31

T.R. Braidwood, Q.C., and G.W.K. Scarborough, for appellants.

J.M. Webster and P.M. Daykin, for respondents.

(Vancouver No. CA009889)

May 31, 1989. The judgment of the Court was delivered by

[1] Seaton J.A.: – This litigation arises out of a contract by which the plaintiff agreed to sell property to Bon Street Developments Ltd. for $4,220,000. The sale was to close on September 25, 1985, but on September 5, 1985 the purchaser repudiated the agreement and offered $3,000,000. Later it offered $3,300,000. When a Mr. Ortt, the realtor involved, pointed out that the purchaser would be liable on the agreement, the defendant Kaplan responded that they could "walk away from the deal because their lawyer had some angle".

[2] The "angle" only became apparent after these proceedings were launched. The Bon Street Developments Ltd. with whom the original discussions were held was a different company than the Bon Street Developments Ltd. that entered into the contract. The new Bon Street Developments Ltd. was a shell company. It had no assets. The company with whom they had originally dealt had changed its name to 262098 B.C. Ltd. and is now Bon Street Holdings Ltd. The defendants Kaplan and MacDonald are directors and the beneficial owners of the shares of each company.

[3] The new Bon Street Developments Ltd. was found liable for breach of contract and judgment for $1,746,336.40 was awarded against it. That company has no assets and does not appeal.

[4] The focus of the lawsuit, the appeal and the cross-appeal is on the liability of the defendants Bon Street Holdings Ltd. (the original Bon Street Developments Ltd.), Kaplan and MacDonald and the finding of the trial Judge that "Their actions constituted a deceit, a fraudulent misrepresentation." Damages for fraud were assessed against those three defendants in the amount of $400,000.

[5] The plaintiff was anxious to dispose of property near Granville Island and hoped that it could be sold at a good price during the "window of opportunity" created by the imminence of Expo '86. There was reason to believe that this property could benefit from Expo if construction started during the summer of 1985.

[6] Knowlton Realty Ltd., with whom Ortt worked, had a listing. The first step in selling the property was a letter dated March 25, 1985 from Ortt to "Mr. Brian MacDonald, President, Bon Street Developments Ltd." pointing out that the site was available.

[7] Bon Street Developments Ltd. was known to Ortt as a successful development company. He had been told of a substantial project in downtown Vancouver which had recently been completed and was being operated by Bon Street Developments Ltd. Because the major tenant of the property was London Drugs, it was referred to throughout the case as the "London Drugs property". Ortt had also been told that Kaplan and MacDonald had been known to renege on commitments and that he should not do a "handshake deal" with them.

[8] At the beginning of April 1985 Ortt met with Kaplan and MacDonald in the offices of Bon Street Developments Ltd. The business cards of Kaplan and MacDonald bore that name. That was the name on the offices, on the letterhead and in the telephone book. That was all proper at the beginning of April. Ortt was in truth dealing with the Bon Street Developments Ltd. that he thought he was.

[9] In mid-April Bon Street Developments Ltd. changed its name to 262098 B.C. Ltd. and the shell company, 286357 B.C. Ltd., on the same day changed its name to Bon Street Developments Ltd. Everything else remained the same: the business cards, the letterhead, the telephone number and the office premises. The land registry office records showing the London Drugs property owned by Bon Street Developments Ltd. remained the same. Even the banking arrangements remained the same. The cheques which were later paid in this transaction were in the name of Bon Street Developments Ltd., though that was the account of the original company of that name and no account has been opened for the new company.

[10] In May, an interim agreement was entered into by the new company offering a $100,000 deposit and a $4,200,000 price. If accepted by the plaintiff, the property would not be available for sale to others during the "Expo window". Therefore, the plaintiff was anxious that the sale be firm and required Ortt to ensure that this was a "recourse purchase". That meant that it was to a buyer who was bound to buy and who had sufficient assets so that it would either complete the contract or be able to bear the loss that would flow from a breach of the contract. Ortt made enquiries of the defendants and of others and he searched the land registry records. As a result he was able to tell the plaintiff that

this was indeed a recourse purchase. Of course, he did not know of the name change. The plaintiff executed the interim agreement.

[11] It was the original company that the plaintiff dealt with at the beginning and thought it was dealing with throughout. It knew of no other company. It was the original company through its officers that led the plaintiff to that belief. It was the original company that paid the deposit of $100,000. It was the original company that bore all the expense of inquiring into the feasibility of the project. That the original company bore all the expense was said to be an accounting slip.

[12] The trial Judge, with ample justification, did not accept the evidence of Kaplan and MacDonald where it conflicted with that of Ortt.

[13] The purposes of the corporate name changes were several. A memorandum prepared by an accountant listed as the first objective: "(1) the protection of successful projects from losses arising as a result of unsuccessful projects."

[14] According to Kaplan, one of the principal functions of the corporate restructuring was to "tie down" properties. The idea was to enter into agreements using the shell company. If a project proved not to be feasible, it could be abandoned without risking the assets of the original company or the individuals. That is what was done here.

[15] In the course of his judgment the trial Judge said:

> "However, it was felt that there was a certain amount of goodwill attached to the company name so a different company (the (new) company) was given that name to use for the next new project to be undertaken."

In my view, the company and its name cannot be separated in that way. The purpose of the name changes was to pass on the goodwill of the company by pretending that the new company was the old. That is what was done here.

[16] I turn to the arguments that question that the appellants should be found liable in fraud.

[17] An argument was mounted because the trial Judge distinguished between misleading Ortt as to who the purchaser was and misleading Ortt as to what assets the purchaser had. Of course, the two concepts are related. Ortt was led to believe that he was dealing with the original Bon Street Developments Ltd. with all of the assets that it held. But the trial Judge did find a difference and one of the arguments was based on that difference. He said:

> "On all the evidence and in particular, because of the circumstances I have outlined, I am satisfied that the conversations suggested by Ortt about the substance of the purchaser and about specific assets took place.
>
> What flows from that? Plaintiff's counsel, as I have indicated, has submitted that there was a misrepresentation as to the identity of the company making the offer, that is, that it was represented that the [original] company rather than the [new] company was making the offer. That is not quite my conclusion.
>
> My interpretation of what transpired is that Kaplan and MacDonald deliberately induced Ortt to assume, or at least deliberately permitted him to assume, that the company making the offer – the (new) company – owned assets that were in fact owned by the (original) company, knowing very well that that fact was important to and would influence the plaintiff's decision as to the acceptance of their offer. *It was not the specific identity of the offering party that Ortt was enquiring about, but rather what assets that company owned, whichever it was.* About that issue Kaplan and MacDonald were being deliberately deceitful. Whether they made an explicit misrepresentation in that regard or whether they simply omitted to tell him what the circumstances called for, namely, that the offering company was a shell company and did not own the assets he was enquiring about, the result is the same. Their actions constituted a deceit, a fraudulent misrepresentation.
>
> It is central to my findings that, as I have said, the misrepresentation was not as to the identity of the company making the offer but rather as to what assets that company, whichever it was, owned. *Ortt was essentially interested in the latter, not the details of the corporate organization of the defendants' development enterprise.* That distinction is particularly important both as to the remedy of rectification and as to the issue of damages, to which issues I shall return later."

I have emphasized the sentences that appear to have led to the conclusions of the trial Judge.

[18] All that Ortt was concerned with was that he was dealing with a buyer of substance against whom a claim could successfully be made in the event of a breach of contract. His investigations and enquiries were directed to that concern. Hie defendants sought to have the plaintiff contract with a buyer without assets and succeeded by deceiving Ortt into thinking he was dealing with a company with substantial assets.

[19] The appellants argued that the fraud found was not the fraud alleged in the pleadings. The statement of claim included this allegation:

> "16. Prior to the execution of the May 21st Agreement negotiations were carried on between the plaintiff, Knowlton and all of the Defendants. During these negotiations each of the Principals represented to Knowlton and the Plaintiff as follows:
>
> (a) that the (new Bon Street Developments Ltd.) had substantial assets available;
>
> (b) in particular, that the (new Bon Street Developments Ltd.) was the registered owner of the London Drugs Property as well as other real estate holdings;
>
> (c) that if the (new Bon Street Developments Ltd.) did in fact default under the Offer that there would be substantial assets available to the Plaintiff."

[20] I reject the argument that the trial Judge found a different fraud than that alleged in the pleadings. I think that the pleadings are broad enought to encompass the fraud found.

[21] One of the arguments of the appellants focused on the use of the terms "we", "us", "they" and "them" which MacDonald and Kaplan, according to the argument, used to refer to themselves and their several companies. Ortt understood them to be referring to the one company of which he was aware. On many occasions during the trial such terms were used to mean a company. I take this from the evidence of Tanner, an officer of the plaintiff:

> "he (Ortt) had gone to, I think, unusual lengths to try to identify just who he was dealing with and the nature and the quality and substance of the purchaser and he stressed that he had made a thorough investigation of the company and he was satisfied that *they* indeed were who *they* said *they* were and *they* were a company of substance." (Emphasis added.)

There is no doubt that the term "they" meant "the purchasing company."

[22] If MacDonald and Kaplan used "we" to mean the two companies called Bon Street Developments Ltd., that was part of the deception. They knew that Ortt was asking about the Bon Street Developments Ltd. that was buying the property, not some other company. When he asked about financial statements and was told that they would not be given to him, MacDonald and Kaplan knew that he meant statements of the purchasing company, not some other company. They also knew that the purchasing company had been in existence for a limited period and had no assets. When he explored in depth the ownership of the London Drugs property with them, they knew that he thought that the purchasing company was the Bon Street Developments Ltd. that owned that property and that appeared on the certificate of title that Ortt had had searched. If they said "we" on such occasions, that was simply part of the fraud. I do not think the appellant can take any comfort from the loose usage of the words "we", "us", "they" and "them".

[23] The appellants argued that the trial Judge found something short of fraud when he said:

> "My interpretation of what transpired is that Kaplan and MacDonald deliberately induced Ortt to assume, or at least deliberately *permitted him to assume,* that the company making the offer – the (new) company – owned assets that were in fact owned by the (original) company, knowing very well that that fact was important to and would influence the plaintiff's decision as to the acceptance of their offer." (Emphasis added.)

[24] The argument is that this does not disclose fraud. The term "permitted", if it includes "encourage", describes much of what took place following the substitution of the shell

company for the original company. Having deceived Ortt and his client by changing corporate names, the defendants encouraged them to remain deceived.

[25] Ortt thought he knew what company he was dealing with, Bon Street Developments Ltd., and he asked about the assets of that company. He did not know, and it was apparent to Kaplan and MacDonald that he did not know, of the switch of company names. On the evidence, the conclusion is inescapable that Ortt was intentionally misled by the conduct and the statements of the defendants into believing he was dealing with the company that had the London Drugs property and other assets about which they were speaking.

[26] This argument cannot succeed.

[27] Several arguments were based on the need for proof of an intention to defraud. The evidence permits no conclusion other than that the defendants intended to do what they succeeded in doing. I do not think these arguments have merit.

[28] The plaintiff cross-appealed. It sought to recover judgment for $1,746,336.40 against all of the defendants, not just against the new company. Alternatively, it sought to have us increase the damages awarded for fraud against Kaplan, MacDonald and the original company.

[29] In one of its arguments the plaintiff sought to fix liability on the individual defendants for inducing breach of contract. When the new company breached its contract it had little choice. It had no assets. It held this one contract.

[30] I agree with the trial Judge that the conduct of the directors does not make them liable for inducing breach of contract.

[31] The plaintiff also sought in the cross-appeal to fix liability for damages for breach of contract on the individuals and possibly the original Bon Street Developments Ltd. by an argument entitled "Lift the Corporate Veil". The plaintiff says that company law does not protect principals of a company who acted fraudulently or dishonestly, and that in such cases, the corporate veil should be lifted to fix liability on the principals.

[32] The trial Judge dealt with this question in this way:

> "SHAM
>
> Plaintiff's counsel also made a submission expressed in rather general and sweeping terms that the (new) company was a mere 'device and a sham' and the Court should

> 'pierce the corporate veil' to hold the individual defendants liable on the agreement. However, the (new) company was a properly incorporated legal entity whose principals intended to operate through it for specific purposes which I have described. It had no significant assets – it was a 'shell' company – but of course that per se does not mean it did not have the power to contract to purchase real estate. Indeed, I was told that that was not uncommon in the real estate industry. Furthermore, the fact that the principals of the company may have intended even at the time of undertaking the obligation on behalf of the company to take advantage of the limited liability of the company if it suited their purposes does not per se make the company a sham, i.e. does not expose its principals to liability for the company's obligations."

[33] There are cases in which the law will fix liability on the principals but they do not support the broad proposition put forward on the cross-appeal.

[34] A number of cases, including *Covert* v. *Minister of Finance of N.S.,* [1980]. 2 S.C.R. 774, (sub nom. *Re Jodrey; Covert* v. *Minister of Finance (N.S.))* 8 E.T.R. 69, [1980] C.T.C. 437, 41 N.S.R. (2d) 181, 76 A.P.R. 181, 32 N.R. 275, relied on by the plaintiff, turn on particular legislation and do not assist this argument.

[35] Some of the cases referred to by counsel used corporate veil language but in truth seem to have been based on holding out, estoppel, or agency.

[36] The judicial expletives that demonstrate want of clear propositions in this area have been gathered by Professor Pickering in "The Company as a Separate Legal Entity" (1968) 31 Mod. L.Rev. 481.

[37] I do not subscribe to the "Deep Rock doctrine" that permits the corporate veil to be lifted whenever to do otherwise is not fair: see *Pepper v. Litton,* 308 U.S. 295, 84 L. Ed. 281 (1939). That doctrine and the doctrine laid down in *Salomon* v. *Salomon & Co.; Salomon Co.* v. *Salomon,* [1897] A.C. 22, [1895-9] All E.R. Rep. 33 (H.L.), cannot co-exist. If it were possible to ignore the principles of corporate entity when a judge thought it unfair not to do so, *Salomon's* case would have afforded a good example for the application of that approach.

[38] In *Kosmopoulos v. Constitution Insurance Co.,* [1987] 1 S.C.R. 2 at 10-11, 22 C.C.L.I. 296, 36 B.L.R. 233, [1987] I.L.R. 1-2147, 74 N.R. 360, 21 O.A.C. 4, 34 D.L.R. (4th) 208, there is an obiter dictum that might be thought to support the "Deep Rock doctrine":

> "(a) 'Lifting the Corporate Veil'
>
> As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.,* [1897] A.C. 22 (H.L.). The law on when a court may disregard this principle by 'lifting the corporate veil' and regarding the company as a

> mere 'agent' or 'puppet' of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the 'separate entities' principle is not enforced when it would yield a result 'too flagrantly opposed to justice, convenience or the interests of the Revenue': L. C. B. Gower, *Modern Company Law* (4th ed. 1979), at p. 112. I have no doubt that theoretically the veil could be lifted in this case to do justice, as was done in *American Indemnity Co.* v. *Southern Missionary College* [260 S.W. 2d 269], cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so."

The concluding words in the chapter in L.C.B. Gower, *Modern Company Law,* 4th ed. (London: Stevens & Sons, 1979) from which Wilson J. quoted are these (at p. 138):

> "The most that can be said is that the courts' policy is to lift the veil if they think that justice demands it and they are not constrained by contrary binding authority. The results in individual cases may be commendable, but it smacks of palm-tree justice rather than the application of legal rules."

Professor Welling in *Corporate Law in Canada* (Toronto: Butterworths, 1984) put it more firmly. He referred to the American cases that apply the fair play rationale and said (at p. 129):

> "Little need be said about this rationale, other than that it simply will not do. There are, so far as we know, no such broadly enforceable standards of 'fair play and good conscience,' at least in Canadian corporate law."

[39] In *Kosmopoulos,* supra, the Court was considering an insurance question where a shareholder claimed an insurable interest in the assets of the company. That raises somewhat different problems, and the Court did not lift the corporate veil in the course of its decision.

[40] Cases in which Courts have ignored the corporate entity fall under a number of headings, only one of which could warrant consideration here. In Gower's *Modern Company Law* at p. 126, that heading is stated as "Fraud or improper conduct". None of the cases cited there has any similarity to this one.

[41] The cases in which the corporate veil is pierced on the ground of "fraud or improper conduct" deal with instances where a corporation is used to effect a purpose or commit an act which the shareholder could not effect or commit.

[42] In *Gilford Motor Co.* v. *Home,* [1933] Ch. 935, [1933] All E.R. Rep. 109 (C.A.), the plaintiff sought an injunction to prevent the defendant, through a newly incorporated company, from breaching a restrictive covenant. The injunction was granted against both the individual and the company on the basis that the company was merely a device by which the individual defendant breached his restrictive covenant.

[43] Similarly, in *Jones v. Lipman,* [1962] 1 All E.R. 442, [1962] 1 W.L.R. 832, (Ch. D.), the plaintiff was granted specific performance of a contract entered into with the first defendant. In an attempt to avoid the contract, the first defendant sold the property in question to the second defendant, a company in which the first defendant and a clerk of his solicitor were sole shareholders.

[44] In *Lockharts Ltd. v. Excalibur Holdings Ltd.* (1987), 47 R.P.R. 8, 83 N.S.R. (2d) 181, 210 A.P.R. 181 (T.D.), a plaintiff was granted a declaration that its judgment against one company was binding on another company owned by the same individual, as assets had been conveyed to the second company in order to avoid the plaintiff's judgment.

[45] The Courts have also pierced the corporate veil so as to ignore the separate legal existence of related companies. This has been done in income tax cases. For example, see *De Salaberry Realties Ltd. v. M.N.R.,* 46 D.L.R. (3d) 100, [1974] C.T.C. 295, 74 D.T.C. 623 (Fed. T.D.), where the character of the company's business was determined from a look at the business of its associated companies.

[46] The group enterprise theory has also been extended to other types of cases. This version of piercing the corporate veil was used in *Manley Inc. v. Fallis* (1977), 2 B.L.R. 277, 38 C.P.R. (2d) 74 (Ont. C.A.) to find an employee of one company liable for breach of fiduciary duty by setting up a business in competition with his employer's parent company. In *D.H.N. Food Distributors Ltd. v. London Borough of Tower Hamlets,* [1976] 3 All E.R. 462, [1976] 1 W.L.R. 852 (C.A.), the English Court of Appeal held that a related group of companies was entitled to compensation for disturbance from its business and land, despite the fact that no one company both owned the land and carried on business. This decision, which purports to expand the group enterprise theory, has been limited to its facts by the House of Lords in *Woolfson v. Strathclyde Regional Council,* [1978] S.C. (H.L.) 90. The idea of treating related companies as one entity, absent some specific statutory requirement, has also been disapproved of by the Australian High Court in *Industrial Equity Ltd. v. Blackburn* (1977), 137 C.L.R. 567, 17 A.L.R. 575 (H.C.).

[47] While the group enterprise theory may be successful on certain facts, no cases were cited which would, through this theory, make one company liable for its associated company's contracts.

[48] One case cited by the plaintiff does appear to fix liability on a company for a contract entered into by an associated company on the basis that the contracting party was misled as to the identity of the company with whom he had contracted: *Pacific Rim*

Installations v. Tilt-up Construction Ltd. (1978), 5 B.C.L.R. 231 (Co. Ct.). Although that case cites the corporate veil cases, both defendant companies were held liable in contract on the grounds that the non-contracting company had held itself out as the contracting party and was therefore estopped from denying that it had entered into a contract with the plaintiff. The case is of no assistance to this plaintiff as the trial Judge expressly found that the plaintiff was not mistaken as to the identify of the contracting company, merely its assets.

[49] In this case the plaintiff knew it was dealing with a company. The fraud found by the trial Judge caused the plaintiff to believe that the company had assets that it, in fact, did not have. That has nothing to do with the corporate veil. The use of a company as a means of avoiding bearing business losses is neither unusual nor a basis for lifting the veil.

[50] In my view, the proper remedy is not to lift the corporate veil, but to award damages for fraud against the individuals and the company that committed the fraud. That is what the trial Judge did.

[51] That leaves the question whether there are other grounds upon which the original Bon Street Developments Ltd. should be held liable for the full contractual measure of damages rather than the damages directly caused by the fraud. The plaintiff's argument in this respect was included in the argument under the heading, "The Learned Trial Judge erred in failing to 'lift the corporate veil' ". The heading is unfortunate. Lifting the veil is no help – when it is lifted the old company is not to be seen. Neither company had shares in the other.

[52] Headings seem to have confused this matter at trial as well. Cases fixing liability where the person was said not to have contracted with the person he thought he was contracting with are found under the heading "Rectification". The trial Judge disposed of the argument under that heading and under the heading "Estoppel" with this statement:

> "However, those authorities and the principles set out therein do not apply because of the findings of fact I have made. As I have indicated, the misrepresentations by the defendants and the mistaken belief of the plaintiff in this case were not as to the identity of the party making the offer but rather as to the assets owned by the company making the offer."

[53] The plaintiff did not challenge that finding on the appeal; yet a successful challenge would appear to be the first step in a claim that the original company was liable for the damages assessed in contract. Counsel might have considered that if he succeeded in

fixing liability on the old company for the contract damages there would be no loss arising out of the fraud and therefore no judgment against the individual defendants.

[54] There may be routes that would lead to the original company being bound by the contract entered into by the new company. I have not searched for such routes. The issues and arguments at trial and on this appeal were chosen by counsel, who knew much more about the evidence that was available and the evidence that was called than I can know. I have therefore thought that I should restrict myself to a consideration of the arguments raised in the factums and argued before us.

[55] The arguments of the plaintiff that would make the individual defendants or the old company liable for the damages assessed against the new company cannot succeed.

[56] I turn to arguments in the appeal and cross-appeal respecting the amount awarded for damages for fraud.

[57] The proper award of damages for fraudulent misrepresentation is the amount required to place the innocent party in the position it would have been in if the representation had not been made. The trial Judge found that if the representations had not been made, the plaintiff would have declined to enter into the interim agreement with a deposit of less than $500,000. He subtracted the $100,000 that was originally deposited and awarded damages against MacDonald, Kaplan and Bon Street Holdings Ltd. of $400,000.

[58] The difficulty in this reasoning is that we do not know whether the defendants would have made a deposit of $500,000. It is difficult to know what would have happened if there had been no fraudulent misrepresentation, but on the evidence accepted by the trial Judge there are two possibilities. Either a deposit of $500,000 would have been paid, or there would have been no agreement entered into. The trial Judge favoured the first of those possibilities and awarded damages accordingly. It would be difficult to assess the damage incurred under the second possibility. The plaintiff might have made a good sale while the Expo window was open in the summer of 1985. The property did not sell until February 1987 and then for $2,800,000. If, under the second possibility, it is concluded that the property might have been sold for $3,300,000, an amount offered by the new company after the repudiation, then the damages would be the same amount as the trial Judge awarded.

[59] On the appeal it was said that the award was too high. That is based on the premise that the purchaser would not have paid a deposit of $500,000 and that there would, therefore, have been no agreement. But that would have brought into effect the second possibility that I have referred to, that there would have been a sale to another purchaser. The evidence suggests that the plaintiff could have sold at that time for $3,300,000.

[60] On the cross-appeal the plaintiff said that the damages should be higher, equal to the loss in value of the property between the summer of 1985 and the time that it was ultimately sold, taking the amount in the interim agreement as the value in 1985. But that amount is artificially high because the defendants did not intend to pay it if the feasibility study was discouraging. It is also seen to be high by the fact that no other buyer could be found who would offer a sum in that range.

[61] On the whole I think that the trial Judge's figure of $500,000, less the $100,000 on hand, was an appropriate assessment of the loss sustained as a result of the fraud.

[62] The appellants raised a question about costs. The trial Judge made a special order pursuant to s. 8, Appendix B, of the Rules of Court to allow a higher level to the plaintiff than otherwise would have been permitted. He said:

> "In my view 'special reason' exists in this case. The litigation was complex and a large amount of money was involved. There were many issues of fact and law to be resolved. The trial took 11 days and there were many interlocutory applications. My essential finding was one of fraud against the defendants. In my view it is an appropriate case for an order under s. 8 that the bill of costs not be limited by the schedule of maximum costs but be taxed on the basis of $50,000 under s. 3 as suggested by counsel for the plaintiff."

[63] There were many issues. Included in the reasons for judgment were sections entitled, "Rectification", "Inducing Breach of Contract", "Section 130 of the Company Act", "Partnership Liability" and "Sham". On each of those issues the plaintiff lost. Raising numerous issues that fail should not entitle a plaintiff to costs on a higher scale. If anything it should tell against the plaintiff in costs. I think that this finding of special reason cannot stand.

[64] I would allow the appeal respecting costs, dismiss the appeal in all other respects, and dismiss the cross-appeal.

Appeal and cross-appeal dismissed.

TAB 2

Chevron Corporation and Chevron Canada Limited *Appellants*

v.

Daniel Carlos Lusitande Yaiguaje, Benancio Fredy Chimbo Grefa, Miguel Mario Payaguaje Payaguaje, Teodoro Gonzalo Piaguaje Payaguaje, Simon Lusitande Yaiguaje, Armando Wilmer Piaguaje Payaguaje, Angel Justino Piaguaje Lucitante, Javier Piaguaje Payaguaje, Fermin Piaguaje, Luis Agustin Payaguaje Piaguaje, Emilio Martin Lusitande Yaiguaje, Reinaldo Lusitande Yaiguaje, Maria Victoria Aguinda Salazar, Carlos Grefa Huatatoca, Catalina Antonia Aguinda Salazar, Lidia Alexandria Aguinda Aguinda, Clide Ramiro Aguinda Aguinda, Luis Armando Chimbo Yumbo, Beatriz Mercedes Grefa Tanguila, Lucio Enrique Grefa Tanguila, Patricio Wilson Aguinda Aguinda, Patricio Alberto Chimbo Yumbo, Segundo Angel Amanta Milan, Francisco Matias Alvarado Yumbo, Olga Gloria Grefa Cerda, Narcisa Aida Tanguila Narvaez, Bertha Antonia Yumbo Tanguila, Gloria Lucrecia Tanguila Grefa, Francisco Victor Tanguila Grefa, Rosa Teresa Chimbo Tanguila, Maria Clelia Reascos Revelo, Heleodoro Pataron Guaraca, Celia Irene Viveros Cusangua, Lorenzo Jose Alvarado Yumbo, Francisco Alvarado Yumbo, Jose Gabriel Revelo Llore, Luisa Delia Tanguila Narvaez, Jose Miguel Ipiales Chicaiza, Hugo Gerardo Camacho Naranjo, Maria Magdalena Rodriguez Barcenes, Elias Roberto Piyahuaje Payahuaje, Lourdes Beatriz Chimbo Tanguila, Octavio Ismael Cordova Huanca, Maria Hortencia

Chevron Corporation et Chevron Canada Limited *Appelantes*

c.

Daniel Carlos Lusitande Yaiguaje, Benancio Fredy Chimbo Grefa, Miguel Mario Payaguaje Payaguaje, Teodoro Gonzalo Piaguaje Payaguaje, Simon Lusitande Yaiguaje, Armando Wilmer Piaguaje Payaguaje, Angel Justino Piaguaje Lucitante, Javier Piaguaje Payaguaje, Fermin Piaguaje, Luis Agustin Payaguaje Piaguaje, Emilio Martin Lusitande Yaiguaje, Reinaldo Lusitande Yaiguaje, Maria Victoria Aguinda Salazar, Carlos Grefa Huatatoca, Catalina Antonia Aguinda Salazar, Lidia Alexandria Aguinda Aguinda, Clide Ramiro Aguinda Aguinda, Luis Armando Chimbo Yumbo, Beatriz Mercedes Grefa Tanguila, Lucio Enrique Grefa Tanguila, Patricio Wilson Aguinda Aguinda, Patricio Alberto Chimbo Yumbo, Segundo Angel Amanta Milan, Francisco Matias Alvarado Yumbo, Olga Gloria Grefa Cerda, Narcisa Aida Tanguila Narvaez, Bertha Antonia Yumbo Tanguila, Gloria Lucrecia Tanguila Grefa, Francisco Victor Tanguila Grefa, Rosa Teresa Chimbo Tanguila, Maria Clelia Reascos Revelo, Heleodoro Pataron Guaraca, Celia Irene Viveros Cusangua, Lorenzo Jose Alvarado Yumbo, Francisco Alvarado Yumbo, Jose Gabriel Revelo Llore, Luisa Delia Tanguila Narvaez, Jose Miguel Ipiales Chicaiza, Hugo Gerardo Camacho Naranjo, Maria Magdalena Rodriguez Barcenes, Elias Roberto Piyahuaje Payahuaje, Lourdes Beatriz Chimbo Tanguila, Octavio Ismael Cordova Huanca, Maria Hortencia

Viveros Cusangua, Guillermo Vincente Payaguaje Lusitante, Alfredo Donaldo Payaguaje Payaguaje and Delfin Leonidas Payaguaje Payaguaje *Respondents*

and

International Human Rights Program at the University of Toronto Faculty of Law, MiningWatch Canada, Canadian Centre for International Justice and Justice and Corporate Accountability Project *Interveners*

INDEXED AS: CHEVRON CORP. *v.* YAIGUAJE

2015 SCC 42

File No.: 35682.

2014: December 11; 2015: September 4.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Karakatsanis, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Private international law — Foreign judgments — Recognition — Enforcement — Foreign judgment creditor sought recognition and enforcement of foreign judgment in Ontario against U.S. foreign judgment debtor's and Canadian seventh-level indirect subsidiary — Foreign judgment debtor served ex juris at U.S. head office — Subsidiary served in juris at place of business in Ontario — Whether a real and substantial connection must exist between defendant or dispute and Ontario for jurisdiction to be established — Whether Ontario courts have jurisdiction over foreign judgment debtor's subsidiary when subsidiary is a third party to the judgment for which recognition and enforcement is sought.

The oil-rich Lago Agrio region of Ecuador has long attracted the exploration and extraction activities of global oil companies, including Texaco. As a result of those activities, the region is said to have suffered extensive environmental pollution that has disrupted the lives and jeopardized the futures of its residents. For over 20 years, the 47 respondents/plaintiffs, who represent

Viveros Cusangua, Guillermo Vincente Payaguaje Lusitante, Alfredo Donaldo Payaguaje Payaguaje et Delfin Leonidas Payaguaje Payaguaje *Intimés*

et

International Human Rights Program at the University of Toronto Faculty of Law, Mines Alerte Canada, Centre canadien pour la justice internationale et Justice and Corporate Accountability Project *Intervenants*

RÉPERTORIÉ : CHEVRON CORP. *c.* YAIGUAJE

2015 CSC 42

N° du greffe : 35682.

2014 : 11 décembre; 2015 : 4 septembre.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Karakatsanis, Wagner et Gascon.

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

Droit international privé — Jugements étrangers — Reconnaissance — Exécution — Demande de reconnaissance et d'exécution d'un jugement étranger présentée en Ontario par le créancier judiciaire à l'encontre du débiteur judiciaire américain et de sa filiale canadienne indirecte au septième degré — Signification ex juris de la demande au siège social du débiteur judiciaire aux États-Unis — Demande signifiée à la filiale à son établissement commercial en Ontario — L'établissement de la compétence du tribunal exige-t-il l'existence d'un lien réel et substantiel entre le défendeur ou le litige et l'Ontario? — Les tribunaux ontariens ont-ils compétence à l'égard de la filiale d'un débiteur en vertu d'un jugement étranger alors que cette filiale est une tierce partie au jugement dont on demande la reconnaissance et l'exécution?

La région riche en pétrole de Lago Agrio, en Équateur, attire depuis longtemps les activités d'exploration et d'extraction de sociétés pétrolières multinationales, y compris Texaco. En raison de ces activités, la région aurait subi une pollution environnementale importante qui a eu pour effet de perturber les vies et de compromettre l'avenir des personnes qui y vivent. Depuis plus de 20 ans,

approximately 30,000 indigenous Ecuadorian villagers, have been seeking legal accountability and financial and environmental reparation for harms they allegedly suffered due to Texaco's former operations in the region. Texaco has since merged with Chevron, a U.S. corporation. The Appellate Division of the Provincial Court of Justice of Sucumbíos affirmed an Ecuadorian trial judge's award of US$8.6 billion in environmental damages and US$8.6 billion in punitive damages against Chevron. Ecuador's Court of Cassation upheld the judgment except on the issue of punitive damages. In the end, the total amount owed was reduced to US$9.51 billion.

Since the initial judgment, Chevron has fought the plaintiffs in the U.S. courts and has refused to acknowledge or pay the debt. As Chevron does not hold any Ecuadorian assets, the plaintiffs commenced an action for recognition and enforcement of the Ecuadorian judgment in the Ontario Superior Court of Justice. It served Chevron at its head office in California, and served Chevron Canada, a seventh-level indirect subsidiary of Chevron, first at an extra-provincially registered office in British Columbia, and then at its place of business in Ontario. *Inter alia*, the plaintiffs sought the Canadian equivalent of the award resulting from the judgment of the Appellate Division of the Provincial Court of Justice of Sucumbíos. Chevron and Chevron Canada each sought orders setting aside service *ex juris* of the amended statement of claim, declaring that the court had no jurisdiction to hear the action, and dismissing or permanently staying the action.

The motion judge ruled in the plaintiffs' favour with respect to jurisdiction. However, he exercised the court's power to stay the proceeding on its own initiative pursuant to s. 106 of the Ontario *Courts of Justice Act*. The Court of Appeal held this was not an appropriate case in which to impose a discretionary stay under s. 106. On the jurisdictional issue, it held that, as the foreign court had a real and substantial connection with the subject matter of the dispute or with the defendant, an Ontario court has jurisdiction to determine whether the foreign judgment should be recognized and enforced in Ontario against Chevron. With respect to Chevron Canada, in view of its bricks-and-mortar business in Ontario and its significant

les 47 intimés, les demandeurs, qui représentent environ 30 000 villageois autochtones de l'Équateur, tentent de faire reconnaître la responsabilité juridique et d'obtenir une réparation financière et environnementale pour les préjudices qu'ils auraient subis en raison des activités exercées auparavant par Texaco dans la région. Depuis lors, Texaco a fusionné avec Chevron, une société par actions américaine. La section d'appel de la Cour provinciale de justice de Sucumbíos a confirmé le jugement de première instance rendu en Équateur condamnant Chevron à verser 8,6 milliards de dollars US en dommages-intérêts environnementaux ainsi que 8,6 milliards de dollars US en dommages-intérêts punitifs. La Cour de cassation de l'Équateur a confirmé cette décision, sauf en ce qui concerne les dommages-intérêts punitifs. En définitive, le montant total dû a été réduit à 9,51 milliards de dollars US.

Depuis le jugement initial, Chevron a livré bataille aux demandeurs devant les tribunaux américains et a refusé de reconnaître ou d'acquitter la dette. Puisque Chevron ne possède pas de biens en Équateur, les demandeurs ont intenté devant la Cour supérieure de justice de l'Ontario une action en reconnaissance et en exécution du jugement équatorien. L'acte introductif d'instance a été signifié à Chevron à son siège social en Californie, et il a été signifié à Chevron Canada, une filiale indirecte au septième degré de Chevron, d'abord à un bureau situé à l'extérieur de la province, en Colombie-Britannique, et ensuite à un établissement commercial qu'elle exploite en Ontario. Les demandeurs ont réclamé notamment l'équivalent canadien du montant que leur accordait la section d'appel de la Cour provinciale de justice de Sucumbíos. Chevron et Chevron Canada ont toutes deux demandé une ordonnance annulant la signification *ex juris* de la déclaration amendée, un jugement déclarant que la cour n'a pas compétence pour connaître de l'action et une ordonnance de rejet ou de sursis permanent de l'action.

Sur la question de la compétence, le juge saisi de la motion a donné gain de cause aux demandeurs. Il a toutefois exercé son pouvoir de surseoir à l'instance de son propre chef, en application de l'art. 106 de la *Loi sur les tribunaux judiciaires* de l'Ontario. La Cour d'appel a estimé qu'il ne convenait pas en l'espèce d'imposer un sursis discrétionnaire en application de l'art. 106. Sur la question de la compétence, elle a conclu que, puisque le tribunal étranger avait un lien réel et substantiel avec l'objet du litige ou le défendeur, un tribunal ontarien avait compétence pour déterminer si le jugement étranger devait être reconnu et exécuté en Ontario contre Chevron. En ce qui concerne Chevron Canada, compte tenu de l'établissement

relationship with Chevron, the Court of Appeal found that an Ontario court has jurisdiction to adjudicate a recognition and enforcement action that also named it as a defendant.

Held: The appeal should be dismissed.

Canadian courts, like many others, have adopted a generous and liberal approach to the recognition and enforcement of foreign judgments. To recognize and enforce such a judgment, the only prerequisite is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction were satisfied. There is no need to demonstrate a real and substantial connection between the dispute or the defendant and the enforcing forum. In actions to recognize and enforce foreign judgments within the limits of the province, it is the act of service on the basis of a foreign judgment that grants an Ontario court jurisdiction over the defendant. To conclude otherwise would undermine the important values of order and fairness that underlie all conflicts rules, and would be inconsistent with this Court's statement that the doctrine of comity must be permitted to evolve concomitantly with international business relations, cross-border transactions, and mobility.

This Court has never required there to be a real and substantial connection between the defendant or the action and the enforcing court for jurisdiction to exist in recognition and enforcement proceedings. An unambiguous statement by this Court that a real and substantial connection is not necessary will have the benefit of providing a fixed, clear and predictable rule, allowing parties to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect and will help to avert needless and wasteful jurisdictional inquiries.

Two considerations of principle support the view that the real and substantial connection test should not be extended to an enforcing court in an action for recognition and enforcement. First, the crucial difference between an action at first instance and an action for recognition and enforcement is that, in the latter case, the only purpose of the action is to allow a pre-existing obligation to be fulfilled. As the enforcing court is not creating a new substantive obligation, there can be no concern that the parties are situated elsewhere, or that the facts underlying the dispute

physique, en briques et mortier, qu'elle exploitait en Ontario et du lien important qui la rattachait à Chevron, la Cour d'appel a estimé qu'un tribunal ontarien avait compétence pour trancher une action en reconnaissance et en exécution qui la constituait aussi comme défenderesse.

Arrêt : Le pourvoi est rejeté.

Les tribunaux canadiens, à l'instar de bien d'autres tribunaux, ont adopté une approche souple et libérale en ce qui concerne la reconnaissance et l'exécution des jugements étrangers. Pour la reconnaissance et l'exécution de ces jugements, la seule condition préalable est que le tribunal étranger ait eu un lien réel et substantiel avec les parties au litige ou avec l'objet du litige, ou que les fondements traditionnels de la compétence soient respectés. Il n'est pas nécessaire de démontrer l'existence d'un lien réel et substantiel entre le différend ou le défendeur et le ressort d'exécution. Dans les actions en reconnaissance et en exécution de jugements étrangers dans les limites de la province, c'est l'acte de signification fondé sur un jugement étranger qui confère au tribunal ontarien la compétence à l'égard d'un défendeur. Conclure autrement saperait les valeurs importantes d'ordre et d'équité qui servent de fondement à toutes les règles de droit international privé et serait incompatible avec l'affirmation de notre Cour selon laquelle le principe de la courtoisie doit pouvoir évoluer au même rythme que les relations commerciales internationales, les opérations transfrontalières et la libre circulation d'un pays à l'autre.

Notre Cour n'a jamais, dans une demande de reconnaissance et d'exécution, assujetti la déclaration de compétence à l'existence d'un lien réel et substantiel entre le défendeur ou l'action, d'une part, et le ressort d'exécution, d'autre part. Une affirmation non équivoque par notre Cour selon laquelle l'existence d'un lien réel et substantiel n'est pas nécessaire aura l'avantage de fournir une règle fixe, claire et prévisible; elle permettra aux parties de prédire avec une certitude raisonnable si un tribunal saisi d'une situation qui présente un aspect international ou interprovincial se déclarera ou non compétent et aidera à éviter des examens de la compétence inutiles et coûteux.

Deux considérations de principe permettent de conclure qu'il n'y a pas lieu, pour un tribunal saisi d'une action en reconnaissance et en exécution, d'appliquer le critère du lien réel et substantiel. Premièrement, la différence déterminante entre une action de première instance et une action en reconnaissance et en exécution est que dans le dernier cas, l'action a pour seul but de permettre l'acquittement d'une obligation préexistante. Puisqu'un tribunal d'exécution ne crée pas une nouvelle obligation substantielle, il importe peu que les parties se trouvent ailleurs,

are properly addressed in another court. The only important element is the foreign judgment and the legal obligation it has created. Furthermore, enforcement is limited to measures that can be taken only within the confines of the jurisdiction and in accordance with its rules, and the enforcing court's judgment has no coercive force outside its jurisdiction. Similarly, enforcement is limited to seizable assets found within its territory. As a result, any potential constitutional concerns relating to conflict of laws simply do not arise in recognition and enforcement cases: since the obligation created by a foreign judgment is universal, each jurisdiction has an equal interest in the obligation resulting from the foreign judgment, and no concern about territorial overreach could emerge.

Beyond this, it must be remembered that the notion of comity has consistently been found to underlie Canadian recognition and enforcement law. The need to acknowledge and show respect for the legal action of other states has consistently remained one of comity's core components, and militates in favour of recognition and enforcement. Legitimate judicial acts should be respected and enforced, not sidetracked or ignored. The goal of modern conflicts systems rests on the principle of comity, which calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity. This is true of all areas of private international law, including the recognition and enforcement of foreign judgments. In recognition and enforcement proceedings, order and fairness are protected by ensuring that a real and substantial connection existed between the foreign court and the underlying dispute. If such a connection did not exist, or if the defendant was not present in or did not attorn to the foreign jurisdiction, the resulting judgment will not be recognized and enforced in Canada. No unfairness results to judgment debtors from having to defend against recognition and enforcement proceedings — through their own behaviour and legal noncompliance, they have made themselves the subject of outstanding obligations, so they may be called upon to answer for their debts in various jurisdictions. They are also provided with the opportunity to convince the enforcing court that there is another reason why recognition and enforcement should not be granted. Requiring a defendant to be present or to have assets in the enforcing jurisdiction would only undermine order and fairness: presence will frequently be absent given the very nature of the proceeding at issue, and requiring assets in the enforcing jurisdiction when recognition and

ou qu'il soit opportun qu'un autre tribunal traite les faits sous-jacents au litige. Le seul élément important est le jugement étranger ainsi que l'obligation juridique qu'il a créée. De plus, l'exécution se limite à des mesures qui ne peuvent être prises que dans les limites du ressort du tribunal d'exécution et conformément à ses règles, et le jugement du tribunal d'exécution n'a aucun effet contraignant en dehors du ressort d'exécution. De même, l'exécution se limite aux biens saisissables qui se trouvent dans la province. Ainsi d'éventuelles questions d'ordre constitutionnel ayant trait au droit international privé ne se posent tout simplement pas dans une demande de reconnaissance et d'exécution : puisque l'obligation créée par le jugement étranger est universelle, chaque ressort a un intérêt égal à l'égard de l'obligation qui résulte du jugement étranger et aucun problème d'excès de compétence territoriale ne pourrait se poser.

Au-delà de ces considérations, il faut se rappeler que la notion de courtoisie sous-tend le droit canadien en matière de reconnaissance et d'exécution. Le besoin de reconnaître et respecter les mesures juridiques prises par d'autres États est invariablement demeuré un des éléments au cœur de ce principe, et la courtoisie milite en faveur de la reconnaissance et de l'exécution. Il convient de respecter et d'exécuter les actes judiciaires légitimes et non pas de les écarter ou d'en faire abstraction. Le système moderne de droit international privé repose sur le principe de la courtoisie, qui appelle à la promotion de l'ordre et de l'équité, une attitude de respect et de déférence envers les autres États, et un degré de stabilité et de prévisibilité pour faciliter la réciprocité. Ce principe s'applique à tous les domaines du droit international privé, y compris celui de la reconnaissance et l'exécution des jugements étrangers. Dans une demande de reconnaissance et d'exécution, la protection de l'ordre et de l'équité est déjà assurée par l'existence d'un lien réel et substantiel entre le tribunal étranger et le litige sous-jacent. Faute d'un tel lien, ou si le défendeur ne se trouvait pas dans le ressort étranger ou n'a pas acquiescé à la compétence de ses tribunaux, le jugement rendu ne sera pas reconnu et exécuté au Canada. Il n'y a rien d'injuste à ce qu'un débiteur judiciaire doive opposer une défense à une demande de reconnaissance et d'exécution — par son propre comportement et le non-respect d'un jugement, il s'est lui-même rendu redevable d'une obligation en souffrance et il peut être appelé par divers ressorts à acquitter sa dette. Il a également l'occasion de convaincre le tribunal d'exécution qu'il existe une autre raison de ne pas faire droit à la demande de reconnaissance et d'exécution. Exiger la présence du défendeur ou de ses biens dans la province du tribunal d'exécution ne ferait

enforcement proceedings are instituted would risk depriving creditors of access to funds that might eventually enter the jurisdiction. In today's globalized world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality.

Finding that there is no requirement of a real and substantial connection between the defendant or the action and the enforcing court in an action for recognition and enforcement is also supported by the choices made by the Ontario legislature, all other common law provinces and territories, Quebec, other international common law jurisdictions and most Canadian conflict of laws scholars.

In this case, jurisdiction is established with respect to Chevron. It attorned to the jurisdiction of the Ecuadorian courts, it was served *ex juris* at its head office, and the amended statement of claim alleged that it was a foreign debtor pursuant to a judgment of an Ecuadorian court. While this judgment has since been varied by a higher court, this occurred after the amended statement of claim had been filed; even if the total amount owed was reduced, the judgment remains largely intact. The plaintiffs have sufficiently pleaded the Ontario courts' jurisdiction over Chevron.

The question of whether jurisdiction exists over Chevron Canada should begin and end with traditional, presence-based jurisdiction. Where jurisdiction stems from the defendant's presence in the jurisdiction, there is no need to consider whether a real and substantial connection exists. To establish traditional, presence-based jurisdiction over an out-of-province corporate defendant, it must be shown that the defendant was carrying on business in the forum at the time of the action. This is a question of fact: the court must inquire into whether the company has some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained for a period of time. Here, the motion judge's factual findings have not been contested. They are sufficient to establish presence-based jurisdiction. Chevron Canada has a physical office in Ontario, where it was served. Its business activities at this office are sustained; it has representatives who provide

que miner l'ordre et l'équité : le défendeur y est souvent absent vu la nature même de la demande en cause, et exiger la présence de biens dans le ressort lorsqu'est introduite la demande de reconnaissance et d'exécution risquerait de priver les créanciers de fonds qui pourraient éventuellement se trouver dans le ressort. À l'ère de la mondialisation et des échanges électroniques, obliger un créancier judiciaire à attendre que le débiteur étranger ou ses biens se trouvent dans la province avant qu'un tribunal reconnaisse sa compétence dans une demande de reconnaissance et d'exécution reviendrait à faire abstraction de la réalité économique actuelle.

Les choix qu'ont exercé le législateur ontarien, toutes les provinces de common law et les territoires, le Québec, des ressorts de common law dans d'autres pays ainsi que la plupart des auteurs d'ouvrages canadiens de doctrine en droit international privé viennent également appuyer la conclusion que, dans une action en reconnaissance et en exécution, il n'est pas nécessaire d'exiger l'existence d'un lien réel et substantiel entre le défendeur ou l'action, d'une part, et le ressort d'exécution, d'autre part.

En l'espèce, la compétence est établie à l'égard de Chevron. Elle a acquiescé à la compétence des tribunaux équatoriens, la demande lui a été signifiée *ex juris* à son siège social, et dans leur déclaration amendée, les demandeurs ont affirmé qu'elle était un débiteur étranger en vertu d'un jugement d'un tribunal équatorien. Bien que ce jugement ait depuis été modifié par un tribunal d'instance supérieure, la modification est ultérieure au dépôt de la déclaration amendée; même si la somme totale due a été réduite, le jugement initial demeure en grande partie intact. Les demandeurs ont suffisamment fait valoir la compétence des tribunaux de l'Ontario à l'égard de Chevron.

La question de savoir si les tribunaux ontariens ont compétence à l'égard de Chevron Canada doit commencer et prendre fin avec la compétence traditionnelle fondée sur la présence. Lorsque la compétence découle de la présence du défendeur dans le ressort, point n'est besoin de se demander s'il existe un lien réel et substantiel. Pour prouver la compétence traditionnelle, fondée sur la présence, à l'égard d'une société défenderesse de l'extérieur de la province, il faut démontrer que cette défenderesse exploitait une entreprise dans le ressort au moment de l'action. Il s'agit là d'une question de fait : le tribunal doit se demander si cette société a une présence directe ou indirecte dans l'État du tribunal qui s'attribue compétence, et si elle se livre à des activités commerciales soutenues pendant un certain temps. En l'espèce, les conclusions de fait du juge saisi de la motion n'ont pas été contestées. Elles suffisent à établir la compétence fondée sur la présence. Chevron Canada possède un

services to customers in the province. Canadian courts have found that jurisdiction exists in such circumstances. The motion judge's analysis was correct, and the Ontario Court of Appeal had no need to go beyond these considerations to find jurisdiction.

The establishment of jurisdiction does not mean that the plaintiffs will necessarily succeed in having the Ecuadorian judgment recognized and enforced. A finding of jurisdiction does nothing more than afford the plaintiffs the opportunity to seek recognition and enforcement of the Ecuadorian judgment. Once past the jurisdictional stage, Chevron and Chevron Canada can use the available procedural tools to try to dispose of the plaintiffs' allegations. This possibility is foreign to and remote from the questions that must be resolved on this appeal. Further, the conclusion that the Ontario courts have jurisdiction in this case should not be understood to prejudice future arguments with respect to the distinct corporate personalities of Chevron and Chevron Canada or whether Chevron Canada's shares or assets will be available to satisfy Chevron's debt.

Cases Cited

Applied: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416; **distinguished:** *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572; **referred to:** *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2002); *Chevron Corp. v. Donziger*, 768 F.Supp.2d 581 (2011); *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2012); *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362 (2014); *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Hilton v. Guyot*, 159 U.S. 113 (1895); *Spencer v. The Queen*, [1985] 2 S.C.R. 278; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *BNP Paribas (Canada) v. Mécs* (2002), 60 O.R. (3d) 205; *Tasarruf Mevduati Sigorta Fonu v. Demirel*, [2007] EWCA Civ 799, [2007] 1 W.L.R. 2508; *Yukos Capital S.A.R.L. v. OAO Tomskneft VNK*, [2014] IEHC 115; *Lenchyshyn v. Pelko Electric, Inc.*, 723 N.Y.S.2d 285 (2001); *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Financial Services Co.*, 986 N.Y.S.2d 454 (2014); *Haaksman v. Diamond Offshore (Bermuda), Ltd.*, 260 S.W.3d 476 (2008); *Pure Fishing, Inc. v. Silver Star Co.*, 202 F.Supp.2d 905 (2002); *Electrolines, Inc. v. Prudential Assurance Co.*, 677 N.W.2d 874 (2004); *Base Metal*

bureau en Ontario, où elle a reçu signification. Les activités commerciales qu'elle exerce dans ce bureau sont soutenues; ses représentants servent la clientèle dans cette province. Les tribunaux canadiens ont conclu à l'existence de la compétence dans une telle situation. L'analyse du juge saisi de la motion était juste, et la Cour d'appel de l'Ontario n'avait pas à examiner d'autres considérations que celles qui précèdent pour conclure à la compétence des tribunaux ontariens.

L'établissement de la compétence ne signifie pas que les demandeurs parviendront nécessairement à faire reconnaître et exécuter le jugement équatorien. Une déclaration de compétence n'a pas d'autre effet que de donner aux demandeurs la possibilité de solliciter la reconnaissance et l'exécution du jugement équatorien. Une fois franchie l'étape de la compétence, Chevron et Chevron Canada peuvent invoquer les moyens procéduraux à leur disposition pour tenter de faire rejeter les allégations des demandeurs. Cette possibilité est étrangère aux questions à trancher en l'espèce et éloignée de celles-ci. De plus, il ne faut pas considérer que la conclusion selon laquelle les tribunaux ontariens ont compétence dans la présente affaire porte préjudice aux arguments futurs concernant les personnalités morales distinctes de Chevron et de Chevron Canada, ou que les actions ou les biens de Chevron Canada pourront servir à acquitter la dette de Chevron.

Jurisprudence

Arrêts appliqués : *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077; *Beals c. Saldanha*, 2003 CSC 72, [2003] 3 R.C.S. 416; **distinction d'avec l'arrêt :** *Club Resorts Ltd. c. Van Breda*, 2012 CSC 17, [2012] 1 R.C.S. 572; **arrêts mentionnés :** *Aguinda c. Texaco, Inc.*, 303 F.3d 470 (2002); *Chevron Corp. c. Donziger*, 768 F.Supp.2d 581 (2011); *Chevron Corp. c. Naranjo*, 667 F.3d 232 (2012); *Chevron Corp. c. Donziger*, 974 F.Supp.2d 362 (2014); *Pro Swing Inc. c. Elta Golf Inc.*, 2006 CSC 52, [2006] 2 R.C.S. 612; *Hunt c. T&N plc*, [1993] 4 R.C.S. 289; *Hilton c. Guyot*, 159 U.S. 113 (1895); *Spencer c. La Reine*, [1985] 2 R.C.S. 278; *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022; *BNP Paribas (Canada) c. Mécs* (2002), 60 O.R. (3d) 205; *Tasarruf Mevduati Sigorta Fonu c. Demirel*, [2007] EWCA Civ 799, [2007] 1 W.L.R. 2508; *Yukos Capital S.A.R.L. c. OAO Tomskneft VNK*, [2014] IEHC 115; *Lenchyshyn c. Pelko Electric, Inc.*, 723 N.Y.S.2d 285 (2001); *Abu Dhabi Commercial Bank PJSC c. Saad Trading, Contracting and Financial Services Co.*, 986 N.Y.S.2d 454 (2014); *Haaksman c. Diamond Offshore (Bermuda), Ltd.*, 260 S.W.3d 476 (2008); *Pure Fishing, Inc. c. Silver Star Co.*, 202 F.Supp.2d 905 (2002); *Electrolines, Inc. c. Prudential Assurance Co.*, 677 N.W.2d

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges MacPherson, Gillese et Hourigan), 2013 ONCA 758, 118 O.R. (3d) 1, 313 O.A.C. 285, 370 D.L.R. (4th) 132, 52 C.P.C. (7th) 229, 15 B.L.R. (5th) 285, [2013] O.J. No. 5719 (QL), 2013 CarswellOnt 17574 (WL Can.), qui a infirmé une décision du juge Brown, 2013 ONSC 2527, 361 D.L.R. (4th) 489, 15 B.L.R. (5th) 226, [2013] O.J. No. 1955 (QL), 2013 CarswellOnt 5729 (WL Can.). Pourvoi rejeté.

Clarke Hunter, Q.C., Anne Kirker, Q.C., and *Robert Frank*, for the appellant Chevron Corporation.

Benjamin Zarnett, *Suzy Kauffman* and *Peter Kolla*, for the appellant Chevron Canada Limited.

Alan J. Lenczner, Q.C., *Brendan F. Morrison* and *Chris J. Hutchison*, for the respondents.

Murray Klippenstein, *Renu Mandhane* and *W. Cory Wanless*, for the interveners the International Human Rights Program at the University of Toronto Faculty of Law, MiningWatch Canada and the Canadian Centre for International Justice.

A. Dimitri Lascaris and *James Yap*, for the intervener the Justice and Corporate Accountability Project.

The judgment of the Court was delivered by

GASCON J. —

I. Overview

[1] In a world in which businesses, assets, and people cross borders with ease, courts are increasingly called upon to recognize and enforce judgments from other jurisdictions. Sometimes, successful recognition and enforcement in another forum is the only means by which a foreign judgment creditor can obtain its due. Normally, a judgment creditor will choose to commence recognition and enforcement proceedings in a forum where the judgment debtor has assets. In this case, however, the Court is asked to determine whether the Ontario courts have jurisdiction to recognize and enforce an Ecuadorian judgment where the foreign judgment debtor, Chevron Corporation ("Chevron"), claims to have no connection with the province, whether through assets or otherwise. The Court is also asked to determine whether the Ontario courts have jurisdiction over a Canadian subsidiary of Chevron, Chevron Canada Limited ("Chevron Canada"), a stranger to the foreign judgment for which recognition and enforcement is being sought.

Clarke Hunter, c.r., *Anne Kirker, c.r.*, et *Robert Frank*, pour l'appelante Chevron Corporation.

Benjamin Zarnett, *Suzy Kauffman* et *Peter Kolla*, pour l'appelante Chevron Canada Limited.

Alan J. Lenczner, c.r., *Brendan F. Morrison* et *Chris J. Hutchison*, pour les intimés.

Murray Klippenstein, *Renu Mandhane* et *W. Cory Wanless*, pour les intervenants International Human Rights Program at the University of Toronto Faculty of Law, Mines Alerte Canada et le Centre canadien pour la justice internationale.

A. Dimitri Lascaris et *James Yap*, pour l'intervenant Justice and Corporate Accountability Project.

Version française du jugement de la Cour rendu par

LE JUGE GASCON —

I. Aperçu

[1] Dans un monde où les entreprises, les biens et les personnes franchissent aisément les frontières, les tribunaux sont appelés de plus en plus à reconnaître et à exécuter des jugements rendus dans d'autres ressorts. Parfois, la reconnaissance et l'exécution dans un autre ressort est le seul moyen par lequel le créancier en vertu d'un jugement étranger peut obtenir son dû. Normalement, ce créancier choisit d'introduire une demande de reconnaissance et d'exécution dans un ressort où le débiteur judiciaire possède des biens. Toutefois, en l'espèce, on demande à notre Cour de déterminer si les tribunaux de l'Ontario ont compétence pour reconnaître et exécuter un jugement équatorien dont le débiteur judiciaire, Chevron Corporation (« Chevron »), prétend n'avoir aucun lien avec la province, que ce soit parce qu'elle n'y possède pas de biens ou pour toute autre raison. On demande également à la Cour de déterminer si les tribunaux ontariens ont compétence à l'égard d'une filiale canadienne de Chevron, Chevron Canada Limited (« Chevron Canada »), qui n'est pas partie au jugement étranger dont on demande la reconnaissance et l'exécution.

[2] The courts below found that jurisdiction existed over Chevron. They held that the only connection that must be proven for recognition and enforcement to proceed is one between the foreign court and the original action on the merits; there is no preliminary need to prove a connection with Ontario for jurisdiction to exist in recognition and enforcement proceedings. They also found there to be an independent jurisdictional basis for proceeding against Chevron Canada due to the place of business it operates in the province, and at which it had been duly served.

[3] I agree with the outcomes reached by the courts below with respect to both Chevron and Chevron Canada and I would dismiss the appeal. In an action to recognize and enforce a foreign judgment where the foreign court validly assumed jurisdiction, there is no need to prove that a real and substantial connection exists between the enforcing forum and either the judgment debtor or the dispute. It makes little sense to compel such a connection when, owing to the nature of the action itself, it will frequently be lacking. Nor is it necessary, in order for the action to proceed, that the foreign debtor contemporaneously possess assets in the enforcing forum. Jurisdiction to recognize and enforce a foreign judgment within Ontario exists by virtue of the debtor being served on the basis of the outstanding debt resulting from the judgment. This is the case for Chevron. Jurisdiction also exists here with respect to Chevron Canada because it was validly served at a place of business it operates in the province. On the traditional jurisdictional grounds, this is sufficient to find jurisdiction.

II. Backgrounds and Facts

[4] The dispute underlying the appeal originated in the Lago Agrio region of Ecuador. The oil-rich area has long attracted the exploration and extraction activities of global oil companies, including

[2] Les juridictions inférieures ont conclu que les tribunaux ontariens avaient compétence à l'égard de Chevron. Elles ont statué que le seul lien dont il fallait faire la preuve pour que la demande de reconnaissance et d'exécution suive son cours était celui entre le tribunal étranger et l'action initiale; pour établir la compétence dans une demande de reconnaissance et d'exécution, il n'est pas nécessaire d'établir l'existence d'un lien avec l'Ontario. Elles ont également conclu qu'il existait un fondement juridictionnel indépendant permettant l'introduction d'une instance contre Chevron Canada du fait de l'établissement commercial qu'elle exploite dans la province, où elle a valablement reçu signification.

[3] J'accepte les résultats auxquels sont arrivées les cours d'instance inférieure à l'égard de Chevron et de Chevron Canada et je suis d'avis de rejeter le pourvoi. Dans une action en reconnaissance et en exécution d'un jugement étranger où le tribunal étranger s'est valablement déclaré compétent, il n'est pas nécessaire de prouver l'existence d'un lien réel et substantiel entre le ressort dans lequel l'exécution est demandée et le débiteur judiciaire ou le litige. Il serait illogique d'exiger un tel lien qui, vu la nature de l'action elle-même, sera dans bien des cas inexistant. Il n'est pas non plus nécessaire, pour que l'action suive son cours, que le débiteur étranger possède des biens dans le ressort où l'exécution est demandée au moment où cette demande est faite. La compétence pour reconnaître et exécuter un jugement étranger en Ontario existe du fait que le débiteur a reçu signification d'un recours fondé sur la dette en souffrance découlant de ce jugement. C'est le cas de Chevron. La compétence existe également à l'égard de Chevron Canada puisqu'elle a valablement reçu signification à un établissement commercial qu'elle exploite dans la province. Suivant les fondements traditionnels de la compétence, cela suffit pour que l'on puisse conclure à la compétence des tribunaux ontariens.

II. Contexte et faits

[4] Le litige sous-jacent au pourvoi a pris naissance dans la région de Lago Agrio, en Équateur. Cette région riche en pétrole attire depuis longtemps les activités d'exploration et d'extraction de sociétés

Texaco, Inc. ("Texaco"). As a result of those activities, the region is said to have suffered extensive environmental pollution that has, in turn, disrupted the lives and jeopardized the futures of its residents. The 47 respondents ("plaintiffs") represent approximately 30,000 indigenous Ecuadorian villagers. For over 20 years, they have been seeking legal accountability as well as financial and environmental reparation for harms they allegedly have suffered due to Texaco's former operations in the region. Texaco has since merged with Chevron.

[5] In 1993, the plaintiffs filed suit against Texaco in the United States District Court for the Southern District of New York. In 2001, after lengthy interim proceedings, the District Court dismissed their suit on the grounds of international comity and *forum non conveniens*. The following year, the United States Court of Appeals for the Second Circuit upheld that judgment, relying in part on a commitment by Texaco to submit to the jurisdiction of the Ecuadorian courts should its motion to dismiss succeed: *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

[6] In 2003, the plaintiffs filed suit against Chevron in the Provincial Court of Justice of Sucumbíos. Several years of litigation ensued. In 2011, Judge Zambrano ruled in the plaintiffs' favour, and ordered Chevron to pay US$8.6 billion in environmental damages, as well as US$8.6 billion in punitive damages that were to be awarded unless Chevron apologized within 14 days of the judgment. As Chevron did not apologize, the punitive damages award remained intact. In January 2012, the Appellate Division of the Provincial Court of Justice of Sucumbíos affirmed the trial judgment. In November 2013, Ecuador's Court of Cassation upheld the Appellate Division's judgment, except on the issue of punitive damages. In the end, the total amount owed was reduced to US$9.51 billion.

pétrolières multinationales, y compris Texaco, Inc. (« Texaco »). En raison de ces activités, la région aurait subi une pollution environnementale importante, ce qui a eu pour effet de perturber les vies et de compromettre l'avenir des personnes qui y vivent. Les 47 intimés (« demandeurs ») représentent environ 30 000 villageois autochtones de l'Équateur. Depuis plus de 20 ans, ils tentent de faire reconnaître la responsabilité juridique et d'obtenir une réparation financière et environnementale pour les préjudices qu'ils auraient subis en raison des activités exercées auparavant par Texaco dans la région. Depuis lors, Texaco et Chevron ont fusionné.

[5] En 1993, les demandeurs ont intenté une poursuite contre Texaco devant la Cour de district des États-Unis pour le district sud de New York. En 2001, au terme de longues procédures interlocutoires, la Cour de district a rejeté leur poursuite pour cause de courtoisie internationale et de *forum non conveniens*. L'année suivante, la Cour d'appel des États-Unis pour le deuxième circuit a confirmé ce jugement, s'appuyant en partie sur l'engagement de Texaco de se soumettre à la compétence des tribunaux équatoriens si sa requête en rejet de l'action était accueillie : *Aguinda c. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

[6] En 2003, les demandeurs ont intenté une poursuite contre Chevron devant la Cour provinciale de justice de Sucumbíos. Le litige a duré plusieurs années. En 2011, le juge Zambrano a statué en faveur des demandeurs, condamnant Chevron à verser 8,6 milliards de dollars US en dommages-intérêts environnementaux, auxquels s'ajouterait une somme de 8,6 milliards de dollars US en dommages-intérêts punitifs si Chevron ne présentait pas ses excuses dans les 14 jours du jugement. Puisque Chevron ne s'est pas excusée, la condamnation aux dommages-intérêts punitifs a été maintenue. En janvier 2012, la section d'appel de la Cour provinciale de justice de Sucumbíos a confirmé le jugement de première instance. En novembre 2013, la Cour de cassation de l'Équateur a confirmé l'arrêt de la section d'appel, sauf en ce qui concerne les dommages-intérêts punitifs. En définitive, le montant total dû a été réduit à 9,51 milliards de dollars US.

[7] Meanwhile, Chevron instituted further U.S. proceedings against the plaintiffs' American lawyer, Steven Donziger, and two of his Ecuadorian clients, seeking equitable relief. Chevron alleged that Mr. Donziger and his team had corrupted the Ecuadorian proceedings by, among other things, ghost-writing the trial judgment and paying Judge Zambrano US$500,000 to release it as his own. In 2011, Judge Kaplan of the United States District Court for the Southern District of New York granted preliminary relief in the form of a global anti-enforcement injunction with respect to the Ecuadorian judgment: *Chevron Corp. v. Donziger*, 768 F.Supp.2d 581 (S.D.N.Y. 2011). The United States Court of Appeals for the Second Circuit overturned this injunction in 2012, stressing that "[t]he [plaintiffs] hold a judgment from an Ecuadorian court. They may seek to enforce that judgment in any country in the world where Chevron has assets": *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), at pp. 245-46. In 2014, Judge Kaplan of the District Court held that the Ecuadorian judgment had resulted from fraud committed by Mr. Donziger and others on the Ecuadorian courts: *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362 (S.D.N.Y. 2014). That decision and the underlying allegations of fraud are not before this Court.

[8] Since the initial judgment, Chevron has refused to acknowledge or pay the debt that the trial court said it owed, and it does not hold any Ecuadorian assets. Faced with this situation, the plaintiffs have turned to the Canadian courts for assistance in enforcing the Ecuadorian judgment, and obtaining their financial due. On May 30, 2012, after the Appellate Division's decision but prior to the release of the 2013 judgment of the Court of Cassation, they commenced an action for recognition and enforcement of the Ecuadorian judgment against Chevron, Chevron Canada and Chevron Canada Finance Limited in the Ontario Superior Court of Justice. The action against the latter has since been discontinued.

[7] Entre-temps, Chevron a intenté aux États-Unis un autre recours, en equity, contre l'avocat américain des demandeurs, Steven Donziger, et deux de ses clients équatoriens. Chevron alléguait que M. Donziger et son équipe avaient corrompu l'instance équatorienne, notamment en rédigeant anonymement le jugement de première instance et en versant au juge Zambrano la somme de 500 000 dollars US pour qu'il rende ce jugement comme si c'était le sien. En 2011, le juge Kaplan de la Cour de district des États-Unis pour le district sud de New York a accordé à *Chevron* une mesure de redressement préliminaire sous la forme d'une injonction mondiale contre l'exécution à l'égard du jugement équatorien : *Chevron Corp. c. Donziger*, 768 F. Supp.2d 581 (S.D.N.Y. 2011). La Cour d'appel des États-Unis pour le deuxième circuit a infirmé cette injonction en 2012, soulignant que [TRADUCTION] « [l]es [demandeurs] ont obtenu un jugement d'un tribunal équatorien. Ils peuvent tenter d'en obtenir l'exécution dans n'importe quel pays au monde où Chevron possède des biens » : *Chevron Corp. c. Naranjo*, 667 F.3d 232 (2d Cir. 2012), p. 245-246. En 2014, le juge Kaplan de la Cour de district a conclu que le jugement équatorien résultait de la fraude commise par M. Donziger et d'autres personnes à l'endroit des tribunaux équatoriens : *Chevron Corp. c. Donziger*, 974 F.Supp.2d 362 (S.D.N.Y. 2014). Ce jugement et les allégations sous-jacentes de fraude ne sont pas en cause devant notre Cour.

[8] Depuis le jugement initial, Chevron refuse de reconnaître ou d'acquitter la dette que le tribunal de première instance lui a imputée et elle ne possède pas de biens en Équateur. Devant cette situation, les demandeurs se sont adressés aux tribunaux canadiens pour obtenir leur assistance dans l'exécution du jugement équatorien et la récupération des sommes qui leur sont dues. Le 30 mai 2012, après que la section d'appel eût rendu sa décision mais avant que la Cour de cassation rende son jugement en 2013, ils ont intenté devant la Cour supérieure de justice de l'Ontario une action en reconnaissance et en exécution du jugement équatorien contre Chevron, Chevron Canada et Chevron Canada Finance Limited. Depuis, l'action contre cette dernière entité a été abandonnée.

[9] Chevron, a U.S. corporation incorporated in Delaware, was served at its head office in San Ramon, California. Chevron Canada, a Canadian corporation governed by the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, with its head office in Alberta, is a seventh-level indirect subsidiary of Chevron, which has 100 percent ownership of every company in the chain between itself and Chevron Canada. The plaintiffs initially served Chevron Canada with their amended statement of claim at an extra-provincially registered office in British Columbia. Later, they served the company at a place of business it operates in Mississauga, Ontario.

[10] In serving Chevron in San Ramon, the plaintiffs relied upon rule 17.02(m) of Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("Rules"), which provides that service may be effected outside of Ontario without leave where the proceeding consists of a claim "on a judgment of a court outside Ontario". In serving Chevron Canada at its Mississauga office, the plaintiffs relied upon rule 16.02(1)(c), which requires that personal service be made on a corporation "by leaving a copy of the document . . . with a person at any place of business of the corporation who appears to be in control or management of the place of business".

[11] In their amended statement of claim, the plaintiffs sought: (a) the Canadian equivalent of the award of US$18,256,718,000 resulting from the 2012 judgment of the Appellate Division of the Provincial Court of Justice of Sucumbíos; (b) the Canadian equivalent of costs to be determined by the Ecuadorian court; (c) a declaration that the shares of Chevron Canada are available to satisfy the judgment of the Ontario court; (d) the appointment of an equitable receiver over the shares and assets of Chevron Canada; (e) prejudgment interest from January 3, 2012; and (f) all costs of the proceedings on a substantial indemnity basis, plus all applicable taxes. In response, the appellants each brought a motion in which they sought substantially the same relief: (1)

[9] Chevron, une société par actions américaine constituée au Delaware, a été notifiée par voie de signification à son siège social de San Ramon, en Californie. Chevron Canada, une société par actions canadienne assujettie à la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, c. C-44, et dont le siège social est situé en Alberta, est une filiale indirecte au septième degré de Chevron, qui est propriétaire à part entière de chacune des sociétés qui se trouvent entre elle et Chevron Canada. Les demandeurs avaient d'abord signifié leur déclaration amendée à Chevron Canada à un bureau situé à l'extérieur de la province, en Colombie-Britannique. Plus tard, ils ont notifié la société par voie de signification à un établissement commercial qu'elle exploite à Mississauga, en Ontario.

[10] En signifiant l'acte introductif d'instance à Chevron à San Ramon, les demandeurs se sont appuyés sur l'al. 17.02m) des *Règles de procédure civile*, R.R.O. 1990, Règl. 194 de l'Ontario (« Règles »), qui prévoit que la signification peut être faite en dehors de l'Ontario sans autorisation si la demande « se fond[e] sur un jugement d'un tribunal en dehors de l'Ontario ». En signifiant l'acte introductif d'instance à Chevron Canada à son bureau de Mississauga, les demandeurs se sont appuyés sur l'al. 16.02(1)c) des Règles, qui prévoit que la signification à personne à une personne morale se fait « en laissant une copie du document à [. . .] une personne qui paraît assumer la direction d'un établissement de la personne morale ».

[11] Dans leur déclaration amendée, les demandeurs ont réclamé ce qui suit : a) l'équivalent canadien de 18 256 718 000 de dollars US, sur la foi de l'arrêt rendu en 2012 par la section d'appel de la Cour provinciale de justice de Sucumbíos; b) l'équivalent canadien des dépens que fixera le tribunal équatorien; c) un jugement déclarant que les actions de Chevron Canada pourront servir à acquitter le jugement du tribunal ontarien; d) la nomination d'un séquestre à l'égard des actions et des biens de Chevron Canada; e) l'intérêt avant jugement à compter du 3 janvier 2012; et f) tous les dépens de l'instance sur une base d'indemnisation substantielle, majorés des taxes applicables. En réponse, les appelantes ont chacune présenté une

an order setting aside service *ex juris* of the amended statement of claim; and (2) an order declaring that the court had no jurisdiction to hear the action, and dismissing or permanently staying it.

III. Judicial History

A. *Ontario Superior Court of Justice (Commercial List) (Brown J.), 2013 ONSC 2527, 361 D.L.R. (4th) 489*

(1) Order Setting Aside Service *Ex Juris*

[12] The motion judge was asked to determine the prerequisites for establishing that an Ontario court has jurisdiction in an action to recognize and enforce a foreign judgment. Chevron contended that the "real and substantial connection" test for establishing jurisdiction articulated by this Court in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, applies not only to the question whether a court can assume jurisdiction over a dispute in order to decide its merits, but also to whether an enforcing court has jurisdiction in an action to recognize and enforce a foreign judgment. The plaintiffs replied that the "real and substantial connection" test for jurisdiction does not apply to the enforcing court. Rather, in an action for recognition and enforcement, it need only be established that the foreign court had a real and substantial connection with the dispute's parties or with its subject matter. The motion judge ruled in the plaintiffs' favour, dismissing Chevron's motion. He offered five reasons for his conclusion.

[13] First, in his view, this Court's leading cases on recognition and enforcement — *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, and *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416 — contain no suggestion that a real and

motion dans laquelle elles demandaient essentiellement la même réparation : (1) une ordonnance annulant la signification *ex juris* de la déclaration amendée; et (2) un jugement déclarant que la cour n'a pas compétence pour connaître de l'action et une ordonnance de rejet ou de sursis permanent de l'action.

III. Historique judiciaire

A. *Cour supérieure de justice de l'Ontario (rôle des affaires commerciales) (le juge Brown), 2013 ONSC 2527, 361 D.L.R. (4th) 489*

(1) Ordonnance annulant la signification *ex juris*

[12] On a demandé au juge saisi de la motion de déterminer les conditions préalables pour établir la compétence d'un tribunal ontarien dans une action en reconnaissance et en exécution d'un jugement étranger. Chevron a prétendu que le critère du « lien réel et substantiel » qui permet au tribunal d'établir la compétence, formulé par notre Cour dans *Club Resorts Ltd. c. Van Breda*, 2012 CSC 17, [2012] 1 R.C.S. 572, s'appliquait non seulement pour déterminer si un tribunal pouvait connaître d'un litige sur le fond, mais également pour déterminer si un tribunal d'exécution a compétence à l'égard d'une action en reconnaissance et en exécution d'un jugement d'un tribunal étranger. Les demandeurs ont répliqué que le critère du « lien réel et substantiel » qui permet d'établir la compétence ne s'appliquait pas au tribunal d'exécution. Dans une action en reconnaissance et en exécution d'un jugement étranger, le demandeur doit plutôt démontrer seulement que le tribunal étranger avait un lien réel et substantiel avec les parties au litige ou avec l'objet du litige. Le juge saisi de la motion a donné gain de cause aux demandeurs et a rejeté la motion de Chevron. Le juge a donné cinq motifs au soutien de sa conclusion.

[13] Premièrement, à son avis, les principaux arrêts de notre Cour en matière de reconnaissance et d'exécution — *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077, et *Beals c. Saldanha*, 2003 CSC 72, [2003] 3 R.C.S. 416 — ne laissent

substantial connection between the foreign judgment debtor and Ontario is needed. Second, he found that there is nothing in *Van Breda* to suggest that it altered the principles laid down in *Morguard* and *Beals*. Third, requiring that rule 17.02(m) be read "within the (un-stated) context of the Ontario court otherwise enjoying some real and substantial connection to the defendant would render the sub-rule meaningless" because the Ontario court will, of course, have no connection with the subject matter of the judgment, given that "it is a foreign judgment which by its very nature has no connection with Ontario": para. 80. Nor will there be an *in personam* connection between the defendant and Ontario, as "the sub-rule specifically contemplates that a non-Ontario resident will be the defendant in the action": *ibid.* Fourth, the judge held that there may be legitimate reasons (for instance, the practical reality that assets can exit a jurisdiction quickly) for seeking the recognition and enforcement of a foreign judgment against a non-resident debtor who has no assets in Ontario. To insist that the debtor have assets in the jurisdiction before a judgment creditor can seek recognition and enforcement could harm the creditor's ability to recover the debt. Fifth, the motion judge considered two analogous Ontario statutes — the *Reciprocal Enforcement of Judgments (U.K.) Act*, R.S.O. 1990, c. R.6, and the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 — and found that neither of these legislative schemes establishes a requirement that the defendant be located or possess assets in Ontario before a creditor can register a foreign judgment or arbitral award. In "an age of global commerce", he added, it would be misguided to have a more restrictive common law approach than a statutory one: para. 82.

[14] The motion judge also found that jurisdiction existed over Chevron Canada, which had initially contended that because it was not a judgment debtor, there was no basis upon which to serve it *ex juris* in British Columbia. The judge observed, however, that the situation had changed since Chevron

aucunement croire à la nécessité d'un lien réel et substantiel entre le débiteur en vertu du jugement étranger et l'Ontario. Deuxièmement, il a estimé que rien dans l'arrêt *Van Breda* n'indique que la Cour modifiait les principes établis dans *Morguard* et *Beals*. Troisièmement, s'il fallait exiger que l'al. 17.02m) des Règles s'applique [TRADUCTION] « dans le contexte (implicite) où le tribunal ontarien avait par ailleurs un lien réel et substantiel avec le défendeur, l'alinéa serait dénué de sens », puisqu'il est bien évident que le tribunal ontarien n'aura aucun lien avec l'objet du jugement, car « il s'agit d'un jugement étranger qui, de par sa nature même, n'a aucun lien avec l'Ontario » : par. 80. Il n'y aura pas non plus de lien *in personam* entre le défendeur et l'Ontario, puisque « l'alinéa prévoit expressément qu'un non-résident de l'Ontario sera le défendeur à l'action » : *ibid.* Quatrièmement, le juge a statué qu'il pouvait exister des raisons légitimes (par exemple, la réalité pratique que l'on peut rapidement sortir des biens d'un ressort) de demander la reconnaissance et l'exécution d'un jugement étranger contre un débiteur non-résident qui n'a pas de biens en Ontario. Insister sur la présence de biens du débiteur dans le ressort avant qu'un créancier judiciaire puisse demander la reconnaissance et l'exécution pourrait empêcher le créancier de recouvrer la dette. Cinquièmement, le juge a examiné deux lois ontariennes analogues — la *Loi sur l'exécution réciproque des jugements (Royaume-Uni)*, L.R.O. 1990, c. R.6, et la *Loi sur l'arbitrage commercial international*, L.R.O. 1990, c. I.9 — et il a conclu que ni l'un ni l'autre de ces régimes législatifs n'imposait l'exigence que le défendeur se trouve en Ontario ou qu'il y possède des biens avant qu'un créancier puisse enregistrer un jugement ou une sentence rendus à l'étranger. Il a ajouté qu'à « l'ère de la globalisation en matière commerciale », il serait malavisé qu'une règle de common law impose des conditions plus rigoureuses que ce que prévoit une loi : par. 82.

[14] Le premier juge a conclu en outre que le tribunal ontarien avait compétence à l'égard de Chevron Canada. Cette dernière avait d'abord prétendu que, parce qu'elle n'était pas une débitrice en vertu du jugement, rien ne permettait de la notifier par voie de signification *ex juris* en Colombie-Britannique.

Canada had brought its motion: the plaintiffs had served the corporation at a "bricks and mortar" office it operates in Mississauga, Ontario (para. 87). This constituted a "place of business" within the meaning of rule 16.02(1)(c), and service at that location was sufficient to establish jurisdiction.

(2) Order of a Stay Under Section 106 of the *Courts of Justice Act*

[15] In spite of these conclusions, the motion judge found that this was an appropriate case in which to exercise the court's power to stay a proceeding "on its own initiative" pursuant to s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. He so held for several reasons. First, Chevron does not own, has never owned, and has no intention of owning assets in Ontario. Second, Chevron conducts no business in Ontario. Third, there is no basis for asserting that Chevron Canada's assets are Chevron's assets for the purposes of satisfying the Ecuadorian judgment. Chevron does not own Chevron Canada's shares. Nor is there a legal basis for piercing Chevron Canada's corporate veil. In the judge's view, even though "[i]mportant considerations of international comity accompany any request for the recognition of a judgment rendered by a foreign court . . . [t]he evidence [in this case] disclosed that there is nothing in Ontario to fight over", and thus no reason to allow the claim to proceed any further: para. 111.

B. *Ontario Court of Appeal (MacPherson, Gillese and Hourigan JJ.A.), 2013 ONCA 758, 118 O.R. (3d) 1*

[16] The plaintiffs appealed the stay entered by the motion judge. Chevron and Chevron Canada cross-appealed his conclusion that the Ontario courts have jurisdiction.

Toutefois, le juge a noté que la situation avait changé depuis que Chevron Canada avait présenté sa motion : en effet, les demandeurs avaient notifié la personne morale par voie de signification à un établissement physique, en « briques et mortier », qu'elle exploitait à Mississauga, en Ontario (par. 87). Celui-ci constituait un « établissement » au sens de l'al. 16.02(1)c) des Règles, et la signification à cet endroit suffisait pour établir la compétence.

(2) Ordonnance de sursis en application de l'art. 106 de la *Loi sur les tribunaux judiciaires*

[15] Malgré ces conclusions, le juge saisi de la motion a conclu qu'en l'espèce, il était opportun que le tribunal exerce son pouvoir de surseoir à l'instance « de son propre chef », en application de l'art. 106 de la *Loi sur les tribunaux judiciaires*, L.R.O. 1990, c. C.43, et ce, pour plusieurs motifs. Premièrement, Chevron ne possède pas de biens en Ontario, elle n'en a jamais possédé et elle n'a aucune intention d'en posséder. Deuxièmement, Chevron ne fait pas affaire en Ontario. Troisièmement, rien ne permet d'affirmer que les biens de Chevron Canada sont les biens de Chevron aux fins de l'exécution du jugement équatorien. Chevron n'est pas propriétaire des actions de Chevron Canada. Il n'y a pas non plus de fondement juridique justifiant qu'il soit fait abstraction de la personnalité morale distincte de Chevron Canada. De l'avis du juge, même si [TRADUCTION] « [d']importantes considérations de courtoisie internationale vont de pair avec toute demande de reconnaissance d'un jugement rendu par un tribunal étranger [. . .] [i]l ressort de la preuve [en l'espèce] qu'il n'y a rien à gagner en Ontario », si bien qu'il n'y a aucune raison de permettre à la demande de suivre son cours : par. 111.

B. *Cour d'appel de l'Ontario (les juges MacPherson, Gillese et Hourigan), 2013 ONCA 758, 118 O.R. (3d) 1*

[16] Les demandeurs ont interjeté appel du sursis prononcé par le juge de première instance. Chevron et Chevron Canada ont fait appel incident de sa conclusion selon laquelle les tribunaux ontariens avaient compétence.

(1) Entering of the Stay

[17] To maintain consistency with their jurisdictional challenge, Chevron and Chevron Canada made no submissions before the Ontario Court of Appeal in support of the stay that had been granted. They made no submissions on this point before this Court either. This issue is therefore not before us.

[18] In this regard, I would simply note that the Court of Appeal rejected the view that this was an appropriate case in which to impose a discretionary stay under s. 106 of the *Courts of Justice Act*. MacPherson J.A., writing for the court, emphasized that Chevron and Chevron Canada — both "sophisticated parties with excellent legal representation" — had decided not to attorn to the jurisdiction of the Ontario courts: para. 45. They referenced s. 106 in their submissions only insofar as it potentially supported a stay on the basis of lack of jurisdiction, not on the basis on which it had ultimately been granted. The stay was entirely the initiative of the motion judge. According to the Court of Appeal, a s. 106 stay should only be granted in rare circumstances, and the bar to granting it should be raised even higher when it is not requested by the parties. In fact, the s. 106 stay in this case constituted a "disguised, unrequested and premature Rule 20 and/or Rule 21 motion": para. 57. In MacPherson J.A.'s view, the motion judge had effectively imported a *forum non conveniens* motion into his reasoning on the stay, even though no such motion had been before him. The issues that the motion judge had addressed deserved to be fully canvassed on the basis of a complete record and full legal argument.

[19] I note as well that the Court of Appeal found that although the motion judge's analysis with respect to jurisdiction relied on the notion of comity, he underplayed comity's importance in the reasons he gave in support of the stay. The Court of Appeal disagreed that allowing the case to be heard on the

(1) Ordonnance de sursis

[17] Pour demeurer conséquentes à l'égard de leur contestation de la compétence, Chevron et Chevron Canada n'ont pas présenté d'observations devant la Cour d'appel de l'Ontario à l'appui du sursis qui avait été accordé. Elles n'ont pas non plus présenté d'observations sur ce point devant nous. En conséquence, notre Cour n'est pas saisie de cette question.

[18] À cet égard, je fais simplement remarquer que la Cour d'appel a rejeté l'idée selon laquelle il convenait en l'espèce d'imposer un sursis discrétionnaire en application de l'art. 106 de la *Loi sur les tribunaux judiciaires*. S'exprimant au nom de la cour, le juge MacPherson a souligné que Chevron et Chevron Canada — toutes deux [TRADUCTION] « des parties avisées, représentées par d'excellents avocats » — avaient décidé de ne pas acquiescer à la compétence des tribunaux ontariens : par. 45. Elles ont fait mention de l'art. 106 dans leurs observations, mais seulement dans la mesure où cet article était susceptible d'appuyer une demande de sursis fondée sur l'absence de compétence, et non pas sur le fondement en vertu duquel le sursis a finalement été prononcé. Le premier juge avait accordé le sursis de sa propre initiative. Selon la Cour d'appel, un sursis en application de l'art. 106 ne doit être prononcé qu'en de rares occasions, et le critère sur lequel on s'appuie pour le prononcer doit être encore plus rigoureux lorsque les parties ne le demandent pas. Le sursis prononcé en application de l'art. 106 constituait en fait une « motion déguisée, non demandée et prématurée, en application de la règle 20 ou de la règle 21 » : par. 57. Le juge MacPherson était d'avis que le juge avait de fait importé une motion de *forum non conveniens* dans son raisonnement relatif au sursis, même s'il n'était saisi d'aucune motion en ce sens. Les questions traitées par le premier juge méritaient d'être examinées en profondeur sur le fondement d'un dossier complet et de plaidoiries complètes.

[19] Je fais également remarquer que la Cour d'appel a conclu que, même si le premier juge s'était appuyé sur la notion de courtoisie dans son analyse de la question de la compétence, il en avait minimisé l'importance dans les motifs qu'il a donnés au soutien du sursis. La Cour d'appel a rejeté l'idée que

merits would constitute a mere "academic exercise": para. 70. In its view, in light of Chevron's considerable efforts to stall proceedings up to that point, the plaintiffs "[did] not deserve to have their entire case fail on the basis of an argument against their position that was not even made, and to which they did not have an opportunity to respond": *ibid.* It found that while the plaintiffs may not ultimately succeed on the merits, or in collecting from the judgment debtor, this was not relevant to a determination of whether to grant a discretionary stay at this stage of the proceedings. For the Court of Appeal, "[t]his case crie[d] out for assistance, not unsolicited and premature barriers": para. 72.

permettre l'instruction au fond de l'instance constituerait un simple [TRADUCTION] « exercice théorique » : par. 70. À son avis, compte tenu des moyens dilatoires considérables mis en œuvre jusque-là par Chevron, les demandeurs « ne mérit[aient] pas d'être entièrement déboutés sur le fondement d'un argument contre leur thèse qui n'a même pas été avancé, et auquel ils n'ont pas eu l'occasion de répondre » : *ibid.* Elle a estimé que, même si, en définitive, les demandeurs peuvent ne pas avoir gain de cause sur le fond ou qu'ils ne réussissent pas à recouvrer ce que leur doit le débiteur judiciaire, cette possibilité n'est aucunement pertinente pour déterminer s'il y a lieu de prononcer un sursis discrétionnaire à cette étape des procédures. Selon la Cour d'appel, « [i]l fallait en l'espèce prêter main-forte et non dresser des obstacles non sollicités et prématurés » : par. 72.

(2) Jurisdiction to Determine Whether the Ecuadorian Judgment Should Be Recognized and Enforced

[20] On the jurisdictional issue, the Court of Appeal agreed with the motion judge's analysis. It found this Court's judgment in *Beals* to be "crystal clear" about how the real and substantial connection test is to be applied in an action for recognition and enforcement of a foreign judgment: para. 29. The sole question is whether the foreign court properly assumed jurisdiction, in the sense that it had a real and substantial connection with the subject matter of the dispute or with the defendant. In other words, there need not be an inquiry into the relationship between "the legal dispute in the foreign country and the domestic Canadian court being asked to recognize and enforce the foreign judgment": para. 30.

[21] MacPherson J.A. found that this Court's decision in *Van Breda* did not alter this analysis. In his view, *Van Breda* applies to actions at first instance, not to actions for recognition and enforcement. In a first instance case, "an Ontario court exceeds its constitutional authority when it assumes jurisdiction of a case where there is no real and substantial connection to Ontario": para. 32. Assuming jurisdiction in such a case "offends the principle of comity because

(2) Compétence pour déterminer s'il y a lieu de reconnaître et d'exécuter le jugement équatorien

[20] Sur la question de la compétence, la Cour d'appel a accepté l'analyse du juge de première instance. Selon elle, l'arrêt de notre Cour dans *Beals* énonce [TRADUCTION] « on ne peut plus clairement » la manière dont le critère du lien réel et substantiel doit s'appliquer dans une action en reconnaissance et en exécution d'un jugement étranger : par. 29. La seule question est de savoir si le tribunal étranger s'est à bon droit déclaré compétent, en ce sens où il avait un lien réel et substantiel avec l'objet du litige ou le défendeur. Autrement dit, il n'est pas nécessaire d'examiner le lien entre « le litige dans le pays étranger et le tribunal canadien appelé à reconnaître et à exécuter le jugement étranger » : par. 30.

[21] Le juge MacPherson a conclu que l'arrêt de notre Cour dans *Van Breda* ne modifiait en rien cette analyse. À son avis, l'arrêt *Van Breda* s'applique aux actions de première instance, et non pas aux actions en reconnaissance et en exécution. Dans une action de première instance, [TRADUCTION] « un tribunal ontarien outrepasse sa compétence constitutionnelle lorsqu'il se déclare compétent dans une affaire où il n'y a pas de lien réel et substantiel avec

one or more other jurisdictions have a real and substantial connection to the subject matter of the litigation and Ontario does not": *ibid.* No constitutional issues or comity concerns arise when merely recognizing and enforcing a foreign judgment, "because the Ontario court does not purport to intrude on matters that are properly within the jurisdiction of the foreign court": para. 33. In the result, MacPherson J.A. held that "it is clear that the Ecuadorian judgment for US$9.51 billion against Chevron satisfied the requirement of rule 17.02(m)": para. 35. Thus, "an Ontario court has jurisdiction to determine whether the Ecuadorian judgment against Chevron may be recognized and enforced in Ontario": *ibid.*

[22] With respect to Chevron Canada, the Court of Appeal held that the motion judge had been "correct to note Chevron Canada's bricks-and-mortar business in Ontario": para. 38. In addition, the court found that "Chevron Canada's significant relationship with Chevron" was also relevant to whether jurisdiction was legitimately found: *ibid.* An Ontario court thus has jurisdiction to adjudicate a recognition and enforcement action against Chevron that also names Chevron Canada as a defendant.

IV. Issues

[23] The appeal raises two issues:

(a) In an action to recognize and enforce a foreign judgment, must there be a real and substantial connection between the defendant or the dispute and Ontario for jurisdiction to be established?

(b) Do the Ontario courts have jurisdiction over Chevron Canada, a third party to the judgment for which recognition and enforcement is sought?

l'Ontario » : par. 32. Se déclarer compétent dans une telle situation « contrevient au principe de courtoisie parce qu'un ou plusieurs autres ressorts ont un lien réel et substantiel avec l'objet du litige alors que l'Ontario n'en a pas » : *ibid.* Il ne se pose aucune question constitutionnelle ni aucun problème de courtoisie lorsqu'il s'agit simplement de reconnaître et d'exécuter un jugement étranger « car le tribunal ontarien ne prétend pas se mêler de questions qui relèvent à bon droit de la compétence du tribunal étranger » : par. 33. En conséquence, le juge MacPherson a statué que « le jugement équatorien condamnant Chevron à payer 9,51 milliards de dollars US répondait clairement à l'exigence de l'al. 17.02m) » : par. 35. Ainsi, « un tribunal ontarien avait compétence pour déterminer si le jugement devait être reconnu et exécuté en Ontario » : *ibid.*

[22] En ce qui concerne Chevron Canada, la Cour d'appel a statué que le juge de première instance avait [TRADUCTION] « eu raison de prendre en considération l'établissement physique, en briques et mortier, exploité en Ontario par Chevron Canada » : par. 38. La cour a conclu en outre que « le lien important qui existait entre Chevron Canada et Chevron » était également pertinent pour résoudre la question de savoir si le tribunal avait effectivement compétence : *ibid.* Un tribunal ontarien avait donc compétence pour trancher une action en reconnaissance et en exécution intentée contre Chevron et qui constituait aussi Chevron Canada comme défenderesse.

IV. Questions en litige

[23] Le pourvoi soulève deux questions :

a) Dans une action en reconnaissance et en exécution d'un jugement étranger, doit-il exister un lien réel et substantiel entre le défendeur ou le litige, d'une part, et l'Ontario, d'autre part, pour que la compétence soit établie?

b) Les tribunaux ontariens ont-ils compétence à l'égard de Chevron Canada, une tierce partie au jugement dont on demande la reconnaissance et l'exécution?

V. Analysis

A. *Establishing Jurisdiction Over Foreign Debtors in Actions to Recognize and Enforce Foreign Judgments*

[24] Chevron submits that before proceeding with an action to recognize and enforce a foreign judgment, an Ontario enforcing court must follow a two-step process. First, it must determine its own jurisdiction by applying the real and substantial connection test articulated by this Court in *Van Breda*. For Chevron, this test applies to actions to recognize and enforce foreign judgments just as it does to actions at first instance. Chevron suggests that one way — and in many cases the only way — in which this first component can be satisfied is if the defendant has assets in Ontario, or if there is a reasonable prospect of his or her having assets in Ontario in the future. Second, if jurisdiction is found, then the enforcing court should proceed to assess whether the foreign court appropriately assumed jurisdiction. Chevron does not dispute that this second component is satisfied here: a real and substantial connection undoubtedly existed between the subject matter of the litigation, Chevron and the Ecuadorian court that rendered the foreign judgment.

[25] In support of its position, Chevron relies on a passage from this Court's decision in *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 28: "Under the traditional rule [that only monetary judgments were enforceable], once the jurisdiction of the enforcing court is established, the petitioner must show that he or she meets the conditions for having the judgment recognized and enforced" (Chevron's factum, at para. 52 (emphasis added by Chevron)). It contends that the requirement of a preliminary finding of jurisdiction did not need to be addressed in the Court's previous leading cases on recognition and enforcement — *Morguard* and *Beals* — as in each of those cases, the judgment debtor was resident in the province.

V. Analyse

A. *Établissement de la compétence à l'égard de débiteurs étrangers dans les actions en reconnaissance et en exécution de jugements étrangers*

[24] Chevron prétend qu'avant de connaître d'une action en reconnaissance et en exécution d'un jugement étranger, un tribunal d'exécution ontarien doit suivre un processus en deux étapes. Premièrement, il doit déterminer sa propre compétence en appliquant le critère du lien réel et substantiel formulé par notre Cour dans *Van Breda*. Selon Chevron, ce critère s'applique aux actions en reconnaissance et en exécution de jugements étrangers tout comme aux actions de première instance. Chevron prétend que l'une des façons — et, dans bien des cas, la seule façon — de satisfaire à cette première étape consiste, pour le demandeur, à établir que le défendeur possède des biens en Ontario, ou qu'il existe une possibilité raisonnable qu'il en possédera. Deuxièmement, si la compétence est ainsi établie, le tribunal d'exécution doit alors se demander si le tribunal étranger s'était à bon droit déclaré compétent. Chevron ne conteste pas que ce deuxième élément a été satisfait en l'espèce : il existait indubitablement un lien réel et substantiel entre l'objet du litige, Chevron et le tribunal équatorien qui a rendu le jugement étranger.

[25] À l'appui de sa thèse, Chevron cite l'extrait suivant du par. 28 de l'arrêt *Pro Swing Inc. c. Elta Golf Inc.*, 2006 CSC 52, [2006] 2 R.C.S. 612, de notre Cour : « Selon la règle classique [voulant que seuls les jugements pécuniaires soient exécutoires], une fois établie la compétence du tribunal d'exécution, le demandeur doit démontrer qu'il remplit les conditions de la reconnaissance et de l'exécution du jugement » (mémoire de Chevron, par. 52 (souligné par Chevron)). Chevron prétend que dans ses principaux arrêts portant sur la reconnaissance et l'exécution, soit les arrêts *Morguard* et *Beals*, notre Cour n'avait pas eu à se prononcer sur l'exigence d'une conclusion préliminaire de compétence, puisque dans chacune de ces affaires, le débiteur judiciaire résidait dans la province.

[26] Chevron further argues that this position is consistent with *Van Breda*. There, the Court emphasized that pursuant to the Constitution, Canadian courts can only adjudicate disputes where doing so constitutes a legitimate exercise of state power: para. 31. Chevron suggests that in actions to recognize and enforce foreign judgments, this constitutional legitimacy must still exist. Ontario courts risk jurisdictional overreach if they assume jurisdiction in cases like this one, in which the province has no interest. Moreover, assuming jurisdiction in such a case risks undermining, not furthering, the notion of comity. The rules for service *ex juris* create mere presumptions of jurisdiction that are "rebuttable if there is no real and substantial connection with the province": Chevron's factum, at para. 57.

[27] I agree with the Ontario Court of Appeal and the motion judge that the approach favoured by Chevron is sound neither in law nor in policy. Canadian courts, like many others, have adopted a generous and liberal approach to the recognition and enforcement of foreign judgments. To recognize and enforce such a judgment, the only prerequisite is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction were satisfied. It is true that in any case in which a Canadian court exercises authority over a party, some basis must exist for its doing so. It does not follow, however, that jurisdiction is and can only be established using the real and substantial connection test, whether that test is satisfied by the existence of assets alone or on another basis. In actions to recognize and enforce foreign judgments within the limits of the province, it is the act of service on the basis of a foreign judgment that grants an Ontario court jurisdiction over the defendant. I arrive at this conclusion for several reasons. First, this Court has rightly never imposed a requirement to prove a real and substantial connection between the defendant or the dispute and the province in actions to recognize and enforce foreign judgments. Second, the distinct principles that underlie actions for recognition and enforcement as opposed to actions at first instance

[26] Chevron plaide en outre que cette thèse est conforme à l'arrêt *Van Breda*. Dans cette affaire, la Cour a souligné que, aux termes de la Constitution, les tribunaux canadiens ne peuvent statuer sur des litiges que dans l'exercice légitime du pouvoir de l'État : par. 31. Chevron prétend que dans les actions en reconnaissance et en exécution de jugements étrangers, cette légitimité constitutionnelle doit toujours exister. Les tribunaux ontariens risquent d'outrepasser leur compétence s'ils se déclarent compétents dans des affaires comme celle-ci, où la province n'a aucun intérêt. Qui plus est, une déclaration de compétence dans une telle affaire risquerait de miner, plutôt que de soutenir, la notion de courtoisie. Les règles relatives à la signification *ex juris* ne font que créer des présomptions de compétence, lesquelles sont [TRADUCTION] « réfutables s'il n'existe aucun lien réel et substantiel avec la province » : mémoire de Chevron, par. 57.

[27] Tout comme la Cour d'appel de l'Ontario et le juge de première instance, je conclus que le raisonnement mis de l'avant par Chevron est mal fondé sur les plans du droit et des principes. Les tribunaux canadiens, à l'instar de bien d'autres, ont adopté une approche souple et libérale en ce qui concerne la reconnaissance et l'exécution des jugements étrangers. Pour la reconnaissance et l'exécution de ces jugements, la seule condition préalable est que le tribunal étranger ait eu un lien réel et substantiel avec les parties au litige ou avec l'objet du litige, ou que les fondements traditionnels de la compétence soient respectés. Il est vrai que dans toute affaire dans laquelle un tribunal canadien exerce sa compétence à l'égard d'une partie, il doit avoir une raison de le faire. Toutefois, il ne s'ensuit pas que la seule manière d'établir la compétence consiste à faire appel au critère du lien réel et substantiel, que la satisfaction de ce critère dépende uniquement de l'existence de biens dans le ressort ou qu'elle repose sur un autre fondement. Dans les actions en reconnaissance et en exécution de jugements étrangers dans les limites de la province, c'est l'acte de signification fondé sur un jugement étranger qui confère au tribunal ontarien la compétence à l'égard d'un défendeur. Plusieurs motifs m'amènent à cette conclusion. Premièrement, dans les actions en reconnaissance et en exécution de

support this position. Third, the experiences of other jurisdictions, convincing academic commentary, and the fact that comparable statutory provisions exist in provincial legislation reinforce this approach. Finally, practical considerations militate against adopting Chevron's submission.

(1) Jurisprudential Guidance Prior to *Van Breda*

[28] Contrary to Chevron's contention, this Court has never required there to be a real and substantial connection between the defendant or the action and the enforcing court for jurisdiction to exist in recognition and enforcement proceedings.

[29] This Court's modern judgments on recognition and enforcement begin with the 1990 decision in *Morguard*. There, the Court expanded the traditionally limited bases upon which foreign judgments could be recognized and enforced. Before *Morguard*, a foreign judgment would be recognized and enforced only if the defendant in the original action had been present in the foreign jurisdiction, or had consented to the court's jurisdiction: S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2010), at p. 53; *Morguard*, at p. 1092. These traditional bases for recognition and enforcement attracted criticism as being unduly restrictive, particularly as between sister provinces: see, e.g., V. Black, "Enforcement of Judgments and Judicial Jurisdiction in Canada" (1989), 9 *Oxford J. Legal Stud.* 547.

[30] In *Morguard*, La Forest J., writing for the Court, held that the judgments of another province could and should also be recognized and enforced

jugements étrangers, notre Cour n'a jamais, à juste titre, exigé la preuve d'un lien réel et substantiel entre le défendeur ou le litige, d'une part, et la province, d'autre part. Deuxièmement, les principes qui sous-tendent les actions en reconnaissance et en exécution, lesquels sont distincts de ceux qui sous-tendent les actions de première instance, appuient cette thèse. Troisièmement, la jurisprudence d'autres juridictions, des commentaires de doctrine convaincants et le fait qu'il existe des dispositions législatives comparables dans les lois provinciales appuient cette approche. Enfin, des considérations d'ordre pratique militent contre l'adoption des arguments de Chevron.

(1) La jurisprudence antérieure à l'arrêt *Van Breda*

[28] Contrairement à ce que prétend Chevron, notre Cour n'a jamais, dans une demande de reconnaissance et d'exécution, assujetti la déclaration de compétence à l'existence d'un lien réel et substantiel entre le défendeur ou l'action, d'une part, et le ressort d'exécution, d'autre part.

[29] L'arrêt *Morguard*, rendu en 1990, marque le point de départ de la jurisprudence moderne de notre Cour en matière de reconnaissance et d'exécution. Dans cet arrêt, la Cour a élargi les fondements jusqu'alors limités sur lesquels les jugements étrangers pouvaient être reconnus et exécutés. Avant l'arrêt *Morguard*, la reconnaissance et l'exécution d'un jugement étranger n'étaient possibles que si le défendeur à l'action initiale avait été présent dans le ressort étranger ou s'il avait consenti à ce que le tribunal se déclare compétent : S. G. A. Pitel et N. S. Rafferty, *Conflict of Laws* (2010), p. 53; *Morguard*, p. 1092. On a reproché à ces fondements traditionnels de la reconnaissance et de l'exécution d'être indûment restrictifs, particulièrement dans leur application entre provinces canadiennes : voir, p. ex., V. Black, « Enforcement of Judgments and Judicial Jurisdiction in Canada » (1989), 9 *Oxford J. Legal Stud.* 547.

[30] Dans *Morguard*, le juge La Forest, s'exprimant au nom de la Cour, a statué que les jugements d'une autre province pouvaient et devaient aussi

where the other province's court assumed jurisdiction on the basis of a real and substantial connection between the action and that province: pp. 1102 and 1108. In his view, the traditional grounds for recognition and enforcement had been retained based on a misguided notion of comity, unsuited to "the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner": p. 1096. Moreover, the traditional recognition and enforcement rules were tailored to circumstances that had existed at a time when it would have been difficult for the defendant to defend "an action initiated in a far corner of the world in the then state of travel and communications": p. 1097. The need to revisit the traditional rules was particularly acute in a federal state like Canada, to which "considerations underlying the rules of comity apply with much greater force": p. 1098.

[31] In arriving at his conclusions, La Forest J.'s analysis focused entirely on whether the court of the other province or territory had "properly, or appropriately, exercised jurisdiction in the action": p. 1102. He intimated no need to interrogate the enforcing court's jurisdiction, either in his discussion of the law or in its application to the facts of the case. Instead, once a real and substantial connection between the original court and the action is demonstrated, and it is clear that the original court had jurisdiction, the resulting judgment "should be recognized and be enforceable" in the other provinces: p. 1108.

[32] This Court revisited the prerequisites to recognition and enforcement in 2003 in *Beals*. It held that the real and substantial connection test should also apply to the money judgments of other countries' courts. In reasons written by Major J., the majority of the Court found that the principles of order, fairness, and comity that underlay the decision in *Morguard*, while originally cast in the interprovincial context, were equally compelling internationally: paras. 25-27. According to Major J.,

être reconnus et exécutés dans les cas où le tribunal de cette autre province s'était déclaré compétent sur le fondement d'un lien réel et substantiel entre l'action et cette province : p. 1102 et 1108. À son avis, le maintien des fondements traditionnels de reconnaissance et d'exécution s'appuyait sur une conception malavisée de la courtoisie, non adaptée à « la nécessité qu'impose l'époque moderne de faciliter la circulation ordonnée et équitable des richesses, des techniques et des personnes d'un pays à l'autre » : p. 1096-1097. Qui plus est, les règles traditionnelles de reconnaissance et d'exécution étaient adaptées aux circonstances prévalant à une époque où il était difficile pour le défendeur de contester « une action engagée à l'autre bout du monde dans les conditions de déplacement et de communication qui prévalaient alors » : p. 1097. Le besoin de revoir les règles traditionnelles était particulièrement criant dans un État fédéral comme le Canada, où « [l]es considérations qui sous-tendent les règles de la courtoisie s'appliquent avec beaucoup plus de force » : p. 1098.

[31] Pour arriver à ses conclusions, le juge La Forest a concentré son analyse sur une seule question, à savoir si le tribunal de l'autre province ou territoire avait « correctement et convenablement exercé sa compétence dans l'action » : p. 1102. Nulle part dans son analyse du droit ou dans l'application de celui-ci aux faits de l'affaire laisse-t-il entendre qu'il faut s'interroger sur la compétence du tribunal saisi de la demande d'exécution. À son avis, dès qu'un lien réel et substantiel entre le tribunal saisi à l'origine et l'action est démontré et qu'il est clair que ce tribunal avait compétence, le jugement qui s'ensuit « devrait être reconnu et exécuté » dans les autres provinces : p. 1108.

[32] Dans l'arrêt *Beals*, rendu en 2003, notre Cour a réexaminé les conditions préalables à la reconnaissance et à l'exécution, statuant que le critère du lien réel et substantiel devait également s'appliquer aux jugements pécuniaires rendus par les tribunaux de pays étrangers. Dans les motifs du juge Major, les juges majoritaires de la Cour ont conclu que les principes d'ordre, d'équité et de courtoisie qui sous-tendaient l'arrêt *Morguard*, quoique formulés à l'origine dans le contexte interprovincial, valaient

"[i]nternational comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law": para. 28. Where a real and substantial connection existed between the foreign court and the action's subject matter or its defendants, the foreign judgment should be recognized and enforced: para. 29.

[33] Here again, the Court did not articulate or imply a need to inquire into the enforcing court's jurisdiction; the focus remained squarely on the foreign jurisdiction. In Major J.'s view, the following conditions must be met before a domestic court will enforce a judgment from a foreign jurisdiction:

> The enforcing court, in this case Ontario, must determine whether the foreign court had a real and substantial connection to the action or the parties, at least to the level established in *Morguard*, *supra*. A real and substantial connection is the overriding factor in the determination of jurisdiction. . . .
>
> If a foreign court did not properly take jurisdiction, its judgment will not be enforced. . . .
>
> . . .
>
> Once the "real and substantial connection" test is found to apply to a foreign judgment, the court should then examine the scope of the defences available to a domestic defendant in contesting the recognition of such a judgment.

(*Beals*, at paras. 37-39)

[34] Thus, in the recognition and enforcement context, the real and substantial connection test operates simply to ensure that the foreign court from which the judgment originated properly assumed jurisdiction over the dispute. Once this is demonstrated, the defendant has an opportunity to prove that one of the defences to recognition and enforcement should apply. No mention is made of any need

autant sur le plan international : par. 25-27. Pour reprendre les propos du juge Major, « [l]a courtoisie internationale et la prédominance de la circulation et des opérations transfrontalières internationales commandent une modernisation du droit international privé » : par. 28. Dès lors qu'il existe un lien réel et substantiel entre le ressort étranger et l'objet de l'action ou ses défendeurs, il y a lieu de reconnaître et d'exécuter le jugement étranger : par. 29.

[33] Là encore, la Cour n'a pas explicitement ou implicitement énoncé la nécessité de s'interroger sur la compétence du tribunal saisi de la demande d'exécution et la principale question demeurait celle de la compétence du tribunal étranger. Le juge Major était d'avis que les conditions suivantes devaient être remplies avant qu'un tribunal national exécute un jugement rendu dans un ressort étranger :

> Le tribunal saisi de la demande d'exécution, en l'occurrence le tribunal ontarien, doit déterminer si le tribunal étranger avait un lien réel et substantiel avec l'action ou les parties, à tout le moins dans la mesure fixée dans l'arrêt *Morguard*, précité. L'existence d'un lien réel et substantiel est le facteur déterminant en matière de compétence. . .
>
> Si un tribunal étranger n'a pas exercé correctement sa compétence, le jugement qu'il a rendu ne sera pas exécuté. . .
>
> . . .
>
> Dès qu'il conclut que le critère du « lien réel et substantiel » s'applique à un jugement étranger, le tribunal doit examiner la portée des moyens de défense qu'un défendeur canadien peut opposer à la reconnaissance de ce jugement.

(*Beals*, par. 37-39)

[34] Ainsi, dans le contexte de la reconnaissance et de l'exécution, le critère du lien réel et substantiel sert simplement à assurer que le tribunal étranger à l'origine du jugement a tranché le litige à bon droit. Dès que cela est démontré, il est loisible au défendeur de prouver qu'il y a lieu d'appliquer un des moyens de défense à la reconnaissance et à l'exécution. Nulle mention n'est faite par contre

to prove a connection between the enforcing jurisdiction and the action. In the end, the test articulated for recognition and enforcement in *Morguard* and *Beals* is "seemingly straightforward": T. J. Monestier, "Jurisdiction and the Enforcement of Foreign Judgments" (2013), 42 *Advocates' Q.* 107, at p. 110.

[35] Three years later, in *Pro Swing*, the Court once more extended the scope of Canadian recognition and enforcement law, this time in relation to non-monetary foreign judgments. Traditionally, to be recognizable and enforceable, a foreign judgment had to be "(a) for a debt, or definite sum of money" and "(b) final and conclusive": para. 10, quoting *Dicey and Morris on the Conflict of Laws* (13th ed. 2000), vol. 1, Rule 35, at pp. 474-75. In *Pro Swing*, the Court held that non-monetary foreign judgments should also be capable of being recognized and enforced in Canada. In its view, "the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce": para. 31. Chevron contends that it was in the course of this judgment that the Court clearly expressed what had been implicit in *Morguard* and *Beals*: the need to assess the Canadian forum's jurisdiction before recognizing and enforcing the foreign judgment. In this regard, Chevron points to para. 28 of the majority's reasons, where Deschamps J. wrote: "Under the traditional rule, once the jurisdiction of the enforcing court is established, the petitioner must show that he or she meets the conditions for having the judgment recognized and enforced."

[36] I cannot accede to Chevron's submission that this phrase was intended to alter this Court's clear guidance in *Morguard* and *Beals* for two reasons. First, this Court's insistence in *Pro Swing* that jurisdiction must be established prior to determining whether the foreign judgment should be recognized and enforced is hardly controversial: jurisdiction must, of course, always be established regardless of the type of action being brought. Otherwise, the court will lack the power to hear and determine

de la nécessité de prouver un lien entre le tribunal d'exécution et l'action. En définitive, le critère de reconnaissance et d'exécution formulé dans *Morguard* et *Beals* [TRADUCTION] « paraît plutôt simple » : T. J. Monestier, « Jurisdiction and the Enforcement of Foreign Judgments » (2013), 42 *Advocates' Q.* 107, p. 110.

[35] Trois ans plus tard, dans l'arrêt *Pro Swing*, notre Cour a encore une fois étendu l'application du droit canadien en matière de reconnaissance et d'exécution, cette fois aux jugements étrangers non pécuniaires. Jusqu'alors, pour être reconnu et exécuté, il fallait que le jugement étranger soit « a) relatif à une dette ou à une somme déterminée » et « b) définitif » : par. 10, citant *Dicey and Morris on the Conflict of Laws* (13e éd. 2000), vol. 1, règle 35, p. 474-475. Dans *Pro Swing*, la Cour a statué que les jugements étrangers non pécuniaires devaient eux aussi être susceptibles de reconnaissance et d'exécution au Canada. De l'avis de la Cour, « [l]es conditions auxquelles peut être reconnu et exécuté un jugement étranger peuvent [. . .] être résumées de façon générale : il doit avoir été rendu par un tribunal compétent, être définitif et être d'une nature telle que la courtoisie commande son exécution » : par. 31. Chevron prétend que dans cet arrêt, notre Cour a exprimé clairement ce qui était implicite dans *Morguard* et *Beals*, à savoir la nécessité d'évaluer la compétence du tribunal canadien avant que le jugement étranger soit reconnu et exécuté. Au soutien de sa thèse, Chevron cite le par. 28 des motifs des juges majoritaires, où la juge Deschamps a écrit : « Selon la règle classique, une fois établie la compétence du tribunal d'exécution, le demandeur doit démontrer qu'il remplit les conditions de la reconnaissance et de l'exécution du jugement. »

[36] Je ne peux accepter l'argument de Chevron qui prétend que cette phrase était censée modifier les indications claires données par notre Cour dans *Morguard* et *Beals*, et ce, pour deux motifs. Premièrement, le fait que notre Cour ait insisté, dans *Pro Swing*, sur la nécessité que la compétence soit établie avant que l'on détermine s'il y a lieu de reconnaître et d'exécuter le jugement étranger prête difficilement à controverse : il est bien évident que la compétence doit toujours être établie, quel que soit

the case. Where Chevron's submission fails, however, is in assuming that the only way to establish jurisdiction is by proving the existence of a real and substantial connection between the foreign judgment debtor and the Canadian forum. In my view, jurisdiction in an action limited to recognition and enforcement of a foreign judgment within the province of Ontario is established when service is effected on a defendant against whom a foreign judgment debt is alleged to exist. There is no requirement, nor need, to resort to the real and substantial connection test.

[37] Second, Deschamps J. clearly stated the prerequisites to recognition and enforcement elsewhere in her reasons, and did not insist or expand upon such a requirement. She wrote:

> The foreign judgment is evidence of a debt. All the enforcing court needs is proof that the judgment was rendered by a court of competent jurisdiction and that it is final, and proof of its amount. The enforcing court then lends its judicial assistance to the foreign litigant by allowing him or her to use its enforcement mechanisms.
>
> (*Pro Swing*, at para. 11)

This statement is consistent with *Morguard* and *Beals*: there is no need to probe the relationship between the enforcing forum and the action or the defendant. Deschamps J.'s one prior, passing reference to the need for the enforcing court to have jurisdiction cannot serve as a basis for inferring the existence of a significant, and previously unstated, hurdle to recognition and enforcement that simply does not exist. As is evident from her reasons, she retained the focus on jurisdiction in the original foreign proceeding.

(2) Effect of *Van Breda*

[38] Chevron also places considerable reliance upon this Court's decision in *Van Breda*. In my view,

le type d'action intentée. S'il en était autrement, le tribunal n'aurait pas le pouvoir d'instruire et de trancher l'affaire. Cependant, l'argument de Chevron est erroné en ce qu'il présume que la seule façon d'établir la compétence est de prouver l'existence d'un lien réel et substantiel entre le débiteur en vertu d'un jugement étranger et le tribunal canadien. À mon avis, la compétence dans une action qui se limite à la reconnaissance et à l'exécution d'un jugement étranger dans la province de l'Ontario est établie lorsque la signification a été faite au défendeur, le prétendu débiteur en vertu d'un jugement étranger. Il n'est ni obligatoire, ni nécessaire, d'avoir recours au critère du lien réel et substantiel.

[37] Deuxièmement, dans un autre passage de ses motifs, la juge Deschamps a énoncé clairement les conditions préalables à la reconnaissance et à l'exécution, sans insister sur une telle exigence et sans en parler davantage. Elle a écrit ce qui suit :

> Le jugement étranger constate une dette. Tout ce dont le tribunal d'exécution a besoin est la preuve de la compétence du tribunal étranger, du montant du jugement et de son caractère définitif. Le tribunal d'exécution peut alors prêter son concours au justiciable étranger en lui donnant accès aux mécanismes d'exécution internes.
>
> (*Pro Swing*, par. 11)

Cette affirmation est conforme aux arrêts *Morguard* et *Beals* : il n'est pas nécessaire d'examiner plus à fond le lien entre le ressort appelé à exécuter le jugement et l'action ou le défendeur. On ne saurait s'appuyer sur la mention, faite en passant par la juge Deschamps, de la nécessité que le tribunal d'exécution ait compétence pour conclure à l'existence d'un nouvel obstacle important et jusqu'alors inconnu à la reconnaissance et à l'exécution d'un jugement étranger. Un tel obstacle n'existe tout simplement pas. Comme il ressort clairement de ses motifs, la juge Deschamps a plutôt mis l'accent sur la compétence dans l'instance étrangère d'origine, sans plus.

(2) L'effet de l'arrêt *Van Breda*

[38] Chevron s'appuie également abondamment sur l'arrêt *Van Breda* de notre Cour. À mon avis,

this reliance is misplaced. While there is no denying that the *Van Breda* decision carries great importance in many areas of Canadian conflict of laws, its intended scope should not be overstated. Nothing in *Van Breda* altered the jurisdictional inquiry in actions to recognize and enforce foreign judgments as established by this Court in *Morguard*, *Beals* and *Pro Swing*.

[39] In *Van Breda*, LeBel J. clearly specified the limited areas of private international law to which the decision was intended to apply. First, he noted at para. 16 that three categories of issues are "intertwined" in private international law: jurisdiction, *forum non conveniens* and the recognition of foreign judgments. Although he acknowledged that "[n]one of the divisions of private international law can be safely analysed and applied in isolation from the others", LeBel J. nonetheless cautioned that "the central focus of these appeals is on jurisdiction and the appropriate forum", that is, only two of the three categories of issues at play in private international law: para. 16. He went on to propose an analytical framework and legal principles applicable to the assumption of jurisdiction (one way of establishing jurisdiction *simpliciter*) and for deciding whether to decline to exercise it (*forum non conveniens*). Nowhere did he purport to analyze or modify the principles applicable to the recognition and enforcement of foreign judgments, the area of private international law that is the central focus of this appeal.

[40] Second, LeBel J. further — and repeatedly — confined the principles he developed in *Van Breda* to the assumption of jurisdiction in tort actions. For example, he said: ". . . this Court must craft more precisely the rules and principles governing the assumption of jurisdiction by the courts of a province over tort cases in which claimants sue in Ontario, but at least some of the events that gave rise to the claims occurred outside Canada or outside the province" (para. 68). He later added the following:

il est malavisé de le faire. Même s'il est indéniable que l'arrêt *Van Breda* revêt une grande importance dans plusieurs domaines du droit international privé canadien, il ne faut pas en exagérer la portée. L'arrêt *Van Breda* n'a pas eu pour effet de modifier l'analyse relative à la compétence dans les actions en reconnaissance et en exécution de jugements étrangers établie par notre Cour dans les arrêts *Morguard*, *Beals* et *Pro Swing*.

[39] Dans *Van Breda*, le juge LeBel a clairement précisé les domaines limités du droit international privé auxquels l'arrêt devait s'appliquer. D'entrée de jeu, il a fait remarquer au par. 16 que trois catégories de questions étaient « étroitement liées » en droit international privé : la compétence, le *forum non conveniens* et la reconnaissance des jugements étrangers. Tout en reconnaissant qu'« [i]l s'avère impossible d'analyser et d'appliquer sans risque un des éléments du droit international privé en faisant abstraction des autres éléments », le juge LeBel a néanmoins souligné que « les [. . .] pourvois [dont la Cour était saisie] port[aient] essentiellement sur la reconnaissance de compétence et la détermination du tribunal approprié pour l'instruction d'un litige », c'est-à-dire seulement deux des trois catégories de questions en jeu en droit international privé : par. 16. Il a alors proposé un cadre d'analyse et des principes juridiques applicables à la déclaration de compétence (une façon d'établir la simple reconnaissance de compétence) ainsi qu'aux décisions sur l'opportunité de décliner compétence (le *forum non conveniens*). Il n'a nulle part prétendu analyser ou modifier les principes applicables à la reconnaissance et à l'exécution de jugements étrangers, le domaine du droit international privé au cœur du présent pourvoi.

[40] Deuxièmement, le juge LeBel a restreint — plus d'une fois — l'application des principes qu'il a élaborés dans l'arrêt *Van Breda* aux déclarations de compétence dans les actions en responsabilité délictuelle. Par exemple, il a dit que « la Cour doit préciser davantage les règles et les principes applicables aux déclarations de compétence des tribunaux provinciaux en matière de responsabilité délictuelle dans les cas où les demandeurs poursuivent en Ontario et où une partie au moins des faits ayant donné

"Before I go on to consider a list of presumptive connecting factors for tort cases, I must define the legal nature of the list" (para. 80). Perhaps most tellingly, LeBel J. stated, at para. 85: "The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to be an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law."

[41] To accept Chevron's argument would be to extend *Van Breda* into an area in which it was not intended to apply, and in which it has no principled reason to meddle. In fact, and more compellingly, the principles that animate recognition and enforcement indicate that *Van Breda*'s pronouncements should not apply to recognition and enforcement cases. It is to these principles that I will now turn.

(3) Principles Underlying Actions for Recognition and Enforcement

[42] Two considerations of principle support the view that the real and substantial connection test should not be extended to an enforcing court in an action for recognition and enforcement. First, the crucial difference between an action at first instance and an action for recognition and enforcement is that, in the latter case, the only purpose of the action is to allow a pre-existing obligation to be fulfilled. Second, the notion of comity, which has consistently underlain actions for recognition and enforcement, militates in favour of generous enforcement rules.

naissance à l'action sont survenus à l'étranger ou à l'extérieur de la province » : par. 68. Plus loin, il a ajouté ce qui suit : « Cependant, avant de passer à l'examen d'une liste de facteurs de rattachement créant une présomption applicables dans les actions fondées sur un délit, je dois préciser la nature juridique de cette liste » (par. 80). Fait encore plus révélateur peut-être, le juge LeBel a affirmé ce qui suit, au par. 85 : « La liste des facteurs de rattachement créant une présomption proposés ici se rapporte à des actions en responsabilité délictuelle et aux questions s'y rattachant. Elle ne se veut pas une liste complète des facteurs de rattachement concernant les conditions permettant aux tribunaux de se déclarer compétents à l'égard de tous les recours connus en droit. »

[41] Faire droit à l'argument de Chevron conférerait à l'arrêt *Van Breda* une portée excessive qui permettrait son application dans un domaine qu'il n'était pas censé traiter, et dans lequel il n'avait aucune raison valable de s'appliquer. De fait, et de façon encore plus convaincante, les principes qui sous-tendent la reconnaissance et l'exécution amènent à conclure que ce qui est dit dans *Van Breda* ne devrait justement pas s'appliquer dans les affaires de reconnaissance et d'exécution. Je vais donc maintenant aborder ces principes.

(3) Les principes qui sous-tendent les actions en reconnaissance et en exécution

[42] Deux considérations de principe permettent de conclure qu'il n'y a pas lieu, pour un tribunal saisi d'une action en reconnaissance et en exécution, d'appliquer le critère du lien réel et substantiel. Premièrement, la différence déterminante entre une action de première instance et une action en reconnaissance et en exécution est que dans le dernier cas, l'action a pour seul but de permettre l'acquittement d'une obligation préexistante. Deuxièmement, la notion de courtoisie, qui a invariablement sous-tendu les actions en reconnaissance et en exécution, milite en faveur de règles libérales en matière d'exécution.

(a) *Purpose of Recognition and Enforcement Proceedings*

[43] Canadian law recognizes that the purpose of an action to recognize and enforce a foreign judgment is to allow a pre-existing obligation to be fulfilled; that is, to ensure that a debt already owed by the defendant is paid. As Pitel and Rafferty explain, such an action "is based not on the original claim the plaintiff had pursued against the defendant but rather on the obligation created by the foreign judgment": p. 159; see also P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2nd ed. 2014), at ¶11.177. The following comment made by McLachlin C.J. in *Pro Swing* (although in dissent) also reflects this logic: "Barring exceptional concerns, a court's focus when enforcing a foreign judgment is not on the substantive and procedural law on which the judgment is based, but instead on the obligation created by the judgment itself" (para. 77).

[44] Important consequences flow from this observation. First, the purpose of an action for recognition and enforcement is not to evaluate the underlying claim that gave rise to the original dispute, but rather to assist in enforcing an already-adjudicated obligation. In other words, the enforcing court's role is not one of substance, but is instead one of facilitation: *Pro Swing*, at para. 11. The court merely offers an enforcement mechanism to facilitate the collection of a debt within the jurisdiction. This entails that the enforcing court does not exercise jurisdiction in the same way as it does in actions at first instance. In a first instance case like *Van Breda*, the focus is on whether the court has jurisdiction to determine the merits of a substantive legal claim; in a recognition and enforcement case, the court does not create a new substantive obligation, but instead assists with the fulfillment of an existing one.

[45] It follows that there can be no concern that the parties are located elsewhere, or that the facts

a) *L'objet de la demande de reconnaissance et d'exécution*

[43] Le droit canadien reconnaît que l'action en reconnaissance et en exécution d'un jugement étranger a pour objet de permettre l'acquittement d'une obligation préexistante, c'est-à-dire d'assurer le paiement d'une dette dont le défendeur est déjà redevable. Comme l'expliquent Pitel et Rafferty, une telle action [TRADUCTION] « est fondée non pas sur la réclamation initiale que le demandeur avait fait valoir contre le défendeur, mais sur l'obligation créée par le jugement étranger » : p. 159; voir également P. M. Perell et J. W. Morden, *The Law of Civil Procedure in Ontario* (2e éd. 2014), ¶11.177. Les propos suivants de la juge en chef McLachlin dans l'arrêt *Pro Swing* (quoique exprimés dans sa dissidence) reflètent également cette logique : « Sauf circonstances exceptionnelles, le tribunal s'attache à l'obligation créée par le jugement étranger, et non aux dispositions de droit substantiel et procédural qui sous-tendent celui-ci » (par. 77).

[44] D'importantes conséquences se dégagent de cette observation. Premièrement, l'action en reconnaissance et en exécution ne doit pas porter sur l'examen de la réclamation sous-jacente qui a donné lieu au litige initial, mais plutôt sur l'aide que le tribunal peut offrir pour l'exécution d'une obligation déjà reconnue par jugement. Autrement dit, le tribunal d'exécution n'est pas appelé à juger sur le fond, mais plutôt à jouer le rôle de facilitateur : *Pro Swing*, par. 11. Il offre simplement un mécanisme d'exécution pour faciliter le recouvrement d'une dette dans le ressort. Il s'ensuit que le tribunal d'exécution n'exerce pas sa compétence de la même manière qu'il le fait dans les actions de première instance. Dans une affaire en première instance comme *Van Breda*, la cour se demande si elle a compétence pour trancher la réclamation sur le fond; dans une demande de reconnaissance et d'exécution, la cour ne crée pas une nouvelle obligation substantielle, mais aide plutôt à l'acquittement d'une obligation existante.

[45] Par conséquent, il importe peu que les parties se trouvent ailleurs, ou qu'il soit opportun

underlying the dispute are properly addressed in another court, factors that might serve to undermine the existence of a real and substantial connection with the forum in first instance adjudication. The defendant will, of course, not have a significant connection with the forum, otherwise an independent jurisdictional basis would already exist for proceeding against him or her. Moreover, the facts underlying the original judgment are irrelevant, except insofar as they relate to potential defences to enforcement. The only important element is the foreign judgment itself, and the legal obligation it has created. Simply put, the logic for mandating a connection with the enforcing jurisdiction finds no place.

[46] Second, enforcement is limited to measures — like seizure, garnishment, or execution — that can be taken only within the confines of the jurisdiction, and in accordance with its rules: *Pro Swing*, at para. 11; J. Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed. (loose-leaf)), at p. 11-52. The recognition and enforcement of a judgment therefore has a limited impact: as Walker states, "[a]n order enforcing a foreign judgment applies only to local assets" (p. 14-11). The enforcing court's judgment has no coercive force outside its jurisdiction. Whether recognition and enforcement should proceed depends entirely on the enforcing forum's laws. The dispute does not contain a foreign element that would make resort to the real and substantial connection test necessary. Walker adds that, as a result, since enforcement concerns only local assets, "there is no basis for staying the proceedings on the grounds that the forum is inappropriate or that the judgment debtor's principal assets are elsewhere": *ibid.*

[47] Third, and flowing from this reality, any potential constitutional concerns that might sometimes emerge in conflict of laws cases simply do not arise in recognition and enforcement proceedings. In *Morguard*, the Court elaborated a conflict of laws rule and also hinted, without deciding, that the test might have constitutional foundations: pp. 1109-10.

qu'un autre tribunal traite les faits sous-jacents au litige, des facteurs qui pourraient miner l'existence d'un lien réel et substantiel avec le tribunal dans une affaire instruite en première instance. Bien entendu, le défendeur n'aura pas de lien important avec le tribunal, car autrement, il existerait déjà un fondement juridictionnel indépendant pour engager des procédures contre lui. De plus, les faits qui sous-tendaient le jugement initial ne sont pas pertinents, sauf dans la mesure où ils ont trait à d'éventuels moyens de défense contre l'exécution. Le seul élément important est le jugement étranger lui-même, ainsi que l'obligation juridique qu'il a créée. En somme, il serait illogique d'exiger un lien avec le ressort d'exécution.

[46] Deuxièmement, l'exécution se limite à des mesures — par exemple la saisie, la saisie-arrêt et la saisie-exécution — qui ne peuvent être prises que dans les limites du ressort du tribunal d'exécution et conformément à ses règles : *Pro Swing*, par. 11; J. Walker, *Castel & Walker : Canadian Conflict of Laws* (6e éd. (feuilles mobiles)), p. 11-52. La reconnaissance et l'exécution d'un jugement ont donc un effet limité : comme l'affirme Walker, [TRADUCTION] « [l]'ordonnance d'exécution d'un jugement étranger ne s'applique qu'aux biens locaux » (p. 14-11). Le jugement du tribunal d'exécution n'a aucun effet contraignant en dehors du ressort d'exécution. L'opportunité que la demande de reconnaissance et d'exécution suive son cours dépend entièrement des lois du ressort d'exécution. Le litige ne porte sur aucun élément étranger qui nécessiterait le recours au critère du lien réel et substantiel. Par conséquent, ajoute Walker, puisque l'exécution ne concerne que des biens locaux, « il n'y a aucune raison de surseoir à l'instance au motif que le ressort est inapproprié ou que les principaux biens du débiteur judiciaire se trouvent ailleurs » : *ibid.*

[47] Troisièmement, il découle de cette réalité que d'éventuelles questions d'ordre constitutionnel qui pourraient parfois se présenter dans des affaires de droit international privé ne se posent tout simplement pas dans une demande de reconnaissance et d'exécution. Dans *Morguard*, notre Cour a élaboré une règle de droit international privé et a laissé entendre, sans

In *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, the Court confirmed that *Morguard* had created a constitutional principle that was applicable to the assumption of jurisdiction. LeBel J. later reaffirmed and clarified this in *Van Breda*, where he noted that the real and substantial connection test has a dual nature: first, it serves as a constitutional principle; second, it constitutes a conflict of laws rule (paras. 22-24). He stated that "in Canadian constitutional law, the real and substantial connection test has given expression to the constitutionally imposed territorial limits that underlie the requirement of legitimacy in the exercise of the state's power of adjudication"; he added that the test "suggests that the connection between a state and a dispute cannot be weak or hypothetical", as such a connection "would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute": para. 32.

[48] No concern about the legitimacy of the exercise of state power exists in actions to recognize and enforce foreign judgments against judgment debtors. As I have explained, when such an action comes before a Canadian court, the court is not assuming jurisdiction over the parties in the same way as would occur in a first instance case. The enforcing court has no interest in adjudicating the original rights of the parties. Rather, the court merely seeks to assist in the enforcement of what has already been decided in another forum. As Deschamps J. aptly stated in *Pro Swing*, "[t]he enforcing court . . . lends its judicial assistance to the foreign litigant by allowing him or her to use its enforcement mechanisms": para. 11. The manner in which the court exercises control over the parties is thus different — and far less invasive — than in an action at first instance.

[49] In most recognition and enforcement proceedings, the only factor that draws a foreign judgment creditor to the province is the potential for assets upon which to ultimately enforce the judgment. Enforcement is limited to the seizable assets

en décider, que le critère avait peut-être des fondements constitutionnels : p. 1109-1110. Dans *Hunt c. T&N plc*, [1993] 4 R.C.S. 289, la Cour a confirmé que l'arrêt *Morguard* avait créé un principe constitutionnel applicable à la déclaration de compétence. Plus tard, le juge LeBel l'a réaffirmé et précisé dans *Van Breda*, où il a noté que le critère du lien réel et substantiel se présentait sous deux aspects : premièrement, il a l'effet d'un principe constitutionnel et deuxièmement, il constitue une règle de droit international privé (par. 22-24). Pour reprendre les propos du juge LeBel, « en droit constitutionnel canadien, le critère du lien réel et substantiel a affirmé les limites territoriales imposées par la Constitution qui sous-tendent la légitimité nécessaire à l'exercice du pouvoir juridictionnel de l'État »; il a ajouté que le critère « suppose que le lien entre un État et un litige ne peut être ténu ni hypothétique », puisqu'un lien de cette nature « jetterait un doute sur la légitimité de l'exercice, par l'État, de son pouvoir sur les personnes que touche le litige » : par. 32.

[48] La question de la légitimité de l'exercice du pouvoir de l'État ne se pose pas dans les actions en reconnaissance et en exécution de jugements étrangers contre des débiteurs judiciaires. Comme je l'ai expliqué, lorsqu'un tribunal canadien est saisi d'une telle action, le tribunal ne se déclare pas compétent à l'égard des parties de la même façon qu'il le ferait dans une affaire en première instance. Le tribunal d'exécution n'a aucun intérêt à statuer sur les droits initiaux des parties. Le tribunal cherche simplement à prêter son concours à l'exécution d'un jugement rendu par un autre tribunal. Comme la juge Deschamps l'a si bien dit dans *Pro Swing*, « [l]e tribunal d'exécution peut [. . .] prêter son concours au justiciable étranger en lui donnant accès aux mécanismes d'exécution internes » : par. 11. La manière dont le tribunal exerce sa compétence à l'égard des parties est donc différente — et beaucoup moins attentatoire — que dans une action de première instance.

[49] Dans la plupart des demandes de reconnaissance et d'exécution, le seul facteur qui amène le créancier judiciaire dans la province est la présence éventuelle de biens sur lesquels le jugement pourra finalement être exécuté. L'exécution se limite aux

found within the province. No constitutional concern about the legitimacy of this exercise of jurisdiction emerges. I acknowledge that, under provincial legislation, a recognition and enforcement judgment issued in one province may be capable of being "registered" in another province, thus offering some advantage to plaintiffs who have already successfully obtained a recognition and enforcement judgment. Nevertheless, the existence of such legislation does not alter the basic fact that absent some obligation to enforce another forum's judgments, the judicial system of each province controls access to its jurisdiction's enforcement mechanisms, whenever a foreign judgment creditor seeks to seize assets within its territory in satisfaction of a foreign judgment debt.

[50] In addition, the obligation created by a foreign judgment is universal; there is no competing claim to jurisdiction with respect to it. If each jurisdiction has an equal interest in the obligation resulting from a foreign judgment, it is hard to see how any concern about territorial overreach could emerge. Simply put, there can be no concern about jurisdictional overreach if no jurisdiction can reach further into the matter than any other. The purposes that underlie recognition and enforcement proceedings simply do not require proof of a real and substantial connection between the dispute and Ontario, whether for constitutional reasons or otherwise.

(b) *The Notion of Comity in Recognition and Enforcement Proceedings*

[51] Beyond this, it must be remembered that the notion of comity has consistently been found to underlie Canadian recognition and enforcement law. In *Morguard*, this Court stated that comity refers to "the deference and respect due by other states to the actions of a state legitimately taken within its territory", as well as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and

biens saisissables qui se trouvent dans la province. Il ne se pose aucune question constitutionnelle quant à la légitimité de cet exercice de la compétence. Je reconnais que, selon la législation provinciale, un jugement en reconnaissance et en exécution rendu dans une province peut être susceptible d'« enregistrement » dans une autre province, ce qui offre un certain avantage aux demandeurs qui ont déjà obtenu un jugement en reconnaissance et en exécution. Néanmoins, l'existence d'une telle législation ne change rien au fait qu'à défaut de quelque obligation d'exécuter les jugements d'un autre tribunal, le système judiciaire de chaque province contrôle l'accès aux mécanismes d'exécution de son ressort chaque fois que le créancier d'un jugement étranger cherche à saisir des biens sur son territoire pour acquitter une dette constatée par un jugement étranger.

[50] En outre, l'obligation créée par le jugement étranger est universelle; elle ne fait l'objet d'aucune revendication concurrente de compétence. Si chaque ressort a un intérêt égal à l'égard de l'obligation qui résulte du jugement étranger, il est difficile de voir comment pourrait se poser un problème d'excès de compétence territoriale. En somme, il ne saurait y avoir de problème d'excès de compétence si aucun ressort ne peut traiter la question de façon plus étendue que ne le ferait un autre ressort. Bref, compte tenu des objectifs qui sous-tendent les demandes de reconnaissance et d'exécution, il n'est tout simplement pas nécessaire de prouver l'existence d'un lien réel et substantiel entre le litige et l'Ontario, que ce soit pour des motifs d'ordre constitutionnel ou pour d'autres motifs.

b) *La notion de courtoisie dans les demandes de reconnaissance et d'exécution*

[51] Au-delà de ces considérations, il faut se rappeler que la notion de courtoisie sous-tend le droit canadien en matière de reconnaissance et d'exécution. Dans l'arrêt *Morguard*, notre Cour a affirmé que la courtoisie renvoie à « la déférence et le respect que des États doivent avoir pour les actes qu'un autre État a légitimement accomplis sur son territoire », ainsi qu'à « la reconnaissance qu'une nation accorde sur son territoire aux actes législatifs, exécutifs ou judiciaires d'une autre nation,

to the rights of its own citizens or of other persons who are under the protection of its laws": pp. 1095-96, quoting with approval the U.S. Supreme Court's foundational articulation of the concept of comity in *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163-64; see also *Spencer v. The Queen*, [1985] 2 S.C.R. 278, at p. 283, per Estey J., concurring.

[52] The Court's formulation of the notion of comity in *Morguard* was quoted with approval in *Beals*: para. 20. In *Hunt*, the Court observed that "ideas of 'comity' are not an end in themselves, but are grounded in notions of order and fairness to participants in litigation with connections to multiple jurisdictions": p. 325. In *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, the Court again referred to the notion of comity, stating that it entails respect for the authority of each state "to make and apply law within its territorial limit", and that "to accommodate the movement of people, wealth and skills across state lines, a byproduct of modern civilization, [states] will in great measure recognize the determination of legal issues in other states": p. 1047. In *Pro Swing*, the Court described comity as a "balancing exercise" between "respect for a nation's acts, international duty, convenience and protection of a nation's citizens": para. 27. Finally, in *Van Breda*, LeBel J. emphasized that the goal of modern conflicts systems rests on the principle of comity, which, although a flexible concept, calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity: para. 74. This is true of all areas of private international law, including that of the recognition and enforcement of foreign judgments.

[53] As this review of the Court's statements on comity shows, the need to acknowledge and show

compte tenu à la fois des obligations et des convenances internationales et des droits de ses propres citoyens ou des autres personnes qui sont sous la protection de ses lois » : p. 1095-1096, citant avec approbation la déclaration de principe de la Cour suprême des États-Unis relative à la notion de courtoisie dans l'arrêt *Hilton c. Guyot*, 159 U.S. 113 (1895), p. 163-164; voir également *Spencer c. La Reine*, [1985] 2 R.C.S. 278, p. 283, motifs concordants du juge Estey.

[52] La formulation de la notion de courtoisie que l'on retrouve dans l'arrêt *Morguard* a été reproduite avec approbation dans l'arrêt *Beals* : par. 20. Dans l'arrêt *Hunt*, notre Cour a fait remarquer que « les idées de "courtoisie" ne sont pas une fin en soi, mais reposent sur des notions d'ordre et d'équité envers les parties à un litige qui a des liens avec plusieurs ressorts » : p. 325. Dans *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022, la Cour a encore fait mention de la notion de courtoisie, affirmant qu'elle témoigne du respect du pouvoir de chaque État « pour adopter des lois et les appliquer à l'intérieur de son propre territoire » et que, « afin de faciliter la circulation des personnes, des richesses et des compétences d'un pays à l'autre, fruit de la civilisation moderne, [les États] reconnaîtront dans une large mesure la façon dont les autres États auront tranché des questions juridiques » : p. 1047. Dans *Pro Swing*, la Cour a présenté la notion de courtoisie comme un « exercice de pondération » entre « le respect des actes de l'autre État, les obligations et les convenances internationales et la protection des citoyens du ressort d'exécution » : par. 27. Enfin, dans *Van Breda*, le juge LeBel a souligné que le système moderne de droit international privé repose sur le principe de la courtoisie qui, tout en étant une notion souple, appelle à la promotion de l'ordre et de l'équité, une attitude de respect et de déférence envers les autres États, et un degré de stabilité et de prévisibilité pour faciliter la réciprocité : par. 74. Ce principe s'applique à tous les domaines du droit international privé, y compris celui de la reconnaissance et l'exécution des jugements étrangers.

[53] Comme le montre cet examen des déclarations de notre Cour relatives à la courtoisie, le besoin

respect for the legal acts of other states has consistently remained one of the principle's core components. Comity, in this regard, militates in favour of recognition and enforcement. Legitimate judicial acts should be respected and enforced, not sidetracked or ignored. The concepts of order and fairness in which comity is grounded are not affronted by rejecting Chevron's proposed extension of the real and substantial connection test. This is so for several reasons.

[54] First, in recognition and enforcement proceedings, order and fairness are protected by ensuring that a real and substantial connection existed between the foreign court and the underlying dispute. If such a connection did not exist, or if the defendant was not present in or did not attorn to the foreign jurisdiction, the resulting judgment will not be recognized and enforced in Canada. The judgment debtor is free to make this argument in the recognition and enforcement proceedings, and indeed will have already had the opportunity to contest the jurisdiction of the foreign court in the foreign proceedings. Here, for instance, it is accepted that Chevron attorned to the jurisdiction of the Ecuadorian courts. As Walker writes, "[t]he jurisdictional requirements of order and fairness considered in the context of *direct* jurisdiction operate to promote the international acceptance of the adjudication of a matter by a Canadian court": p. 14-1 (emphasis in original). There is no similar requirement of international acceptance in the context of the recognition and enforcement of a foreign judgment.

[55] Second, no unfairness results to judgment debtors from having to defend against recognition and enforcement proceedings. In essence, through their own behaviour and legal noncompliance, the debtors have made themselves the subject of outstanding obligations. It is for this reason that they may be called upon to answer for their debts in various jurisdictions. Of course, the principles of order and fairness are also protected by providing

de reconnaître et respecter les mesures juridiques prises par d'autres États est invariablement demeuré un des éléments au cœur de ce principe. À cet égard, la courtoisie milite en faveur de la reconnaissance et de l'exécution. Il convient de respecter et d'exécuter les actes judiciaires légitimes et non pas de les écarter ou d'en faire abstraction. On ne contrevient pas aux principes d'ordre et d'équité sur lesquels se fonde la courtoisie en rejetant l'idée de Chevron d'étendre comme elle le suggère l'application du critère du lien réel et substantiel, et ce pour plusieurs raisons.

[54] Premièrement, dans une demande de reconnaissance et d'exécution, la protection de l'ordre et de l'équité est déjà assurée par l'existence d'un lien réel et substantiel entre le tribunal étranger et le litige sous-jacent. Faute d'un tel lien, ou si le défendeur ne se trouvait pas dans le ressort étranger ou n'a pas acquiescé à la compétence de ses tribunaux, le jugement rendu ne sera pas reconnu et exécuté au Canada. Il est tout à fait loisible au débiteur judiciaire de faire valoir cet argument dans le cadre de la demande de reconnaissance et d'exécution; du reste, il aura généralement déjà eu la possibilité de contester la compétence du tribunal étranger dans l'instance étrangère. En l'espèce, par exemple, nul ne conteste que Chevron ait acquiescé à la compétence des tribunaux équatoriens. Comme l'écrit Walker, [TRADUCTION] « [l]es exigences d'ordre et d'équité en matière de compétence, considérées dans le contexte de la compétence *directe*, s'appliquent pour promouvoir l'acceptation internationale du fait qu'un tribunal canadien tranche une affaire » : p. 14-1 (en italique dans l'original). Une telle exigence d'acceptation internationale n'existe pas dans le contexte de la reconnaissance et de l'exécution d'un jugement étranger.

[55] Deuxièmement, il n'y a rien d'injuste à ce qu'un débiteur judiciaire doive opposer une défense à une demande de reconnaissance et d'exécution. De fait, par son propre comportement et le non-respect d'un jugement, le débiteur s'est lui-même rendu redevable d'une obligation en souffrance. Voilà pourquoi il peut être appelé par divers ressorts à acquitter sa dette. Bien entendu, les principes d'ordre et d'équité sont également protégés

a foreign judgment debtor with the opportunity to convince the enforcing court that there is another reason why recognition and enforcement should not be granted: see *Beals*, at paras. 39 *et seq.*

[56] Third, contrary to Chevron's argument, a requirement that the defendant have a real and substantial connection with the enforcing court in the sense of being present or having assets in the province would only undermine order and fairness. In recognition and enforcement proceedings, besides an unlikely attornment by the defendant, the only way a real and substantial connection with the enforcing forum could be achieved, in the end, is through presence or assets in the jurisdiction. However, presence will frequently be absent given the very nature of the proceeding at issue. Indeed, rule 17.02(m) is implicitly based on an expectation that the defendant in a claim on a judgment of a court outside Ontario will not be present in the province. Requiring assets to be present in the jurisdiction when recognition and enforcement proceedings are instituted is also not conducive to order or fairness. For one thing, assets such as receivables or bank deposits may be in one jurisdiction one day, and in another the next. If jurisdiction over recognition and enforcement proceedings were dependent upon the presence of assets at the time of the proceedings, this may ultimately prove to only benefit those debtors whose goal is to escape rather than answer for their liabilities, while risking depriving creditors of access to funds that might eventually enter the jurisdiction.

[57] In today's globalized world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality. The motion judge rightly opined as follows on this subject:

en donnant au débiteur en vertu du jugement étranger l'occasion de convaincre le tribunal d'exécution qu'il existe une autre raison de ne pas faire droit à la demande de reconnaissance et d'exécution : voir *Beals*, par. 39 et suiv.

[56] Troisièmement, contrairement à ce que prétend Chevron, l'exigence d'un lien réel et substantiel entre le défendeur et le tribunal d'exécution par la présence du défendeur ou de ses biens dans la province ne ferait que miner l'ordre et l'équité. Dans une demande de reconnaissance et d'exécution, hormis le cas improbable d'un acquiescement du défendeur à la compétence, la seule manière, en définitive, d'établir l'existence d'un lien réel et substantiel avec le ressort d'exécution se limite à la présence du défendeur ou de biens dans le ressort. Or, le défendeur y est souvent absent vu la nature même de la demande en cause. C'est d'ailleurs ce que présume l'al. 17.02m) des Règles : cette disposition repose implicitement sur l'hypothèse que le défendeur dans une demande d'exécution d'un jugement rendu par un tribunal en dehors de l'Ontario ne sera pas présent dans la province. Exiger la présence de biens dans le ressort lorsqu'est introduite la demande de reconnaissance et d'exécution ne contribue guère non plus à l'ordre ou à l'équité. Tout d'abord, des biens comme des créances ou des dépôts bancaires peuvent se trouver dans un ressort un jour, puis se retrouver dans un autre le lendemain. Si la compétence à l'égard d'une demande de reconnaissance et d'exécution dépendait de la présence de biens au moment de l'introduction de l'instance, il se pourrait qu'une telle condition ne profite en fin de compte qu'aux débiteurs qui veulent se dérober à leurs responsabilités plutôt que les assumer, risquant ainsi de priver les créanciers de fonds qui pourraient éventuellement se trouver dans le ressort.

[57] À l'ère de la mondialisation et des échanges électroniques, obliger un créancier judiciaire à attendre que le débiteur étranger ou ses biens se trouvent dans la province avant qu'un tribunal reconnaisse sa compétence dans une demande de reconnaissance et d'exécution reviendrait à faire abstraction de la réalité économique actuelle. Le juge de première instance a eu raison d'écrire ce qui suit à ce sujet :

In an age of electronic international banking, funds once in the hands of a judgment debtor can quickly leave a jurisdiction. While it is highly unlikely that a judgment debtor would move assets into a jurisdiction in the face of a pending recognition action, in some circumstances judgment debtors may not control the timing or location of the receipt of an asset due to them; control may rest in the hands of a third party as a result of contract or otherwise. Where a judgment creditor under a foreign judgment learns that its judgment debtor may come into possession of an asset in the foreseeable future, it might want the recognition of its foreign judgment in advance of that event so that it could invoke some of the enforcement mechanisms of the receiving jurisdiction, such as garnishment. To insist that the judgment creditor under a foreign judgment await the arrival of the judgment debtor's asset in the jurisdiction before seeking recognition and enforcement could well prejudice the ability of the judgment creditor to recover on its judgment. Given the wide variety of circumstances – including timing – in which a judgment debtor might come into possession of an asset, I do not think it prudent to lay down a hard and fast rule that assets of the judgment debtor must exist in the receiving jurisdiction as a pre-condition to the receiving jurisdiction entertaining a recognition and enforcement action. [para. 81]

[TRADUCTION] À une époque où les opérations bancaires se font par voie électronique à l'échelle internationale, les fonds en la possession d'un débiteur judiciaire peuvent rapidement quitter un ressort. Bien qu'il soit hautement improbable qu'un tel débiteur fasse entrer des biens dans un ressort alors même qu'une action en reconnaissance est pendante, il se peut que dans certaines situations, le débiteur n'ait aucune emprise sur le moment ou le lieu de la réception d'un bien qui lui est dû; il se peut que le contrôle appartienne à un tiers, par contrat ou autrement. Lorsque le créancier en vertu d'un jugement étranger apprend que son débiteur judiciaire est susceptible d'entrer en possession d'un bien dans un avenir prévisible, il voudra peut-être obtenir la reconnaissance de son jugement étranger à l'avance pour qu'il puisse faire valoir les mécanismes d'exécution du ressort dans lequel les biens seront reçus, par exemple une saisie-arrêt. S'il fallait exiger que le créancier en vertu d'un jugement étranger attende l'arrivée du bien du débiteur judiciaire dans le ressort avant de demander la reconnaissance et l'exécution, la possibilité qu'a ce créancier de recouvrer sa créance judiciaire pourrait très bien être compromise. Compte tenu de la vaste gamme de circonstances – y compris la chronologie – dans lesquelles un débiteur judiciaire peut entrer en possession d'un bien, j'estime qu'il serait imprudent de fixer une règle absolue exigeant la présence de biens de ce débiteur dans le ressort d'exécution comme condition préalable à ce que le tribunal de ce ressort connaisse d'une action en reconnaissance et en exécution. [par. 81]

I note that in one Ontario lower court decision, albeit in the context of *forum non conveniens*, the existence of assets has been held to be irrelevant to the jurisdictional inquiry: see *BNP Paribas (Canada) v. Mécs* (2002), 60 O.R. (3d) 205 (S.C.J.).

Je souligne que dans un jugement rendu par une juridiction inférieure en Ontario, quoique dans un contexte de *forum non conveniens*, l'existence de biens a été jugée non pertinente dans l'examen de la compétence : voir *BNP Paribas (Canada) c. Mécs* (2002), 60 O.R. (3d) 205 (C.S.J.).

[58] In this regard, I find persuasive value in the fact that other common law jurisdictions — presumably equally concerned about order and fairness as our own — have also found that the presence of assets in the enforcing jurisdiction is not a prerequisite to the recognition and enforcement of a foreign judgment.

[58] À cet égard, j'accorde une valeur persuasive au fait que les tribunaux d'autres ressorts de common law — vraisemblablement aussi soucieux que les nôtres d'assurer l'ordre et l'équité — ont conclu eux aussi que la présence de biens dans le ressort d'exécution n'était pas une condition préalable à la reconnaissance et à l'exécution d'un jugement étranger.

[59] In *Tasarruf Mevduati Sigorta Fonu v. Demirel*, [2007] EWCA Civ 799, [2007] 1 W.L.R. 2508, for example, the England and Wales Court of Appeal

[59] Dans *Tasarruf Mevduati Sigorta Fonu c. Demirel*, [2007] EWCA Civ 799, [2007] 1 W.L.R. 2508, par exemple, la Cour d'appel d'Angleterre et

(Civil Division) held that "a claimant seeking to enforce a foreign judgment by action does not have to show that there are assets in the jurisdiction. To require him to do so would be tantamount to construing the rule as if it were limited in that way": para. 29. The court also held that to be granted permission to serve *ex juris* (permission that is needed under the applicable English procedural rules), the claimant is required to show "that he has a good arguable case in the action, that is that he has a good arguable case that judgment should be given based upon the foreign judgment": *ibid.* The court continued, holding that the claimant must "ordinarily show further that he can reasonably expect a benefit from such a judgment": *ibid.* However, on the facts of the case, it held that service *ex juris* should be permitted where the defendant did not possess assets in England at the time, but had a "reasonable possibility" of having assets in London "one of these days": para. 40.

du Pays de Galles (section civile) a statué qu'un [TRADUCTION] « demandeur qui veut faire exécuter un jugement étranger par voie d'action n'a pas à démontrer l'existence de biens dans le ressort. L'obliger à le faire équivaudrait à interpréter la règle comme si elle était limitée de cette façon » : par. 29. La cour a également statué que pour obtenir une autorisation de signification *ex juris* (nécessaire en vertu des règles de procédure anglaises), le demandeur devait démontrer « que sa cause d'action est valable, c'est-à-dire qu'il peut à bon droit faire valoir qu'un jugement fondé sur le jugement étranger peut être rendu en sa faveur » : *ibid.* La cour a ajouté que le demandeur doit « normalement démontrer en outre qu'il peut raisonnablement s'attendre à tirer avantage d'un tel jugement » : *ibid.* Toutefois, eu égard aux faits de l'affaire, la cour a statué qu'il fallait permettre la signification *ex juris* dans un cas où le défendeur ne possédait pas de biens en Angleterre à l'époque, mais où il existait « une possibilité raisonnable » qu'il possède des biens à Londres « un jour » : par. 40.

[60] The High Court of Ireland followed a similar approach in *Yukos Capital S.A.R.L. v. OAO Tomskneft VNK*, [2014] IEHC 115, in an arbitration context, holding that "the presence of assets within the jurisdiction is not a pre-requisite for the granting of leave to serve out of the jurisdiction on an application to enforce a Convention Award": para. 112 (BAILII). Although the court quoted with approval the passages from *Tasarruf* to the effect that the applicant must demonstrate that some potential benefit would accrue should the recognition and enforcement action succeed, it nevertheless accepted, with no hesitation, that "the seeking of recognition and enforcement of an award in a country where the losing party may have no assets in order to obtain the imprimatur of a respected court upon the award is acceptable": para. 128.

[60] Dans *Yukos Capital S.A.R.L. c. OAO Tomskneft VNK*, [2014] IEHC 115, la Haute Cour d'Irlande a suivi un raisonnement similaire dans une affaire d'arbitrage, statuant que [TRADUCTION] « la présence de biens dans le ressort n'est pas une condition préalable à l'autorisation de faire la signification à l'extérieur du ressort dans une demande d'exécution d'une sentence rendue en application de la Convention » : par. 112 (BAILII). Bien que la Cour ait cité avec approbation les passages de l'arrêt *Tasarruf* où il est dit que le demandeur doit démontrer l'avantage éventuel qu'il tirerait si l'action en reconnaissance et en exécution était accueillie, elle a néanmoins reconnu sans hésitation qu'« il est acceptable de demander la reconnaissance et l'exécution d'une sentence dans un pays où la partie débitrice peut ne pas avoir de biens afin d'obtenir l'homologation de la sentence par une cour de justice reconnue » : par. 128.

[61] The U.S. courts appear to be divided on the prerequisites to recognition and enforcement: see R. A. Brand, "Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments" (2013), 74 *U. Pitt. L. Rev.* 491. Some, as exemplified by the decision in *Lenchyshyn*

[61] Les tribunaux américains paraissent divisés sur les conditions préalables à la reconnaissance et à l'exécution : voir R. A. Brand, « Federal Judicial Center International Litigation Guide : Recognition and Enforcement of Foreign Judgments » (2013), 74 *U. Pitt. L. Rev.* 491. Certains d'entre eux,

v. Pelko Electric, Inc., 723 N.Y.S.2d 285 (App. Div. 2001), take a broad approach. In *Lenchyshyn*, the Supreme Court of New York, Appellate Division, held that personal jurisdiction need not be established over judgment debtors for recognition and enforcement to proceed. In the court's view, "[r]equiring that the judgment debtor have a 'presence' in or some other jurisdictional nexus to the state of enforcement would unduly protect a judgment debtor and enable him easily to escape his just obligations under a foreign country money judgment" (p. 292); moreover, no constitutional obligation exists to satisfy such a requirement (p. 289). The court concluded that "even if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country money judgment . . . and thereby should have the opportunity to pursue all such enforcement steps *in futuro*, whenever it might appear that defendants are maintaining assets in New York": p. 291. The same court recently reiterated the *Lenchyshyn* approach in *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Financial Services Co.*, 986 N.Y.S.2d 454 (App. Div. 2014). Other state and district courts have also adopted its reasoning: *Haaksman v. Diamond Offshore (Bermuda), Ltd.*, 260 S.W.3d 476 (Tex. App. 2008); *Pure Fishing, Inc. v. Silver Star Co.*, 202 F.Supp.2d 905 (N.D. Iowa 2002).

[62] As the motion judge below correctly pointed out, some U.S. courts have taken a different approach. For instance, the Michigan Court of Appeals stated the following in *Electrolines, Inc. v. Prudential Assurance Co.*, 677 N.W.2d 874 (2004):

> We hold that where plaintiff failed to identify any property owned by defendants in Michigan, the trial court erred in holding that it was unnecessary for plaintiff to demonstrate that the Michigan court had personal jurisdiction over defendants in this common-law enforcement action.

comme dans l'arrêt *Lenchyshyn c. Pelko Electric, Inc.*, 723 N.Y.S.2d 285 (App. Div. 2001), adoptent une approche libérale. Dans *Lenchyshyn*, la division d'appel de la Cour suprême de l'État de New York a statué qu'il n'était pas nécessaire d'établir la compétence personnelle à l'égard des débiteurs judiciaires pour que la demande de reconnaissance et d'exécution suive son cours. Pour reprendre les propos de la cour, [TRADUCTION] « [e]xiger qu'un débiteur judiciaire ait une "présence" dans l'État d'exécution ou qu'il ait un quelconque autre lien juridictionnel avec cet État protégerait indûment le débiteur du jugement et lui permettrait facilement de se soustraire à ses obligations légitimes constatées par un jugement pécuniaire étranger » (p. 292); qui plus est, il n'existe aucune obligation constitutionnelle de poser une telle exigence (p. 289). La cour a conclu que « même si les défendeurs n'ont pas actuellement de biens dans l'État de New York, il convient néanmoins d'accorder aux demandeurs la reconnaissance du jugement pécuniaire étranger [. . .] et ces derniers doivent par conséquent avoir la possibilité de prendre toutes ces mesures d'exécution *à l'avenir*, à chaque fois où il pourrait sembler que les défendeurs conservent des biens dans l'État de New York » : p. 291. La même cour a repris l'approche suivie dans *Lenchyshyn* dans *Abu Dhabi Commercial Bank PJSC c. Saad Trading, Contracting and Financial Services Co.*, 986 N.Y.S.2d 454 (App. Div. 2014). D'autres tribunaux d'États et de districts ont également adopté son raisonnement : *Haaksman c. Diamond Offshore (Bermuda), Ltd.*, 260 S.W.3d 476 (Tex. App. 2008); *Pure Fishing, Inc. c. Silver Star Co.*, 202 F.Supp.2d 905 (N.D. Iowa 2002).

[62] Comme le premier juge l'a souligné à juste titre, certains tribunaux américains ont suivi une autre approche. Par exemple, dans l'arrêt *Electrolines, Inc. c. Prudential Assurance Co.*, 677 N.W.2d 874 (2004), la Cour d'appel du Michigan a affirmé ce qui suit :

> [TRADUCTION] Nous statuons que lorsque le demandeur n'a pas identifié de biens au Michigan appartenant aux défendeurs, le tribunal de première instance a eu tort de conclure qu'il n'était pas nécessaire que le demandeur démontre que le tribunal du Michigan avait compétence personnelle à l'égard des défendeurs dans cette action en exécution en common law.

. . .

We have not found any authorities indicating that the foundational requirement of demonstrating a trial court's jurisdiction over a person or property is inapplicable in enforcement proceedings. [pp. 880 and 884]

Other U.S. courts have adopted an even more extreme position, holding that "attachment of assets of the judgment debtor within the state is not sufficient to provide jurisdiction, and that personal jurisdiction over the judgment debtor is necessary": Brand, at p. 506, citing *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208 (4th Cir. 2002), cert. denied, 537 U.S. 822 (2002).

[63] As this review of the case law indicates, many courts in common law jurisdictions have been hesitant to make the presence of assets a prerequisite to jurisdiction in recognition and enforcement proceedings. While it is true that some have nonetheless seen fit to limit the existence of jurisdiction in other ways (notably, by requiring that judgment creditors prove that a benefit will result from successful recognition and enforcement proceedings), they have done so in the context of different procedural rules and distinct constitutional considerations.

[64] Turning to the works of Canadian conflict of laws scholars, most support the view that requiring a real and substantial connection through the defendant being present or having assets in the province is not necessary for the purposes of a recognition and enforcement action. Walker, for instance, writes:

The security of crossborder transactions rests on the confidence that the law will enable the prompt and effective determination of the effect of judgments from other legal systems. For this reason, there are no separate or additional jurisdictional requirements, such as the residence of the defendant or the presence of the defendant's assets in the jurisdiction, for a court to determine

. . .

Nous n'avons trouvé aucune source indiquant que l'exigence de principe selon laquelle il faut démontrer la compétence du tribunal de première instance à l'égard d'une personne ou d'un bien est inapplicable aux demandes d'exécution. [p. 880 et 884]

D'autres tribunaux des États-Unis ont préconisé une approche encore plus extrême, statuant que [TRADUCTION] « la saisie de biens du débiteur judiciaire à l'intérieur de l'État ne suffit pas à conférer la compétence : il faut une compétence personnelle à l'égard du débiteur judiciaire » : Brand, p. 506, citant *Base Metal Trading, Ltd. c. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208 (4th Cir. 2002), cert. refusé, 537 U.S. 822 (2002).

[63] Il ressort de cet examen de la jurisprudence que les tribunaux de plusieurs ressorts de common law hésitent à faire de la présence de biens une condition préalable à la compétence dans les demandes de reconnaissance et d'exécution. Même s'il est vrai que certains de ces tribunaux ont néanmoins jugé bon de limiter l'existence de la compétence d'autres façons (notamment en exigeant que le créancier judiciaire prouve qu'il tirera un avantage quelconque si la demande de reconnaissance et d'exécution est accueillie), ils l'ont fait dans le contexte de règles de procédure différentes et de considérations constitutionnelles distinctes de celles qui prévalent ici.

[64] Cela dit, une étude des ouvrages canadiens de doctrine en droit international privé montre que la plupart des auteurs estiment qu'il n'est pas nécessaire d'exiger, dans le contexte des actions en reconnaissance et en exécution, l'existence d'un lien réel et substantiel par la présence du défendeur ou de ses biens dans la province. Ainsi, Walker écrit ce qui suit :

[TRADUCTION] La sécurité des opérations transfrontalières repose sur la confiance que l'on a que le droit permettra de déterminer rapidement et efficacement l'effet des jugements provenant d'autres systèmes juridiques. Pour cette raison, il n'existe aucune autre exigence distincte ou additionnelle en matière de compétence, par exemple la résidence du défendeur ou la présence de

whether a foreign judgment may be recognized or enforced. [Emphasis added; p. 14-1.]

[65] Perell and Morden express a similar view:

Subject to the defences, a Canadian court will enforce a foreign judgment if the foreign court or foreign jurisdiction had a "real and substantial connection" to the dispute. However, it is not necessary for the plaintiffs to establish that Ontario has a real and substantial connection with the litigation; it is sufficient to show that the foreign court that gave the judgment had a real and substantial connection with the matter. [Footnotes omitted; ¶11.181.]

[66] Pitel and Rafferty take a somewhat different position in the following passage:

Because an action on the foreign judgment is a new legal proceeding, issues of jurisdiction . . . must be considered at the outset. If the defendant is resident in the country in which recognition and enforcement is sought, it will be easy to establish jurisdiction. But in many cases the defendant will not be resident there: he or she will only have assets there, which the plaintiff is going after to enforce the judgment. Typically the presence of assets in a province is an insufficient basis for taking jurisdiction over a foreign defendant. But most provinces have made specific provision to allow for service *ex juris* in such cases. For example, in Ontario service outside the province can be made as of right where the claim is "on a judgment of a court outside Ontario." . . . [T]he plaintiff would still need to show a real and substantial connection to the province in which enforcement was sought. Under this test, the presence of assets may be insufficient to ground substantive proceedings but they should virtually always be sufficient to ground proceedings for recognition and enforcement. [Footnote omitted; pp. 159-60.]

[67] This statement, however, has been criticized by at least one lower court judge who "decline[d] to follow that theory for the following reasons: (1) they cite no authority for the theory that they advance (neither case law nor academic commentary); and (2) the preponderance of precedent is to the contrary": *CSA8-Garden Village LLC v. Dewar*, 2013

biens du défendeur dans le ressort, pour que le tribunal détermine s'il y a lieu de reconnaître ou d'exécuter un jugement étranger. [Je souligne; p. 14-1.]

[65] Perell et Morden expriment une opinion analogue :

[TRADUCTION] Sous réserve des moyens de défense, un tribunal canadien exécutera un jugement étranger si le tribunal ou le ressort étranger avait un « lien réel et substantiel » avec le différend. Toutefois, le demandeur n'a pas à établir que l'Ontario a un lien réel ou substantiel avec le litige; il suffit de démontrer que le tribunal étranger qui a rendu le jugement avait un lien réel et substantiel avec l'affaire. [Notes en bas de page omises; ¶11.181.]

[66] Pitel et Rafferty présentent un point de vue quelque peu différent dans le passage suivant :

[TRADUCTION] Parce qu'une action fondée sur le jugement étranger constitue une nouvelle procédure judiciaire, des questions de compétence [. . .] doivent être examinées d'entrée de jeu. Si le défendeur est résident du pays dans lequel la reconnaissance et l'exécution sont demandées, il sera facile d'établir la compétence. Cependant, dans bien des cas, le défendeur ne sera pas résident de ce pays : il n'y possédera que des biens que le demandeur tente de trouver pour exécuter le jugement. Généralement, la présence de biens dans une province ne suffit pas pour établir la compétence à l'égard d'un défendeur étranger. Toutefois, la plupart des provinces ont adopté des dispositions particulières qui permettent la signification *ex juris* dans ces cas. Par exemple, en Ontario, la signification peut valablement être faite en dehors de la province lorsque la demande se fonde « sur un jugement d'un tribunal en dehors de l'Ontario ». [. . .] [I]l faudrait néanmoins que le demandeur démontre un lien réel et substantiel avec la province dans laquelle l'exécution est demandée. Suivant ce critère, la présence de biens peut être insuffisante pour justifier une instance sur le fond, mais elle devrait pratiquement toujours être suffisante pour justifier une demande de reconnaissance et d'exécution. [Note en bas de page omise; p. 159-160.]

[67] Toutefois, cette affirmation a été critiquée par au moins un juge d'une juridiction inférieure qui [TRADUCTION] « n'a pas souscrit à cette théorie pour les motifs suivants : (1) les auteurs ne citent aucune source au soutien de la théorie qu'ils exposent (que ce soit de la jurisprudence ou de la doctrine); (2) le courant jurisprudentiel prépondérant indique le

ONSC 6229, 369 D.L.R. (4th) 125, at para. 43. I am inclined to agree with this criticism. Pitel and Rafferty's statement does not accord with the principles discussed above that underlie actions for the recognition and enforcement of foreign judgments.

[68] In my view, there is nothing improper in allowing foreign judgment creditors to choose where they wish to enforce their judgments and to assess where, in all likelihood, their debtors' assets could be found or may end up being located one day. In this regard, it is the existence of clear, liberal and simple rules for the recognition and enforcement of foreign judgments that facilitates the flow of wealth, skills and people across borders in a fair and orderly manner: Walker, at p. 14-1. Requiring a real and substantial connection through the presence of assets in the enforcing jurisdiction would serve only to hinder these considerations, which are important for commercial dealings in an increasingly globalized economy. It is true that the absence of assets upon which to enforce a foreign judgment may, in some situations, have an impact on the legitimate use of the judicial resources of an enforcing court, and in turn on the court's exercise of its discretionary power to stay the proceeding. The absence of assets may also influence the appropriateness of the choice of a given forum for the enforcement proceedings. These issues do not relate, however, to the existence of jurisdiction, but to its exercise; as this Court emphasized in *Van Breda*, "a clear distinction must be drawn between the existence and the exercise of jurisdiction": para. 101.

[69] Facilitating comity and reciprocity, two of the backbones of private international law, calls for assistance, not barriers. Neither this Court's jurisprudence nor the principles underlying recognition and enforcement actions requires imposing additional jurisdictional restrictions on the determination of whether a foreign judgment is binding and enforceable in Ontario. The principle of comity does not require that Chevron's submissions be

contraire » : *CSA8-Garden Village LLC c. Dewar*, 2013 ONSC 6229, 369 D.L.R. (4th) 125, par. 43. Je suis enclin à partager cette critique. L'affirmation de Pitel et Rafferty n'est pas conforme aux principes examinés ci-dessus qui sous-tendent les actions en reconnaissance et en exécution des jugements étrangers.

[68] À mon avis, il n'y a rien d'inapproprié à permettre au créancier en vertu d'un jugement étranger de choisir l'endroit où il veut faire exécuter son jugement, et de déterminer où, en toute vraisemblance, les biens de son débiteur peuvent se trouver ou sont susceptibles de se retrouver un jour. Sous ce rapport, c'est l'existence de règles claires, libérales et simples de reconnaissance et d'exécution des jugements étrangers qui facilite la circulation transfrontalière de la richesse, des compétences et des gens de manière équitable et ordonnée : Walker, p. 14-1. Exiger l'existence d'un lien réel et substantiel par la présence de biens dans le ressort d'exécution ne servirait qu'à faire obstacle à ces considérations importantes pour les échanges commerciaux dans une économie de plus en plus mondialisée. Il est vrai que l'absence de biens permettant d'exécuter un jugement étranger peut, dans certaines situations, avoir une incidence sur l'usage légitime des ressources judiciaires du tribunal d'exécution et, ainsi, sur l'exercice par le tribunal de son pouvoir discrétionnaire de surseoir à l'instance. L'absence de biens peut également avoir une incidence sur le caractère opportun du choix d'un tribunal donné qui sera saisi de la demande d'exécution. Cependant, ces questions n'ont pas trait à l'existence de la compétence, mais bien à son exercice; dans *Van Breda*, la Cour a souligné « la nécessité de conserver une nette distinction entre l'existence et l'exercice de la compétence » : par. 101.

[69] La facilitation de la courtoisie et de la réciprocité, deux des pivots du droit international privé, appelle à prêter assistance et non à dresser des obstacles. Ni la jurisprudence de notre Cour ni les principes sous-jacents aux actions en reconnaissance et en exécution ne prescrivent l'imposition de restrictions juridictionnelles additionnelles pour conclure qu'un jugement étranger a force exécutoire en Ontario. Le principe de courtoisie ne nous oblige pas

adopted. On the contrary, an unambiguous statement by this Court that a real and substantial connection is not necessary will have the benefit of providing a "fixed, clear and predictable" rule, which some say is necessary in this area: T. J. Monestier, "A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2007), 33 *Queen's L.J.* 179, at p. 192. Such a rule will clearly be consistent with the dictates of order and fairness; it will also allow parties "to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect", as LeBel J. in *Van Breda* insisted they should be able to do: para. 73. Moreover, a clear rule will help to avert needless and wasteful jurisdictional inquiries that merely thwart the proceedings from their eventual resumption. As some have noted, our courts "should exercise care in interpreting rules and developing legal principles so as not to encourage unnecessary motions", since "[i]n many cases, the defendant's challenge to service *ex juris* is just another dilatory tactic that provincial rules of civil procedure have sought to avoid": G. D. Watson and F. Au, "Constitutional Limits on Service Ex Juris: Unanswered Questions from *Morguard*" (2000), 23 *Advocates' Q.* 167, at p. 205. To accept Chevron's submissions would be to ignore this wise counsel.

(4) Relevant Legislation

[70] Finally, the choices made by the Ontario legislature provide an additional useful perspective, one that reinforces the validity of the approach favoured by this Court's jurisprudence and the principles discussed above. Two points are of note. First, the Rules do not require that the court probe the relationship between the dispute and the province, whether by inquiring into the existence of assets or otherwise. Rule 17.02 establishes the bases upon which a party can serve an adversary with an originating process or notice of a reference outside Ontario without needing to seek leave of the court

à adopter les arguments de Chevron. Au contraire, une affirmation non équivoque par notre Cour selon laquelle l'existence d'un lien réel et substantiel n'est pas nécessaire aura l'avantage de fournir une règle [TRADUCTION] « fixe, claire et prévisible », que certains auteurs disent nécessaire dans ce domaine : T. J. Monestier, « A "Real and Substantial" Mess : The Law of Jurisdiction in Canada » (2007), 33 *Queen's L.J.* 179, p. 192. Une telle règle sera manifestement conforme aux principes d'ordre et d'équité; elle permettra aussi aux parties de « prédire avec une certitude raisonnable si un tribunal saisi d'une situation qui présente un aspect international ou interprovincial se déclarera ou non compétent », répondant ainsi à cette autre considération d'importance que le juge LeBel a énoncée dans l'arrêt *Van Breda* : par. 73. Qui plus est, une règle claire aidera à éviter des examens de la compétence inutiles et coûteux qui ne font qu'empêcher l'instance de suivre son cours. Comme certains auteurs l'ont noté, nos tribunaux [TRADUCTION] « devraient prendre soin d'interpréter les règles et d'élaborer des principes de droit de manière à ne pas encourager des requêtes inutiles », puisque « [d]ans bien des cas, la contestation de la signification *ex juris* par le défendeur n'est qu'une autre tactique dilatoire que les règles provinciales de procédure civile visaient à éviter » : G. D. Watson et F. Au, « Constitutional Limits on Service Ex Juris : Unanswered Questions from *Morguard* » (2000), 23 *Advocates' Q.* 167, p. 205. Accepter les arguments de Chevron reviendrait à faire fi de ce sage conseil.

(4) Dispositions législatives pertinentes

[70] Enfin, les choix du législateur ontarien fournissent une perspective supplémentaire utile qui renforce la validité de l'approche privilégiée dans la jurisprudence de notre Cour et les principes examinés ci-dessus. Deux points méritent d'être soulignés. Premièrement, les Règles n'obligent pas le tribunal à examiner le rapport entre le différend et la province, que ce soit en se demandant s'il se trouve des biens dans la province ou d'une autre façon. La règle 17.02 énonce les fondements sur lesquels une partie peut signifier à un adversaire en dehors de l'Ontario un acte introductif d'instance ou un avis

to do so. Rule 17.02(m) provides that one basis for service exists where the claim is "on a judgment of a court outside Ontario", which, naturally, contemplates recognition and enforcement proceedings. While the Rules do not in and of themselves confer jurisdiction (see Perell and Morden, at ¶2.306), they nevertheless "represent an expression of wisdom and experience drawn from the life of the law" (*Van Breda*, at para. 83) and offer useful guidance with respect to the intentions of the Ontario legislators. That the legislators have not seen fit to craft specific jurisdictional rules respecting foreign judgments is indicative of their intention to have the Rules alone govern, and therefore to maintain the existence of broad jurisdictional bases in actions for recognition and enforcement.

[71] Second, analogous provisions found in other Ontario statutes do not impose an obligation on the plaintiff to establish that the defendant has assets in the province or some other conceivable connection with the forum. For example, the Ontario *International Commercial Arbitration Act*, which permits registration of foreign arbitral awards, does not require that the debtor be present or have assets in Ontario. Article 35(1) of the Schedule to that Act provides that "[a]n arbitral award . . . shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36." Article 36(1) lists various grounds for refusing recognition or enforcement of such awards. None of those grounds is based upon the absence of a real and substantial connection between either the underlying dispute or the defendant and Ontario, or upon an absence of assets. Similarly, the *Reciprocal Enforcement of Judgments (U.K.) Act*, which facilitates the recognition and enforcement of judgments from the United Kingdom, does not permit a debtor to escape enforcement by demonstrating that no real and substantial connection exists between the debtor or the dispute and the forum. Finally, the *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5, which supplies an expedited mechanism for registering and enforcing the judgments of

de renvoi, sans avoir à demander l'autorisation du tribunal. L'alinéa 17.02m) prévoit que la signification peut être ainsi faite lorsque la demande « se fond[e] sur un jugement d'un tribunal en dehors de l'Ontario », ce qui, naturellement, inclut une demande de reconnaissance et d'exécution. Bien que les Règles ne soient pas elles-mêmes attributives de compétence (voir Perell et Morden, ¶2.306), elles « expriment toutefois la sagesse et l'expérience de la vie juridique » (*Van Breda*, par. 83) et nous fournissent un éclairage utile quant aux intentions du législateur ontarien. Le fait que ce législateur n'ait pas jugé bon d'élaborer des règles de compétence spécifiques relatives aux jugements étrangers est une indication de son intention de faire en sorte que les Règles soient les seules mesures applicables et, ainsi, de maintenir l'existence de fondements juridictionnels étendus dans les actions en reconnaissance et en exécution.

[71] Deuxièmement, des dispositions analogues que l'on trouve dans d'autres textes législatifs ontariens n'obligent pas le demandeur à établir que le défendeur possède des biens en Ontario ou qu'il conserve un quelconque autre lien avec le ressort. Ainsi, la *Loi sur l'arbitrage commercial international* de l'Ontario, qui permet l'enregistrement de sentences arbitrales étrangères, n'exige pas que le débiteur soit présent en Ontario ou qu'il y possède des biens. Selon le par. 35(1) de l'annexe de cette loi : « La sentence arbitrale [. . .] est reconnue comme ayant force obligatoire et, sur requête adressée par écrit au tribunal compétent, est exécutée sous réserve des dispositions du présent article et de l'article 36. » Le paragraphe 36(1) énumère divers motifs de refus de la reconnaissance ou de l'exécution d'une sentence. Aucun de ces motifs n'est fondé sur l'absence d'un lien réel et substantiel entre le différend sous-jacent ou le défendeur et l'Ontario, ou sur l'absence de biens en Ontario. De même, la *Loi sur l'exécution réciproque de jugements (Royaume-Uni)* qui facilite la reconnaissance et l'exécution de jugements provenant du Royaume-Uni, ne permet pas au débiteur de se soustraire à l'exécution en démontrant l'absence de lien réel et substantiel entre lui ou le différend et le ressort. Enfin, la *Loi sur l'exécution réciproque de jugements*, L.R.O. 1990, c. R.5, qui prévoit un

the other Canadian provinces and territories, contains no such requirement either.

[72] I note that all the common law provinces and territories have statutes providing for the recognition and enforcement of foreign arbitral awards or of judgments from the United Kingdom. They also have similar statutes providing for the expedited registration or recognition of judgments from specified jurisdictions. In Quebec, it is art. 3155 of the *Civil Code of Québec* that provides for the recognition and enforcement of foreign decisions. It notably does not require a connection between the foreign debtor and the province. In *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, this Court found that "the basic principle laid down in art. 3155 . . . is that any decision rendered by a foreign authority must be recognized unless an exception applies": para. 22. The Court acknowledged that the enumerated exceptions are "limited": *ibid.* I note that none of them concerns a jurisdictional hurdle in the enforcing state. This shows that the Quebec legislature did not intend a connection between the foreign debtor and the province to be a prerequisite to recognition and enforcement.

[73] I acknowledge that the Uniform Law Conference of Canada took a different approach in drafting the *Court Jurisdiction and Proceedings Transfer Act* ("CJPTA") (online) in the 1990s. The CJPTA has been passed, with some variations, in five jurisdictions (Saskatchewan, Prince Edward Island, Yukon, British Columbia, and Nova Scotia), though it has only come into force in three of them. Section 3(e) of the CJPTA provides that one circumstance in which a court has territorial competence in a proceeding is if "there is a real and substantial connection between [*enacting province or territory*] and the facts on which the proceeding against that person is based" (emphasis in original; text in brackets in original). Section 10 states that a real and substantial connection "is presumed to exist if the proceeding . . . (k) is for enforcement of a judgment of a court made in or outside [*enacting province or territory*] or an arbitral award made in or

mécanisme accéléré d'enregistrement et d'exécution des jugements d'autres provinces et territoires canadiens, ne renferme pas non plus une telle exigence.

[72] Je signale que toutes les provinces de common law et les territoires ont des lois qui régissent la reconnaissance et l'exécution de sentences arbitrales étrangères ou de jugements du Royaume-Uni. Ils ont aussi des lois similaires régissant l'enregistrement ou la reconnaissance accélérés de jugements de ressorts désignés. Au Québec, c'est l'art. 3155 du *Code civil du Québec* qui régit la reconnaissance et l'exécution de jugements étrangers. Il n'exige pas notamment l'existence d'un lien entre le débiteur étranger et la province. Dans *Société canadienne des postes c. Lépine*, 2009 CSC 16, [2009] 1 R.C.S. 549, notre Cour a conclu que « l'art. 3155 [. . .] établit, comme principe fondamental [. . .] que toute décision rendue par une autorité étrangère doit être reconnue, sauf exception » : par. 22. La Cour a reconnu que les exceptions énumérées sont « limitées » : *ibid.* Je souligne qu'aucune d'entre elles n'a trait à un obstacle en matière de compétence de l'État d'exécution, ce qui indique que le législateur québécois n'avait pas l'intention d'assujettir la reconnaissance et l'exécution à l'existence d'un lien entre le débiteur étranger et le tribunal d'exécution.

[73] Je reconnais que la Conférence pour l'harmonisation des lois au Canada a adopté une approche différente dans la rédaction de la *Loi uniforme sur la compétence des tribunaux et le renvoi des instances* (« LUCTRI ») (en ligne) dans les années 1990. Cette loi a été adoptée, avec certaines variations, dans cinq ressorts (la Saskatchewan, l'Île-du-Prince-Édouard, le Yukon, la Colombie-Britannique et la Nouvelle-Écosse), bien qu'elle ne soit entrée en vigueur que dans trois de ces ressorts. L'alinéa 3e) de la LUCTRI prévoit qu'un tribunal a compétence territoriale à l'égard d'une instance notamment s'« il existe un lien réel et substantiel entre [*province ou territoire qui adopte la Loi*] et les faits sur lesquels est fondée l'instance » (en italique dans l'original; texte entre crochets dans l'original). Selon l'art. 10, un lien réel et substantiel « est présumé exister [si] [. . .] k) l'instance porte sur l'exécution d'un jugement rendu par un tribunal à l'intérieur ou

outside [*enacting province or territory*]" (emphasis in original; text in brackets in original). Thus, the foreign judgment creates a rebuttable presumption of jurisdiction, which the judgment debtor can contest. Yet, in spite of this possibility, V. Black, S. G. A. Pitel and M. Sobkin point out that, as of 2012, "no defendant [had] succeeded in rebutting a s. 10 presumption" in the provinces in which the CJPTA was in force at that time: *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (2012), at pp. 146-47. As this Court observed in *Van Breda*, "[l]egislatures and courts may adopt various solutions to meet the constitutional requirements and the objectives of efficiency and fairness that underlie our private international law system": para. 34. The legislatures are therefore free to adopt legislation like the CJPTA that departs from the common law, so long as they do so within constitutional limits. Ontario, however, has not done so.

à l'extérieur de [*province ou territoire qui adopte la Loi*] ou sur l'exécution d'une sentence arbitrale rendue à l'intérieur ou à l'extérieur de [*province ou territoire qui adopte la Loi*] » (en italique dans l'original; texte entre crochets dans l'original). Par conséquent, le jugement étranger crée une présomption réfutable de compétence que le débiteur judiciaire peut contester. Pourtant, malgré cette possibilité, V. Black, S. G. A. Pitel et M. Sobkin signalent qu'en date de 2012, [TRADUCTION] « aucun défendeur n'[avait] réussi à réfuter une présomption prévue à l'art. 10 » dans les provinces où la LUCTRI était alors en vigueur : *Statutory Jurisdiction : An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (2012), p. 146-147. Comme notre Cour l'a fait remarquer dans *Van Breda*, « [l]es législatures et les tribunaux provinciaux peuvent adopter diverses solutions pour satisfaire aux exigences constitutionnelles et aux objectifs d'efficacité et d'équité sur lesquels repose notre système de droit international privé » : par. 34. Il est donc loisible aux législateurs d'adopter des lois comme la LUCTRI qui s'écartent de la common law, pourvu qu'elles le fassent dans des limites constitutionnelles. Toutefois, l'Ontario ne l'a pas fait.

[74] As a result, to find in this case that there is no requirement of a real and substantial connection between the forum and the dispute in an action for recognition and enforcement would neither pervert the Ontario legislators' intentions, nor risk some other unforeseen outcome. Instead, such a finding would be respectful of the legislative choices already made by the province, while leaving open legal space in which it is free to develop its own conflict of laws rules, if it so chooses. This decision is limited to common law recognition and enforcement principles.

[74] En conséquence, conclure en l'espèce que l'existence d'un lien réel et substantiel entre le tribunal et le différend n'est pas nécessaire dans une action en reconnaissance et en exécution n'irait pas à l'encontre de l'intention du législateur ontarien et ne risquerait pas d'entraîner quelque autre résultat imprévu. Au contraire, une telle conclusion serait respectueuse des choix législatifs déjà faits par la province, tout en laissant ouvert un espace juridique dans lequel elle est libre d'élaborer ses propres règles de droit international privé, si tel est son choix. Le présent jugement se limite aux principes de reconnaissance et d'exécution de la common law.

(5) Summary

[75] Case law, principle, relevant statutes and practicality all support a rejection of Chevron's contention. Jurisdiction in an action for recognition and enforcement stems from service being effected on the basis of a foreign judgment rendered in the

(5) Résumé

[75] La jurisprudence, les principes de droit, les dispositions législatives pertinentes et les considérations pratiques militent tous contre l'argument de Chevron. Dans une action en reconnaissance et en exécution, la compétence découle de la signification

plaintiff's favour, and against the named defendant. There is no need to demonstrate a real and substantial connection between the dispute and the enforcing forum. To conclude otherwise would undermine the important values of order and fairness that underlie all conflicts rules: *Van Breda*, at para. 74, quoting *Morguard*, at p. 1097. Moreover, such a conclusion would be inconsistent with this Court's statement in *Beals* that the doctrine of comity (to which the principles of order and fairness attach) "must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility": para. 27. Cross-border transactions and interactions continue to multiply. As they do, comity requires an increasing willingness on the part of courts to recognize the acts of other states. This is essential to allow individuals and companies to conduct international business without worrying that their participation in such relationships will jeopardize or negate their legal rights.

faite sur le fondement d'un jugement étranger rendu en faveur du demandeur, aux dépens du défendeur désigné. Il n'est pas nécessaire de démontrer l'existence d'un lien réel et substantiel entre le différend et le ressort d'exécution. Conclure autrement saperait les valeurs importantes d'ordre et d'équité qui servent de fondement à toutes les règles de droit international privé : *Van Breda*, par. 74, citant *Morguard*, p. 1097. Qui plus est, une telle conclusion serait incompatible avec l'affirmation de notre Cour dans l'arrêt *Beals* selon laquelle le principe de la courtoisie (à laquelle se rattachent les principes d'ordre et d'équité) « doit pouvoir évoluer au même rythme que les relations commerciales internationales, les opérations transfrontalières et la libre circulation d'un pays à l'autre » : par. 27. Les opérations et les interactions transfrontalières continuent de se multiplier. Parallèlement, la courtoisie exige que les tribunaux soient de plus en plus disposés à reconnaître les actes accomplis par d'autres États. Cela est essentiel pour permettre aux particuliers et aux entreprises de poursuivre l'exercice de leurs activités internationales sans craindre qu'en s'engageant dans de telles relations, ils compromettent leurs droits ou y renoncent.

[76] In this case, jurisdiction is established with respect to Chevron, which was served *ex juris* pursuant to rule 17.02(m) of the Rules. The plaintiffs alleged in their amended statement of claim that Chevron was a foreign debtor as a result of "the final Judgment of the Appellate Division of the Provincial Court of Justice of Sucumbíos of Ecuador of January 3, 2012": A.R., vol. I, at p. 102. While this judgment has since been varied by the Court of Cassation, this occurred after the amended statement of claim had been filed. The original judgment remains largely intact, although, as noted, the Court of Cassation reduced the total amount owed. The plaintiffs have sufficiently pleaded the Ontario courts' jurisdiction over Chevron.

[76] En l'espèce, la compétence est établie à l'égard de Chevron, qui a reçu signification *ex juris* en application de l'al. 17.02m) des Règles de l'Ontario. Dans leur déclaration amendée, les demandeurs ont allégué que Chevron était un débiteur étranger en vertu d'un [TRADUCTION] « jugement définitif de la section d'appel de la Cour provinciale de justice de Sucumbíos, en Équateur, daté du 3 janvier 2012 » : d.a., vol. I, p. 102. Bien que ce jugement ait depuis été modifié par la Cour de cassation, la modification est ultérieure au dépôt de la déclaration amendée. Le jugement initial demeure en grande partie intact même si, comme je l'ai déjà indiqué, la Cour de cassation a réduit la somme totale due. Les demandeurs ont suffisamment fait valoir la compétence des tribunaux de l'Ontario à l'égard de Chevron.

[77] In closing on this first issue, I wish to emphasize that when jurisdiction is found to exist, it does not necessarily follow that it will or should be exercised: A. Briggs, *The Conflict of Laws* (3rd ed.

[77] En terminant sur cette première question, je tiens à souligner que ce n'est pas parce que l'on conclut à l'existence de la compétence qu'il s'ensuit nécessairement que celle-ci sera exercée ou

2013), at pp. 52-53; see also *Van Breda*, at para. 101. Establishing jurisdiction merely means that the alleged debt merits the assistance and attention of the Ontario courts. Once the parties move past the jurisdictional phase, it may still be open to the defendant to argue any or all of the following, whether by way of preliminary motions or at trial: that the proper use of Ontario judicial resources justifies a stay under the circumstances; that the Ontario courts should decline to exercise jurisdiction on the basis of *forum non conveniens*; that any one of the available defences to recognition and enforcement (i.e. fraud, denial of natural justice, or public policy) should be accepted in the circumstances; or that a motion under either Rule 20 (summary judgment) or Rule 21 (determination of an issue before trial) of the Rules should be granted. The availability of these potential arguments, however, does not oust the jurisdiction of the Ontario courts over the plaintiffs' action for recognition and enforcement.

qu'il convient de le faire : A. Briggs, *The Conflict of Laws* (3e éd. 2013), p. 52-53; voir également *Van Breda*, par. 101. La déclaration de compétence signifie simplement que la dette alléguée mérite l'aide et l'attention des tribunaux ontariens. Lorsque les parties franchissent l'étape relative à la compétence, il est encore loisible à la défenderesse de faire valoir un ou plusieurs des arguments suivants, par voie de requêtes préliminaires ou au procès : que l'usage judicieux des ressources judiciaires de l'Ontario justifie un sursis en l'espèce; que les tribunaux ontariens devraient décliner compétence pour cause de *forum non conveniens*; que l'un ou plusieurs des moyens de défense qu'elle peut opposer à la reconnaissance et à l'exécution (par exemple, la fraude, le déni de justice naturelle ou l'ordre public) devraient être accueillis en l'espèce; ou qu'une motion fondée sur la règle 20 (jugement sommaire) ou 21 (décision d'une question avant l'instruction) des Règles devrait être accueillie. Toutefois, la possibilité de faire valoir ces arguments ne prive pas les tribunaux ontariens de leur compétence à l'égard de l'action en reconnaissance et en exécution introduite par les demandeurs.

B. *Jurisdiction With Respect to Chevron Canada*

[78] For its part, Chevron Canada contends that — whatever might be the case for Chevron — jurisdiction cannot be established over it, a stranger to the original foreign judgment. It advances two primary submissions. First, in its view, the Court of Appeal erroneously found jurisdiction over Chevron without inquiring into the nature of the relationship between that defendant or the subject matter of the action and Ontario. This error allegedly had important consequences on the issue of whether jurisdiction exists over Chevron Canada. Given that I have found that jurisdiction properly exists over Chevron, this submission is now moot.

B. *Compétence à l'égard de Chevron Canada*

[78] Pour sa part, Chevron Canada soutient que — quelle que soit la situation dans laquelle se trouve Chevron — la compétence ne peut être établie à son endroit, car le jugement étranger initial ne la concerne pas. Elle plaide deux arguments principaux à l'appui de cette thèse. Tout d'abord, à son avis, la Cour d'appel a conclu à tort qu'elle avait compétence à l'égard de Chevron sans avoir examiné la nature de la relation entre cette défenderesse ou l'objet de l'action et l'Ontario. Cette erreur aurait eu des répercussions importantes quant à savoir si les tribunaux ontariens ont compétence à l'égard de Chevron Canada. Comme j'ai conclu que les tribunaux ontariens ont, à juste titre, compétence à l'égard de Chevron, cet argument est désormais théorique.

[79] Chevron Canada's second submission is that the other factors relied upon by the Court of Appeal to find jurisdiction (C.A. reasons, at para. 38) —

[79] Chevron Canada soutient ensuite que les autres facteurs sur lesquels s'est fondée la Cour d'appel pour conclure que les tribunaux ontariens sont

namely, Chevron Canada's "bricks-and-mortar business in Ontario" and its "economically significant relationship" with Chevron — do not in fact establish jurisdiction. Chevron Canada argues that while corporations domiciled in Ontario can be brought before the province's courts even in the absence of a relationship between the claim and that province, the same cannot be said for corporations that merely carry on business in Ontario. Relying on *Van Breda*, it argues that in such cases, Ontario courts only have jurisdiction if there is a connection between the subject matter of the claim and the business conducted in the province. According to Chevron Canada, while the Court in *Van Breda* maintained the traditional jurisdictional grounds of presence and consent, it also limited the instances in which presence-based jurisdiction can be said to exist. For corporations, the Court recognized that the existence of an office other than the head office is not an independent jurisdictional ground, but is properly considered part of carrying on business in the province. In Chevron Canada's view, carrying on business from an office is only a presumptive connecting factor that can be rebutted by showing that there is no connection between the claim and the business the corporation conducts in the province. This flows from the constitutional limits on the state's exercise of power and applies regardless of whether service is effected *ex juris* or *in juris*.

compétents (motifs de la C.A., par. 38), soit [TRADUCTION] « l'établissement physique, en briques et mortier, exploité en Ontario » par Chevron Canada et les « rapports économiques importants » qu'elle entretient avec Chevron, n'établissent pas en fait la compétence. Chevron Canada plaide que, bien qu'il soit possible de poursuivre devant les tribunaux de l'Ontario des sociétés domiciliées dans cette province sans qu'il soit nécessaire de démontrer l'existence d'un rapport entre le recours et cette province, on ne peut pas en dire autant des sociétés qui y exploitent simplement une entreprise. S'appuyant sur l'arrêt *Van Breda*, elle plaide que dans ces cas, les tribunaux ontariens ne sont compétents que s'il existe un lien entre l'objet du recours et l'entreprise exploitée dans la province. Toujours selon Chevron Canada, bien que notre Cour dans *Van Breda* ait confirmé les fondements traditionnels de la compétence que sont la présence et le consentement, elle a aussi limité les cas dans lesquels on peut affirmer qu'il y a compétence fondée sur la présence. Quant aux sociétés, la Cour a reconnu que la présence d'un bureau autre que le siège social ne constitue pas un fondement de compétence distinct; elle est plutôt considérée à bon droit comme un élément pertinent de l'exploitation d'une entreprise dans la province. Selon Chevron Canada, l'exploitation d'une entreprise à partir d'un bureau n'est qu'un facteur de rattachement créant une présomption, laquelle peut être réfutée par la preuve de l'absence de lien entre le recours et l'entreprise que la société exploite dans la province. Ce constat découle des limites imposées par la Constitution à l'exercice, par une juridiction, de son pouvoir et il s'applique, peu importe que la signification soit effectuée *ex juris* ou *in juris*.

[80] Chevron Canada further submits that the existence of its "economically significant relationship" with Chevron is insufficient to find jurisdiction: A.F., at para. 65. Such a finding would disregard the concept of separate corporate personality, "a bedrock principle of law" since *Salomon v. Salomon & Co.*, [1897] A.C. 22. This case is not one of the limited instances in which piercing the corporate veil is permissible. Chevron Canada adds that in every action, there must be a "good arguable case" that

[80] Chevron Canada plaide en outre que ses [TRADUCTION] « rapports économiques importants » avec Chevron sont insuffisants pour que l'on puisse conclure à la compétence des tribunaux ontariens : m.a., par. 65. Une telle conclusion ferait abstraction de la notion de personnalité morale distincte, « un principe de droit fondamental » accepté depuis l'arrêt *Salomon c. Salomon & Co.*, [1897] A.C. 22. Il ne s'agit pas en l'espèce de l'un des cas restreints dans lesquels on peut lever le voile

a sufficient connection with Ontario exists before the province's courts can exercise jurisdiction: A.F., at para. 86, citing *Ontario v. Rothman's Inc.*, 2013 ONCA 353, 115 O.R. (3d) 561, at para. 54. In its submission, there is none here.

[81] I do not accept Chevron Canada's submissions. *Van Breda* specifically preserved the traditional jurisdictional grounds of presence and consent. Chevron Canada erroneously seeks to conflate the rules on presence-based jurisdiction and those on assumed jurisdiction, even though they have always developed in their respective spheres. Here, presence-based jurisdiction is made out on the basis of Chevron Canada's office in Mississauga, Ontario, where it was served *in juris*. Carrying on a business in Ontario at which the defendant is served is sufficient to find presence-based jurisdiction. Several Ontario courts have found this to be the case. The reference in *Van Breda* to constitutional conflict of laws principles does not change the fact that a sufficient jurisdictional basis exists to allow the plaintiffs' case to proceed against Chevron Canada. In any event, even in the context of the rules on assumed jurisdiction, which I do not need to consider in this case, it would be inappropriate to import the connecting factors for tort claims identified in *Van Breda* into the recognition and enforcement context without further analysis.

(1) *Van Breda* and the Traditional Jurisdictional Grounds

[82] *Van Breda* was a case about assumed jurisdiction, one of three bases for asserting jurisdiction *in personam* over an out-of-province defendant. The other two bases, known as the "traditional" jurisdictional grounds, are presence-based jurisdiction and consent-based jurisdiction: *Muscutt*

corporatif. Chevron Canada ajoute que dans toute action, il faut une « cause tout à fait défendable » à l'appui de l'existence d'un lien suffisant avec l'Ontario pour que les tribunaux de la province puissent exercer leur compétence : m.a., par. 86, citant *Ontario c. Rothman's Inc.*, 2013 ONCA 353, 115 O.R. (3d) 561, par. 54. À son avis, il n'y en a pas en l'espèce.

[81] Je ne retiens pas les arguments de Chevron Canada. La Cour a expressément maintenu dans *Van Breda* les fondements traditionnels de la compétence que sont la présence et le consentement. Chevron Canada cherche à tort à confondre les règles en matière de compétence fondée sur la présence et celles relatives à la déclaration de compétence, même si ces règles ont toujours évolué dans leurs sphères respectives. En l'espèce, la compétence fondée sur la présence est établie du fait que Chevron Canada exploite un établissement situé à Mississauga, en Ontario, où elle a reçu signification *in juris*. L'exploitation en Ontario d'une entreprise où un acte de procédure est signifié au défendeur suffit pour que l'on puisse conclure à la compétence fondée sur la présence. Plusieurs tribunaux ontariens en ont décidé ainsi. La mention des principes constitutionnels de droit international privé dans *Van Breda* ne change rien au fait qu'il existe un fondement juridictionnel suffisant pour que les demandeurs puissent poursuivre Chevron Canada. Quoi qu'il en soit, même dans le contexte des règles relatives à la déclaration de compétence, une question que je n'ai pas à étudier en l'espèce, il ne conviendrait pas, faute d'une analyse plus poussée, d'introduire dans le domaine de la reconnaissance et de l'exécution les facteurs de rattachement applicables aux actions en responsabilité délictuelle qui sont énumérés dans *Van Breda*.

(1) L'arrêt *Van Breda* et les fondements traditionnels de la compétence

[82] Dans *Van Breda*, il était question de déclaration de compétence, un des trois moyens pour un tribunal de s'attribuer une compétence *in personam* sur un défendeur se trouvant à l'extérieur de la province. Les deux autres moyens, appelés les fondements « traditionnels » de la compétence, sont la

v. Courcelles (2002), 60 O.R. (3d) 20 (C.A.), at para. 19.

[83] Chevron Canada's appeal concerns the traditional ground of presence. Presence-based jurisdiction has existed at common law for several decades; its historical roots "cannot be over-emphasized": S. G. A. Pitel and C. D. Dusten, "Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction" (2006), 85 *Can. Bar Rev.* 61, at p. 69. It "is based upon the requirement and sufficiency of personal service of the originating process within the province or territory of the forum (service *in juris*)": J.-G. Castel, *Introduction to Conflict of Laws* (4th ed. 2002), at p. 83. If service is properly effected on a person who is in the forum at the time of the action, the court has jurisdiction regardless of the nature of the cause of action: T. J. Monestier, "(Still) a 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2013), 36 *Fordham Int'l L.J.* 396, at p. 449. Assumed jurisdiction, for its part, emerged much later and developed through the adoption of rules for service *ex juris*: Pitel and Rafferty, at p. 53. When a court finds that it has jurisdiction on this basis, that jurisdiction is limited to the specific action at issue before it.

[84] While *Van Breda* simplified, justified, and explained many critical aspects of Canadian private international law, it did not purport to displace the traditional jurisdictional grounds. LeBel J. explicitly stated that, in addition to the connecting factors he established for assumed jurisdiction, "jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established": para. 79. In other words, "[t]he real and substantial connection test does not oust the traditional private international law bases for court jurisdiction": *ibid.*

compétence fondée sur la présence et celle fondée sur le consentement : *Muscutt c. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), par. 19.

[83] Le pourvoi de Chevron Canada porte sur le fondement traditionnel lié à la présence. La compétence fondée sur la présence existe en common law depuis des dizaines d'années; l'on [TRADUCTION] « ne saurait trop insister » sur ses racines historiques : S. G. A. Pitel et C. D. Dusten, « Lost in Transition : Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction » (2006), 85 *R. du B. can.* 61, p. 69. Elle [TRADUCTION] « repose sur l'exigence et le caractère suffisant de la signification à personne de l'acte introductif d'instance dans la province ou le territoire du tribunal (signification *in juris*) » : J.-G. Castel, *Introduction to Conflict of Laws* (4e éd. 2002), p. 83. Si la signification est effectuée correctement à un particulier dans le ressort au moment de l'action, le tribunal a compétence peu importe la nature de la cause d'action : T. J. Monestier, « (Still) a "Real and Substantial" Mess : The Law of Jurisdiction in Canada » (2013), 36 *Fordham Int'l L.J.* 396, p. 449. La déclaration de compétence, quant à elle, est apparue beaucoup plus tard et s'est développée avec l'adoption des règles de signification *ex juris* : Pitel et Rafferty, p. 53. Lorsqu'un tribunal se déclare compétent du fait de la signification *ex juris*, sa compétence ne s'applique qu'à l'action en question.

[84] Même si la Cour a simplifié, justifié et expliqué dans *Van Breda* bien des éléments cruciaux du droit international privé au Canada, elle n'entendait pas y écarter les fondements traditionnels de la compétence. Le juge LeBel a explicitement affirmé qu'outre les facteurs de rattachement qu'il a établis pour la déclaration de compétence, « la compétence peut également reposer sur des fondements traditionnels, comme la présence du défendeur à l'intérieur du ressort ou son consentement à se soumettre à la compétence du tribunal, si ces fondements sont établis » : par. 79. En d'autres termes, « [l]e critère du lien réel et substantiel n'écarte pas les fondements traditionnels de la compétence judiciaire en droit international privé » : *ibid.*

[85] To establish traditional, presence-based jurisdiction over an out-of-province corporate defendant, it must be shown that the defendant was carrying on business in the forum at the time of the action. Whether a corporation is "carrying on business" in the province is a question of fact: *Wilson v. Hull* (1995), 174 A.R. 81 (C.A.), at para. 52; *Ingersoll Packing Co. v. New York Central and Hudson River R.R. Co.* (1918), 42 O.L.R. 330 (S.C. (in chambers)), at p. 337. In *Wilson*, in the context of statutory registration of a foreign judgment, the Alberta Court of Appeal was asked to assess whether a company was carrying on business in the jurisdiction. It held that to make this determination, the court must inquire into whether the company has "some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained for a period of time": para. 13. These factors are and always have been compelling indicia of corporate presence; as the cases cited in *Adams v. Cape Industries Plc.*, [1990] 1 Ch. 433, at pp. 467-68, per Scott J., demonstrate, the common law has consistently found the maintenance of physical business premises to be a compelling jurisdictional factor. LeBel J. accepted this in *Van Breda* when he held that "carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there": para. 87.

[85] Pour prouver la compétence traditionnelle, fondée sur la présence, à l'égard d'une société défenderesse de l'extérieur de la province, il faut démontrer que cette défenderesse exploitait une entreprise dans le ressort au moment de l'action. La question de savoir si une société « exploite une entreprise » dans la province est une question de fait : *Wilson c. Hull* (1995), 174 A.R. 81 (C.A.), par. 52; *Ingersoll Packing Co. c. New York Central and Hudson River R.R. Co.* (1918), 42 O.L.R. 330 (C.S. (en cabinet)), p. 337. Dans *Wilson*, dans le cadre de l'enregistrement, prévu par la loi, d'un jugement étranger, la Cour d'appel de l'Alberta devait déterminer si une société exploitait une entreprise dans le ressort du tribunal. Elle a conclu que pour ce faire, le tribunal doit se demander si cette société a [TRADUCTION] « une présence directe ou indirecte dans l'État du tribunal qui s'attribue compétence, et si elle se livre à des activités commerciales soutenues pendant un certain temps » : par. 13. Ces facteurs sont et ont toujours été des indices convaincants de la présence d'une société; comme le démontrent les décisions citées dans *Adams c. Cape Industries Plc.*, [1990] 1 Ch. 433, p. 467-468, le juge Scott, la common law considère invariablement que la tenue de locaux commerciaux constitue un facteur convaincant de compétence. Le juge LeBel l'a reconnu dans *Van Breda* lorsqu'il a conclu que « [l]'exploitation d'une entreprise exige une forme de présence effective — et non seulement virtuelle — dans le ressort en question, par exemple le fait d'y tenir un bureau » : par. 87.

[86] The motion judge in this case made the following factual findings concerning Chevron Canada's Mississauga office:

> Chevron Canada operates a business establishment in Mississauga, Ontario. It is not a mere "virtual" business. It runs a bricks and mortar office from which it carries out a non-transitory business with human means and its Ontario staff provides services to and solicits sales from its customers in this province. [para. 87]

[86] Le juge saisi de la motion en l'espèce a tiré les conclusions de fait suivantes concernant le bureau de Chevron Canada à Mississauga :

> [TRADUCTION] Chevron Canada exploite un établissement commercial à Mississauga, en Ontario. Ce n'est pas un simple établissement « virtuel ». Elle dirige un bureau traditionnel d'où elle exploite une entreprise permanente avec des ressources humaines, et ses employés ontariens fournissent des services et sollicitent des ventes à sa clientèle de cette province. [par. 87]

These findings have not been contested. They are sufficient to establish presence-based jurisdiction.

Ces conclusions n'ont pas été contestées et elles suffisent à établir la compétence fondée sur la présence.

Chevron Canada has a physical office in Mississauga, Ontario, where it was served pursuant to rule 16.02(1)(c), which provides that valid service can be made at a place of business in Ontario. Chevron Canada's business activities at this office are sustained; it has representatives who provide services to customers in the province. Canadian courts have found that jurisdiction exists in such circumstances: *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 (C.A.), at para. 36; *Prince v. ACE Aviation Holdings Inc.*, 2013 ONSC 2906, 115 O.R. (3d) 721, appeal dismissed and cross-appeal allowed 2014 ONCA 285, 120 O.R. (3d) 140; *Abdula v. Canadian Solar Inc.*, 2011 ONSC 5105, 92 B.L.R. (4th) 324, aff'd 2012 ONCA 211, 110 O.R. (3d) 256; *Wilson*; *Charron v. Banque provinciale du Canada*, [1936] O.W.N. 315 (H.C.J.).

[87] The motion judge's analysis was correct, and the Ontario Court of Appeal had no need to go beyond these considerations to find jurisdiction. As several lower courts have noted both prior to and since *Van Breda*, where jurisdiction stems from the defendant's presence in the jurisdiction, there is no need to consider whether a real and substantial connection exists: *Incorporated Broadcasters Ltd.*, at para. 29, cited with approval in *Prince* (C.A.), at para. 48; *Patterson v. EM Technologies, Inc.*, 2013 ONSC 5849, at paras. 13-16 (CanLII). In other words, the question of whether jurisdiction exists over Chevron Canada should begin and end with traditional, presence-based jurisdiction in this case.

(2) Effect of the Constitutional Principles Developed in *Van Breda*

[88] Nonetheless, Chevron Canada adds constitutional flavour to its submissions, contending that LeBel J.'s comments in *Van Breda* on the prerequisites for assuming jurisdiction over corporate defendants should apply to all types of jurisdiction — presence-based, consent-based, and assumed — by

Chevron Canada possède un bureau à Mississauga, en Ontario, où elle a reçu signification conformément à l'al. 16.02(1)c) des Règles, qui prévoit que la signification peut valablement être faite à un établissement en Ontario. Les activités commerciales qu'elle exerce dans ce bureau sont soutenues; ses représentants servent la clientèle dans cette province. Les tribunaux canadiens ont conclu à l'existence de la compétence dans une telle situation : *Incorporated Broadcasters Ltd. c. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 (C.A.), par. 36; *Prince c. ACE Aviation Holdings Inc.*, 2013 ONSC 2906, 115 O.R. (3d) 721, appel rejeté et appel incident accueilli à 2014 ONCA 285, 120 O.R. (3d) 140; *Abdula c. Canadian Solar Inc.*, 2011 ONSC 5105, 92 B.L.R. (4th) 324, conf. par 2012 ONCA 211, 110 O.R. (3d) 256; *Wilson*; *Charron c. Banque provinciale du Canada*, [1936] O.W.N. 315 (H.C.J.).

[87] L'analyse du juge saisi de la motion était juste, et la Cour d'appel de l'Ontario n'avait pas à examiner d'autres considérations que celles qui précèdent pour conclure à la compétence des tribunaux ontariens. Comme l'ont fait remarquer plusieurs juridictions inférieures tant avant que depuis l'arrêt *Van Breda*, point n'est besoin de se demander s'il existe un lien réel et substantiel lorsque la compétence découle de la présence du défendeur dans le ressort : *Incorporated Broadcasters Ltd.*, par. 29, cité avec approbation dans *Prince* (C.A.), par. 48; *Patterson c. EM Technologies, Inc.*, 2013 ONSC 5849, par. 13-16 (CanLII). Autrement dit, l'analyse de la question de savoir si les tribunaux ontariens ont compétence à l'égard de Chevron Canada doit commencer et prendre fin avec la compétence traditionnelle fondée sur la présence en l'espèce.

(2) Effet des principes constitutionnels élaborés dans *Van Breda*

[88] Chevron Canada pimente néanmoins son argumentation d'une saveur constitutionnelle, prétendant que les propos du juge LeBel dans *Van Breda* au sujet des conditions préalables de la déclaration de compétence à l'égard de sociétés défenderesses devraient s'appliquer à tous les types de compétence

virtue of the real and substantial connection test as a constitutional principle: A.F., at paras. 42-50. As noted in my discussion of Chevron, LeBel J. articulated this constitutional principle as suggesting that "the connection between a state and a dispute cannot be weak or hypothetical", as such a connection "would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute": *Van Breda*, at para. 32.

[89] In my view, the real and substantial connection test as a constitutional principle does not dictate that it is "illegitimate" to find jurisdiction over Chevron Canada in this case. Chevron Canada has elected to establish and continue to operate a place of business in Mississauga, Ontario, at which it was served. It should therefore have expected that it might one day be called upon to answer to an Ontario court's request that it defend against an action. If a defendant maintains a place of business in Ontario, it is reasonable to say that the Ontario courts have an interest in the defendant and the disputes in which it becomes involved. As the Ontario Court of Appeal put it in *Incorporated Broadcasters Ltd.*, at para. 33, "[t]here is no constitutional impediment to a court asserting jurisdiction over a person having a presence in the province", at least as presence is established in this case. To accept Chevron Canada's submission to the contrary would be to endorse an unduly "narrow" view of jurisdiction, one towards which this Court has shown no prior inclination: J. Blom, "New Ground Rules for Jurisdictional Disputes: The *Van Breda* Quartet" (2012), 53 *Can. Bus. L.J.* 1, at p. 12. For Ontario courts to have jurisdiction over Chevron Canada in this case, mere presence through the carrying on of business in the province, combined with service therein, suffices to find jurisdiction on the traditional grounds. There is no need to resort to the *Van Breda* criteria for assumed jurisdiction in tort claims in such a situation. To accept Chevron Canada's submissions would be to permit a total conflation of presence-based and assumed jurisdiction. As Briggs has noted, "[c]ommon law jurisdiction draws a fundamental distinction between cases

— la compétence fondée sur la présence, celle fondée sur le consentement et la déclaration de compétence — parce que le critère du lien réel et substantiel est un principe constitutionnel : m.a., par. 42-50. Comme je l'ai fait remarquer dans mon analyse relative à Chevron, le juge LeBel a dit que ce principe constitutionnel suppose que « le lien entre un État et un litige ne peut être ténu ni hypothétique », puisqu'un lien de cette nature « jetterait un doute sur la légitimité de l'exercice, par l'État, de son pouvoir sur les personnes que touche le litige » : *Van Breda*, par. 32.

[89] À mon avis, le critère du lien réel et substantiel en tant que principe constitutionnel n'indique pas forcément qu'il est « illégitime » de conclure à la compétence à l'égard de Chevron Canada en l'espèce. Chevron Canada a choisi d'établir et de continuer d'exploiter un établissement à Mississauga, en Ontario, où elle a reçu signification. Elle devait donc s'attendre à ce qu'elle soit appelée un jour à répondre à une demande du tribunal de l'Ontario pour se défendre contre une action. Si une société défenderesse tient un établissement en Ontario, on peut raisonnablement affirmer que les tribunaux ontariens ont un intérêt envers cette défenderesse et les litiges auxquelles elle prend part. Comme l'a expliqué la Cour d'appel de l'Ontario dans *Incorporated Broadcasters Ltd.*, par. 33, [TRADUCTION] « [a]ucun obstacle constitutionnel n'empêche un tribunal de s'attribuer compétence à l'égard d'une personne présente dans la province », du moins lorsque la présence est établie comme en l'espèce. Se ranger à l'argument contraire de Chevron Canada reviendrait à cautionner une conception trop [TRADUCTION] « étroite » de la compétence, une conception pour laquelle notre Cour n'a montré aucun penchant : J. Blom, « New Ground Rules for Jurisdictional Disputes : The *Van Breda* Quartet » (2012), 53 *Rev. can. dr. comm.* 1, p. 12. Pour que les tribunaux ontariens aient compétence à l'endroit de Chevron Canada en l'espèce, la simple présence assurée par l'exploitation d'une entreprise dans la province, conjuguée à la signification dans celle-ci, suffit pour permettre de conclure à la compétence reposant sur les fondements traditionnels. Il n'est pas nécessaire, dans une telle situation, de recourir au critère de déclaration de compétence applicable

where the defendant is and is not within the territorial jurisdiction of the court when the proceedings are commenced": p. 112.

aux actions en responsabilité délictuelle qui a été énoncé dans *Van Breda*. Faire droit à l'argumentation de Chevron Canada équivaudrait à permettre que soient entièrement confondues la compétence fondée sur la présence et la déclaration de compétence. Comme l'a souligné Briggs, [TRADUCTION] « [l]a compétence en common law établit une distinction fondamentale entre les cas où le défendeur se trouve dans le ressort du tribunal et ceux où il se trouve à l'extérieur du ressort lorsque la procédure est engagée » : p. 112.

[90] Because jurisdiction over Chevron Canada exists on the basis of the traditional grounds, I need not consider how jurisdiction might be found over a third party who is not present in and does not attorn to the jurisdiction of the Ontario courts, but who is alleged to be capable of satisfying a foreign judgment debt. I offer only two comments in this regard.

[90] Puisque les tribunaux ontariens ont compétence à l'endroit de Chevron Canada sur la base des fondements traditionnels, je n'ai pas à me demander s'il est possible de conclure à la compétence de ces tribunaux à l'endroit d'un tiers absent qui n'a pas acquiescé à leur compétence, mais qui serait prétendument en mesure d'acquitter la dette constatée par un jugement étranger. Je n'ai que deux commentaires à faire sur ce point.

[91] First, it should be remembered that the specific connecting factors that LeBel J. established in *Van Breda* were designed for and should be confined to the assumption of jurisdiction in tort actions. His comments with respect to carrying on business in the jurisdiction, at paras. 85 and 87, were tailored to that context. The same is true of the examples he gave to show how the presumption of jurisdiction can be rebutted in respect of the connecting factors he identified. LeBel J.'s statement that the presumptive connecting factor of "carrying on business in the province . . . can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province" must be confined accordingly: para. 96. The connecting factors that he identified for tort claims did not purport to be an inventory covering all claims known to law, and the appropriate connecting factors can reasonably be expected to vary depending on the cause of action at issue.

[91] Premièrement, il faut se rappeler que les facteurs de rattachement précis établis par le juge LeBel dans *Van Breda* visaient la déclaration de compétence dans les actions en responsabilité délictuelle et devraient s'y limiter. Il a adapté à ce contexte ses remarques sur l'exploitation d'une entreprise dans le ressort, aux par. 85 et 87. C'était aussi le cas des exemples qu'il a employés pour montrer la façon de réfuter la présomption de compétence en ce qui a trait aux facteurs de rattachement qu'il a dégagés. Ainsi, l'énoncé du juge LeBel, selon lequel le facteur de rattachement créant une présomption que constitue « le fait que le défendeur exploite une entreprise dans la province [. . .] peut être réfuté par la preuve que l'objet du litige est sans rapport avec les activités commerciales du défendeur dans la province », doit se limiter à ce contexte : par. 96. Les facteurs de rattachement qu'il a relevés pour les actions en responsabilité délictuelle ne se voulaient pas une liste complète concernant tous les recours connus en droit, et on peut raisonnablement s'attendre à ce que les facteurs de rattachement applicables varient en fonction de la cause d'action concernée.

[92] In the recognition and enforcement context, it would hardly make sense to require that the carrying on of business in the province relate to the subject matter of the dispute. The subject matter of recognition and enforcement proceedings is the collection of a debt. A debt is enforceable against any and all assets of a given debtor, not merely those that may have a relationship to the claim. For instance, suppose a foreign judgment is validly rendered against Corporation A in a foreign country as a result of a liability of its Division I, which operates solely in that country. If Corporation A operates a place of business for its separate and unrelated Division II in Ontario, where all its available and recoverable assets happen to be located, it could not be argued that the foreign judgment creditor cannot execute and enforce it in Ontario against Corporation A because the business activities of the latter in the province are not related to the liability created by the foreign judgment.

[92] En matière de reconnaissance et d'exécution, il ne serait guère logique d'exiger que l'exploitation d'une entreprise dans la province se rapporte à l'objet du litige. La demande de reconnaissance et d'exécution a pour objet le recouvrement d'une créance. Le recouvrement d'une créance peut être exécuté à même tous les biens d'un débiteur donné, pas seulement ceux susceptibles d'avoir un lien avec le recours. Par exemple, supposons qu'un jugement étranger est valablement rendu contre la société A dans un pays étranger du fait de la responsabilité de sa division I qui exerce ses activités uniquement dans ce pays. Si la société A exploite un établissement commercial pour sa division II, distincte et indépendante de la division I, en Ontario, où se trouvent tous ses biens disponibles et saisissables, on ne peut soutenir que le créancier du jugement étranger n'est pas à même d'exécuter ce jugement contre la société A en Ontario parce que les activités commerciales de cette dernière en Ontario n'ont rien à voir avec l'obligation créée par le jugement étranger.

[93] Second, one aspect of the plaintiffs' claim in this case is for enforcement of Chevron's obligation to pay the foreign judgment using the shares and assets of Chevron Canada to satisfy its parent corporation's debt obligation. In this respect, the subject matter of the claim is not the Ecuadorian events that led to the foreign judgment to which Chevron Canada is a stranger, but rather, at least arguably, the collection of a debt using shares and assets that are alleged to be available for enforcement purposes. In an enforcement process like this for the collection of a debt against a third party, assets in the jurisdiction through the carrying on of business activities are undoubtedly tied to the subject matter of the claim. From that standpoint, seizable assets are not merely the subject matter of the dispute, they are its core. In this regard, the third party is the direct object of the proceedings. When a plaintiff seeks enforcement against a third party to satisfy a foreign judgment debt, the existence of assets in the province may therefore well be a highly relevant connecting factor of the sort needed for such an action to proceed. Indeed, it is hard to identify who, besides the province, would have jurisdiction over

[93] Deuxièmement, un aspect du recours intenté par les demandeurs en l'espèce vise à faire exécuter l'obligation de Chevron d'acquitter le montant du jugement étranger en se servant des actions et des biens de Chevron Canada pour acquitter la dette de sa société mère. À cet égard, l'objet du recours ne concerne pas les faits survenus en Équateur qui sont à l'origine du jugement étranger auquel Chevron Canada n'est pas partie, mais plutôt, il est au moins possible de le soutenir, le recouvrement d'une créance à même des actions et des biens que l'on dit saisissables aux fins d'exécution. Dans une telle procédure d'exécution engagée pour le recouvrement d'une créance à l'encontre d'un tiers, les biens qui se trouvent dans le ressort du fait de l'exercice d'activités commerciales se rapportent sans aucun doute à l'objet même du recours. Dans cette perspective, les biens saisissables ne sont pas seulement l'objet du litige; ils en sont le cœur. À cet égard, le tiers est directement visé par la demande de reconnaissance et d'exécution. Lorsqu'un demandeur cherche à faire exécuter un jugement étranger contre un tiers pour acquitter une dette constatée par ce jugement, la présence de biens

a company for enforcement processes against that company's assets in the province.

(3) Conclusion

[94] Chevron Canada was served *in juris*, in accordance with rule 16.02(1)(c), at a place of business it operates in Mississauga, Ontario. Traditional, presence-based jurisdiction is satisfied. Jurisdiction is thus established with respect to it. As indicated for Chevron, the establishment of jurisdiction does not mean that the plaintiffs will necessarily succeed in having the Ecuadorian judgment recognized and enforced against Chevron Canada. A finding of jurisdiction does nothing more than afford the plaintiffs the opportunity to seek recognition and enforcement of the Ecuadorian judgment. Once past the jurisdictional stage, Chevron Canada, like Chevron, can use the available procedural tools to try to dispose of the plaintiffs' allegations. This possibility is foreign to and remote from the questions that must be resolved on this appeal.

[95] Further, my conclusion that the Ontario courts have jurisdiction in this case should not be understood to prejudice future arguments with respect to the distinct corporate personalities of Chevron and Chevron Canada. I take no position on whether Chevron Canada can properly be considered a judgment-debtor to the Ecuadorian judgment. Similarly, should the judgment be recognized and enforced against Chevron, it does not automatically follow that Chevron Canada's shares or assets will be available to satisfy Chevron's debt. For instance, shares in a subsidiary belong to the shareholder, not to the subsidiary itself. Only those shares whose ownership is ultimately attributable to the judgment debtor could be the valid target of a recognition and enforcement action. It is not at the early stage of

dans la province peut donc fort bien constituer un facteur de rattachement très pertinent du type de ceux nécessaires pour qu'une action de ce genre suive son cours. En effet, il est difficile de concevoir quels autres tribunaux, à part ceux de la province, auraient compétence à l'égard d'une société dans une procédure d'exécution visant les biens que possède cette société dans la province.

(3) Conclusion

[94] Chevron Canada a reçu signification *in juris*, en conformité avec l'al. 16.02(1)c) des Règles, à un établissement commercial qu'elle exploite à Mississauga, en Ontario. Le critère traditionnel de compétence fondé sur la présence est ainsi satisfait. La compétence est donc établie à l'égard de Chevron Canada. Comme je l'ai indiqué dans le cas de Chevron, l'établissement de la compétence ne signifie pas que les demandeurs parviendront nécessairement à faire reconnaître et exécuter le jugement équatorien contre Chevron Canada. Une déclaration de compétence n'a pas d'autre effet que de donner aux demandeurs la possibilité de solliciter la reconnaissance et l'exécution du jugement équatorien. Une fois franchie l'étape de la compétence, Chevron Canada, tout comme Chevron, peut invoquer les moyens procéduraux à sa disposition pour tenter de faire rejeter les allégations des demandeurs. Cette possibilité est étrangère aux questions à trancher en l'espèce et éloignée de celles-ci.

[95] De plus, il ne faut pas considérer que ma conclusion selon laquelle les tribunaux ontariens ont compétence dans la présente affaire porte préjudice aux arguments futurs concernant les personnalités morales distinctes de Chevron et de Chevron Canada. Je ne me prononce pas sur la question de savoir si Chevron Canada peut être considérée à juste titre comme une débitrice judiciaire en vertu du jugement équatorien. De même, si le jugement est reconnu et exécuté à l'endroit de Chevron, il ne s'ensuit pas automatiquement que les actions ou les biens de Chevron Canada pourront servir à acquitter la dette de Chevron. Par exemple, les actions d'une filiale appartiennent à l'actionnaire et non à la filiale elle-même. Seules les actions dont la propriété peut être attribuée en définitive au débiteur

assessing jurisdiction that courts should determine whether the shares or assets of Chevron Canada are available to satisfy Chevron's debt. As such, contrary to the appellants' submissions, this is not a case in which the Court is called upon to alter the fundamental principle of corporate separateness as reiterated in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at least not at this juncture. In that regard, the deference allegedly owed to the motion judge's findings concerning the separate corporate personalities of the appellants and the absence of a valid foundation for the Ontario courts' exercise of jurisdiction is misplaced. These findings were reached in the context of the s. 106 stay. As I stated above, the Court of Appeal reversed that stay, and this issue is not on appeal before us.

du jugement peuvent à juste titre faire l'objet d'une action en reconnaissance et en exécution. Ce n'est pas au stade de l'analyse de la compétence que les tribunaux doivent décider si les actions ou les biens de Chevron Canada peuvent servir à acquitter la dette de Chevron. Ainsi, contrairement à ce que prétendent les appelants, la Cour n'est pas appelée en l'espèce à modifier le principe fondamental de la personnalité morale distincte qui a été réitéré dans *BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560, du moins pas à ce stade-ci. À cet égard, il serait du reste injustifié de faire preuve de déférence envers les conclusions du juge saisi de la motion relatives aux personnalités morales distinctes des appelantes et à l'absence d'un fondement valable pour l'exercice, par les tribunaux ontariens, de leur compétence. Ces conclusions ont été tirées dans le cadre du sursis de l'instance prononcé en vertu de l'art. 106. Comme je l'ai déjà mentionné, la Cour d'appel a infirmé ce sursis de l'instance et cette décision n'est pas portée en appel devant nous.

VI. Disposition

[96] For these reasons, I would dismiss the appeal, with costs.

Appeal dismissed with costs.

Solicitors for the appellant Chevron Corporation: Norton Rose Fulbright Canada, Calgary and Toronto.

Solicitors for the appellant Chevron Canada Limited: Goodmans, Toronto.

Solicitors for the respondents: Lenczner Slaght Royce Smith Griffin, Toronto; Conway Baxter Wilson, Ottawa.

Solicitors for the interveners the International Human Rights Program at the University of Toronto Faculty of Law, MiningWatch Canada and the Canadian Centre for International Justice: Klippensteins, Toronto; University of Toronto, Toronto.

Solicitors for the intervener the Justice and Corporate Accountability Project: Siskinds, London.

VI. Dispositif

[96] Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante Chevron Corporation : Norton Rose Fulbright Canada, Calgary et Toronto.

Procureurs de l'appelante Chevron Canada Limited : Goodmans, Toronto.

Procureurs des intimés : Lenczner Slaght Royce Smith Griffin, Toronto; Conway Baxter Wilson, Ottawa.

Procureurs des intervenants International Human Rights Program at the University of Toronto Faculty of Law, Mines Alerte Canada et le Centre canadien pour la justice internationale : Klippensteins, Toronto; Université de Toronto, Toronto.

Procureurs de l'intervenant Justice and Corporate Accountability Project : Siskinds, London.

TAB 3

Judgments

Concept Oil Services Ltd (a company incorporated in Hong Kong) v En-Gin Group LLP (a limited liability partnership under the law of Kazakhstan) and others

Tort - Deceit - Conspiracy - Claimant company purchasing refined oil from Ninth Defendant pursuant to framework agreement and addenda - Claimant suffering losses in respect of monies paid pursuant to addenda for oil which was never delivered and loss under tax loan agreement - Claimant claiming damages for deceit and conspiracy - Claimant seeking declaration that various transactions void and of no effect and/or or relief under statute - Whether claims made out - Insolvency Act 1986, ss 423, 425

[2013] EWHC 1897 (Comm), 2012 Folio 416, (Transcript)

QBD, COMMERCIAL COURT

FLAUX J

11 JUNE, 5 JULY 2013

5 JULY 2013

This is a signed judgment handed down by the judge, with a direction that no further record or transcript need be made pursuant to Practice Direction 6.1 to Pt 39 of the Civil Procedure Rules (formerly RSC Ord 59, r (1)(f), Ord 68, r 1). See Practice Note dated 9 July 1990, [1990] 2 All ER 1024.

P Stanley QC for the Claimant

The Defendants did not appear and were unrepresented

Watson, Farley & Williams LLP

FLAUX J:

INTRODUCTION AND BACKGROUND

[1] The Claimant company (to which I will refer as "COS") is incorporated in Hong Kong and carries on business trading crude and refined oil products and conducting related activities, including transportation. Between October 2008 and November 2010 it purchased refined oil from the Ninth Defendant ("EG UK"), an English registered company, pursuant to a Framework Agreement and addenda under that Agreement, in circumstances described in more detail below. At the time that the Agreement was entered into, the directors and shareholders of EG UK were the third and fourth Defendants, Mr Kontsevoy and Mr Buratov. EG UK in turn owned the First Defendant ("EG Group") a Kazakh limited liability partnership, which in turn owned the Second Defendant, another Kazakh limited liability partnership which owned and operated an oil refinery in Kazakhstan.

[2] COS has suffered losses in terms of monies paid pursuant to the addenda for refined oil which was

never delivered and for other related matters and loss under a tax loan agreement pursuant to which COS lent the group money to meet tax liabilities. COS' case is that it was induced to enter these various agreements by representations made by Mr Kontsevoy which proved to be fraudulent. It claims damages against him, Mr Buratov and EG UK in deceit. It also claims damages against all the Defendants except two (the tenth Defendant which has not been served with the proceedings and the eleventh Defendant which was not incorporated until February 2011) for conspiracy, the essence of the case being that the Defendants conspired to change the corporate structure of the group with the consequence that EG UK became a hollow shell with no assets and EG Group was deprived of its assets for no consideration. COS also seeks a declaration that the various transactions by which this alteration of corporate structure were effected are void and of no effect and/or orders under ss 423 and 425 of the Insolvency Act 1986.

[3] On 16 March 2012 on the without notice application of COS, Cooke J granted a freezing injunction against the first eight Defendants and made a separate order for service of the proceedings on the first to fourth and sixth to Eighth Defendants outside the jurisdiction (A subsequent order was made by Hamblen J on 1 May 2012 for service out of the jurisdiction on the tenth and eleventh Defendants.). All the Defendants save the tenth were duly served with the proceedings. Some of the Defendants (the first four Defendants and the sixth to Eighth Defendants) originally instructed English solicitors (initially Norton Rose and subsequently Zaiwalla & Co) to make applications to set aside the freezing injunction and to set aside service of the proceedings, challenging the jurisdiction of the English Court. The Defendants served evidence in support of that application, specifically affidavits of Mr Kontsevoy taking issue on the facts with a number of the points made in COS' evidence, specifically in the affidavit of Mr Michael Zeligmans, the principal shareholder in COS.

[4] Those applications were set down for hearing on 10 October 2012, but the day before the hearing, Zaiwalla & Co came off the record and ceased to act for any of the Defendants. Andrew Smith J dismissed the applications when no-one from the Defendants attended, having given them a period of time before his order took effect to come to court if there had been some misunderstanding. Following the dismissal of the applications, none of the Defendants filed fresh acknowledgments of service as required by the Civil Procedure Rules.

[5] It would then have been open to COS to obtain default judgment pursuant to CPR Pt 12 but the enforcement of such a judgment is notoriously difficult in international cases, because such a judgment is not a determination on the merits. Accordingly, at a case management conference before Gloster J (as she then was) on 8 March 2013, approval was given by the court to proceed with a trial on the merits. The court has inherent jurisdiction to order that there be a trial on the merits where the Defendant has failed to acknowledge service, so that the Claimant can seek to obtain a judgement that, if given, would be far more likely to be enforceable than a default judgement: see per Colman J in *Berliner Bank AG v Karageorgis* [1996] 1 Lloyd's Rep 426 and per Field J in *Habib Bank Ltd v Central Bank of Sudan* [2006] EWHC 1767 (Comm), [2007] 1 All ER (Comm) 53, [2006] 2 Lloyd's Rep 412.

[6] Directions for that trial were made by Gloster J which were complied with by COS. The Defendants were given notice that the trial was taking place but chose not to attend. Mr Paul Stanley QC, who represented COS, called Mr Zeligmans to give evidence. Mr Zeligmans gave oral evidence about the various representations made to him by Mr Kontsevoy and the reliance on those representations by COS and Mr Zeligmans. I had an opportunity to ask Mr Zeligmans questions to clarify one or two points. He otherwise confirmed on oath the truth of his various affidavits and witness statements. He was a clear and straightforward witness of whom I formed a favourable impression and I am satisfied his evidence was truthful.

[7] Although the Defendants did not attend the trial, throughout the hearing Mr Stanley was careful to draw to my attention any points, factual or legal which might be of assistance to the Defendants, following the practice commended by Field J in Habib Bank at 9, applied more recently in *United Trust Bank v Dohil* [2011]

EWHC 3302 (QB), [2012] 2 All ER (Comm) 765, a decision of Mr Simon Picken QC, sitting as a deputy High Court judge.

FINDINGS OF FACT

[8] Mr Zeligmans is a Russian speaking Latvian, although he also speaks good English, having been educated in this country. He set up COS in 2003 to carry on the business of the purchase and transportation of crude oil and refined oil products throughout Europe, Russia and the CIS countries, including Kazakhstan, where he has built up a good network of business relationships. This includes a relationship with Lukoil, the Russian oil company. It was through Lukoil that in 2007 COS came across the refinery at Zhem in Kazakhstan which was owned by EG Production. EG Production was owned by EG Group, which in turn was owned by EG UK, incorporated in 2003. The challenges faced by EG at the time were the sourcing of crude oil for the purposes of refining and financing those purchases. This presented COS and Mr Zeligmans with an opportunity to provide the means of finance and onward supply to Lukoil which was interested in buying refined product from Zhem in substantial quantities. To receive sufficient crude oil at the Zhem refinery for those purposes, it would need to be exported from Russia to Kazakhstan. There were tax advantages at the time in exporting crude oil from Russia to Kazakhstan, refining it there and then exporting the refined product to third countries, rather than exporting it direct from Russia to other countries as crude oil or refining it in Russia.

[9] Mr Zeligmans was introduced to Mr Kontsevoy of EG by Lukoil in early 2008 and attended a meeting with him at Aktobe in Kazakhstan. Lukoil was not interested in providing finance, so Mr Zeligmans was looking elsewhere but knew that, in what was becoming a difficult financial environment, he would only be able to provide finance for a reputable entity with substantial assets. He asked Mr Kontsevoy to explain the structure of the EG group. Mr Kontsevoy explained EG UK was the parent company and trading entity for the EG group and that EG UK owned EG Group, which in turn owned (i) EG Production which owned the Zhem refinery and (ii) another Kazakh limited liability partnership Ostyurk Munai, which had a licence to develop an oilfield in Kazakhstan. Mr Zeligmans explained in evidence that he was not particularly interested in the latter entity, since it is common enough to own licences to exploit oil in that part of the world and the assets of that entity were in any event pledged to the bank. From the outset, Mr Zeligmans' particular interest was in the fact that EG UK had through its subsidiary a 100% interest in the refinery and, because it was an English registered company, it would be subject to the strict corporate governance required of English companies and their directors by English company law.

[10] The following day Mr Zeligmans had a tour of the refinery and of the related facilities, including the rail network by means of which refined product was loaded onto railcars for onward transport. Following these meetings, as Mr Zeligmans said in his witness statement, Mr Kontsevoy was keen to verify what he had told Mr Zeligmans about the EG group. Accordingly he provided Mr Zeligmans with a valuation report on EG UK and its subsidiaries from KPMG dated 5 October 2007. This report, which Mr Zeligmans read, confirmed what he had been told by Mr Kontsevoy, that EG UK was the ultimate owner of EG Production which owned the refinery. Mr Zeligmans confirmed the significance of this in oral evidence, saying that COS would only do business with a company that owned the refinery, not with a trading company with no assets. He also confirmed that this was something that he made clear to Mr Kontsevoy in his discussions with him. Because the essence of what was being proposed was financing an operation to bring in crude oil from Russia and refine it into refined products at the refinery, the importance of the fact that the company with which COS was dealing, EG UK, owned the refinery through its 100% owned subsidiaries, was emphasised to Mr Kontsevoy.

[11] In about August 2008, negotiations began with TNK-BP (which owned the nearest group of Russian oilfields to the Zhem refinery and with which Mr Zeligmans had a good trading relationship) for it to supply crude oil to the refinery. The EG group had no previous relationship with TNK-BP and, accordingly, gave Mr Zeligmans a power of attorney to negotiate with TNK-BP, with which a deal in principle was agreed by mid August. However, it was still necessary to obtain finance. Because Mr Zeligmans had a pre-existing

relationship with BNP Geneva, it was agreed with Mr Kontsevoy that Mr Zeligmans would approach BNP with a proposal for it to provide trade finance.

[12] During the discussions Mr Zeligmans had with BNP, it emerged that one of their biggest concerns was to understand the substance and structure of the EG group. Mr Zeligmans conveyed those concerns to Mr Kontsevoy on the telephone and Mr Kontsevoy confirmed that the corporate structure remained as he had told Mr Zeligmans, that EG UK was 100% owner of EG Group which, in turn, wholly owned EG Production that owned the refinery. Mr Kontsevoy also told Mr Zeligmans on the telephone that this structure would not change unless, at some point in the future EG UK decided to sell its interest, which would only occur if it could procure a substantial price. Having asked Mr Zeligmans during his oral evidence to clarify when those assurances and representations were made over the telephone by Mr Kontsevoy, I am quite satisfied that it was during the negotiations Mr Zeligmans had with BNP and so before the Framework Agreement was entered on 6 October 2008. Furthermore, I am quite satisfied that, because the request for this information was passing backwards and forwards as information and documents were supplied to BNP, Mr Kontsevoy was well aware of the importance which Mr Zeligmans attached to the assurances as to the corporate structure and that it would not change unless EG UK decided to sell its interest.

[13] Ultimately, BNP was not prepared to provide finance to the EG group, in part no doubt because these negotiations coincided with the turmoil in the financial markets following the collapse of Lehman Brothers in September 2008. However, Mr Zeligmans had been considering whether COS itself might not finance EG. A structure was set up pursuant to the Framework Agreement dated 6 October 2008 (which was expressly subject to English law and London arbitration) under which EG UK would sell and COS would buy refined oil products in quantities and at prices determined by subsequent addenda. As explained in his witness statement by Mr Zeligmans, the way in which the Agreement was intended to operate and did operate was that COS would pay in advance for the refined product. Such advance payments would finance the purchase of crude oil by EG UK and its subsidiaries from TNK-BP and the refining of that oil at the refinery, although COS only acquired title to the refined oil upon delivery onto railcars at Zhem station. COS then sold the refined oil to Litasco, a wholly owned trading subsidiary of Lukoil.

[14] Mr Zeligmans made it quite clear in his evidence that, in entering the Framework Agreement, he relied upon the assurances and representations from Mr Kontsevoy as to the EG corporate structure and that it would not change unless EG UK decided to sell its interest in the refinery. He understood that in practical terms, as he put it in his witness statement, the real value of EG (ie the refinery) was locked away in EG UK which, as an English company could not give away its assets or dispose of them other than at market value, and that directors of an English company were under a duty to act in the best interests of the company. It is quite clear that it was on the basis of those representations that COS entered into the Framework Agreement and the subsequent addenda. Mr Zeligmans' evidence was that the representation by Mr Kontsevoy that the corporate structure would not be changed unless EG UK sold its interest in the refinery was repeated by Mr Kontsevoy at a restaurant in Moscow, possibly after the Framework Agreement was signed.

[15] On dates from 6 October 2008 onwards a series of addenda were entered into between COS and EG UK, under which COS purchased the refined oil products, making prepayments which financed the purchase of the crude oil by the EG group. Until about November 2009, the arrangements ran smoothly. However, unbeknownst to COS and Mr Zeligmans, changes were made in that period to the structure of the EG group. First, in April 2009 EG Production was moved within the group so that it became a direct subsidiary of EG UK. Although this was a change in the structure of which COS should have been informed, it does not make any specific complaint about this change.

[16] Far more significant is the filing in Anguilla on 18 September 2009 of a certificate of continuation and articles of continuation under the Anguillan International Business Companies Act 2000 in respect of EG UK. This procedure purported to have the effect of "continuing" EG UK as an Anguillan company, EG Anguilla, the Sixth Defendant. As Mr Stanley rightly submitted, this is a remarkable piece of legislation, the effect of

which purports to be that the company continues as an international Anguillan company and ceases to be incorporated under the law of its place of incorporation, namely England. Clearly, as I elaborate in more detail at 70 - 74 below, under English law, which is the relevant applicable law as the law of the place of incorporation of EG UK, this purported continuation is void and of no effect.

[17] In his first affidavit Mr Kontsevoy said that this "transfer" to Anguilla was for tax reasons. He claimed that there had been advice previously given that EG UK would not need to pay UK tax so long as it did not trade in the UK, but that this advice was subsequently changed and the decision taken to go to Anguilla. He produced no documents to support that contention and so far as the limited material available about the affairs of EG UK demonstrates, no attempt was ever made by the directors of EG UK (Mr Kontsevoy and Mr Buratov) to declare or pay any tax due on EG UK's pro[#64257]ts. Instead dormant company accounts were [#64257]led and Mr Kontsevoy and Mr Buratov simply disregarded their obligations to [#64257]le tax returns. Moreover, if such advice had been given, that does not explain why, at a later stage of the restructuring of the group, they went back to using English registered companies to hold assets (see below). I agree with Mr Stanley that the tax explanation, whilst not impossible, is vague and inconsistent with other aspects of the restructuring. It seems to me that the real explanation for this "transfer" is that it was the first step in an overall restructuring the effect of which was to remove the refinery from the ownership of EG UK, ultimately to the detriment of creditors of the group. I deal with the "transfer" to Anguilla in more detail at 59 - 62 below.

[18] At all events, whatever the real reason for the "transfer" to Anguilla, what is of critical significance is that, as Mr Kontsevoy accepted in his affidavit, he did not tell COS about what he describes as the "redomicile", he said because he did not think it was relevant to COS. I reject that explanation. He knew very well that he had represented to Mr Zeligmans, before the Framework Agreement was entered, that the refinery was ultimately owned by the English company and that he had said the corporate structure would not be changed unless EG UK sold its interest. Yet he and Mr Buratov were divesting the English company of its assets and purporting to "continue" it in a foreign jurisdiction whose corporate governance, if any, was an unknown, without informing Mr Zeligmans, as an honest person would have done, that the representations made before the Framework Agreement was entered were no longer true. As I set out later in the judgment, the representations made at the outset were continuing representations for so long as they were being acted upon by COS and, at this point of transfer to the Sixth Defendant, they became false and thus misrepresentations.

[19] Matters did not end there, because far from telling Mr Zeligmans about the "transfer" to the Sixth Defendant, Mr Kontsevoy continued to sign all the addenda and the Tax Loan Agreement as a director of EG UK, on the basis the other contracting party remained EG UK and using the same stamp, which was marked "En-Gin Ltd United Kingdom", as he had on the Framework Agreement and the addenda signed before the purported transfer to the Sixth Defendant. In those circumstances, Mr Kontsevoy positively misled Mr Zeligmans and continued to do so, knowing that he was doing so. In fact, Mr Zeligmans and COS did not find out about the existence of the Anguillan company until receipt of a letter dated 10 May 2011, after the monies with which this claim is concerned had been expended.

[20] In November 2009, the Kazakh and Russian tax authorities began an investigation alleging that the oil had not been refined to the extent required for export from Kazakhstan. They detained a total of 126 railcars of refined product at the Kazakh border, some of which were later returned to Zhem. In about June 2010, COS discovered that EG was attempting to sell to a third party a large amount of refined product financed by COS which was already on railcars at Zhem. COS was able to contact the third party and block the sale. Eventually, in August 2010, the tax authorities concluded that there had been no contravention of the export rules and shipments resumed.

[21] Whilst the investigations were being carried out, and again unbeknownst to COS and Mr Zeligmans, further corporate changes were made by Mr Kontsevoy and Mr Buratov. In June 2010, the shares in EG Production which owned the refinery, were transferred to Akkert SA, the seventh Defendant ("Akkert"), a

British Virgin Islands company owned by Mr Kontsevoy and Mr Buratov. No consideration was paid by Akkert. This is said to have been done to simplify investment in the refinery. This is an implausible explanation which I reject for the reasons given at 62-63 below.

[22] Then, in July 2010, a 49% interest in EG Production was transferred to Orion Global LLP ("Orion"), apparently a genuine third party investor. Mr Zeligmans accepts that, in the summer of 2010 in Almaty, he was introduced to Mr Hamitov as the representative of an outside investor, but says (and I accept) that he had no idea about the corporate changes. Specifically, he did not know about the transfer to Akkert, as a consequence of which, of course, EG Production was no longer part of the EG group at all.

[23] Mr Zeligmans dealt with the impact of outside investment by Orion in his oral evidence, which I accept:

> "I was, starting from midsummer, aware that there was an investor, but investor to me meant somebody that is coming into the company and not somebody who has been involved in taking the assets out of the company . . . who was investing into the company as opposed to being involved in the scheme to take the assets out of the company.
>
> MR STANLEY: Did the fact that there was an investor lead you to believe that the company with which you were dealing, the UK company, was no longer a UK company?
>
> A Not at all.
>
> Q Did it lead you to believe that it no longer owned the refinery?
>
> A Not at all. I was actually - we were quite positive about the fact that there was a new investor into the company. We were quite pleased with it.
>
> FLAUX J: I think the point you are making is that if Orion had taken shares in the English parent or any of the subsidiaries, there is nothing to concern you in the slightest, indeed quite the reverse?
>
> A Exactly, yes."

[24] The revenue investigation led to complaints on both sides about the expenses that had been incurred, including demurrage on the railcars and agreement was reached on the basis of a 50/50 split, as recorded in Addendum 35 dated 29 July 2010. A little later on 1 October 2010 a Reconciliation Agreement was made setting out the agreed position as at the end of September 2010, that there was a net balance in favour of COS of US$7,624,010.13. Again, both documents were signed by Mr Kontsevoy using the same stamp of EG UK.

[25] Mr Zeligmans described in his affidavit evidence how EG UK would need further working capital to enable them to buy more crude oil and produce more refined product. He wanted to re-engage trade finance banks to provide some of that working capital. Accordingly, he arranged a meeting with BNP in Geneva on 11 October 2010, attended by BNP representatives, himself, Mr Kontsevoy and Mr Hamitov representing Orion. The meeting was conducted in English, of which Mr Kontsevoy speaks very little, so Mr Zeligmans translated for him.

[26] As on the previous occasion when Mr Zeligmans had approached BNP for finance, the bank was interested in whether the refinery was within the structure of the group. Their representatives asked whether the structure of the group was the same as it had been at the time of the earlier discussions in August and

September 2008. Mr Zeligmans translated that question into Russian for Mr Kontsevoy, who confirmed that the structure was the same, that the group owned the refinery. In view of the transfers which had taken place, of which Mr Kontsevoy was well aware, that confirmation was a lie on his part. As he knew, EG UK was in fact an empty shell, the assets of which had purportedly been moved to Anguilla and the refinery had been taken out of EG Anguilla and given to Akkert which was in fact outside the corporate structure altogether. In his affidavit, Mr Kontsevoy denies that he gave this confirmation at the meeting with BNP, but I am quite satisfied that he did.

[27] BNP remained unwilling to finance EG, so it became clear to Mr Zeligmans that COS would have to continue financing EG in order to enable it to work off the outstanding balance. He did so believing, as he said in his evidence, that he was dealing with a UK registered company which held substantial assets, in particular (through EG Production) the refinery, as had been represented by Mr Kontsevoy at the outset and as he had represented again at the meeting with BNP. In fact, as Mr Zeligmans did not know, but Mr Kontsevoy did, that was very far from the truth. Three addenda, 36, 37 and 38 were made in November 2010 and, in reliance on those representations, COS advanced monies to EG. Once again these addenda were signed by Mr Kontsevoy as a director of EG UK, using the same EG UK stamp.

[28] At around the same time, COS agreed to make a loan to EG UK to enable the group to meet its tax liabilities. On 2 November 2010, Mr Kontsevoy emailed to Mr Zeligmans a draft of the proposed agreement, which contained at art 5 a provision that the agreement was governed by English law and that, "in case an agreement is not reached by the parties", in other words, in the event of a dispute, such a dispute would be subject to the exclusive jurisdiction of the English High Court. The draft also stated expressly in the recital that an affiliate of EG UK owned the refinery, which was untrue. The agreement (containing that recital and jurisdiction provision) was made and dated 1 December 2010. Although that was not signed, an addendum no 1 to that agreement dated 2 December 2010 and said to constitute an integral part of that agreement dated 1 December 2010 was signed by both parties, Mr Kontsevoy once again signing on behalf of EG UK and using the same stamp as before. Under that agreement COS advanced US$682,944.

[29] In his affidavit Mr Kontsevoy says, untruthfully, that it was Mr Zeligmans who sent him the draft tax loan agreement. In fact the truth is the opposite. Mr Kontsevoy also asserts that they discussed the jurisdiction clause, that he, Mr Kontsevoy, wanted an arbitration clause as in the Framework Agreement and that Mr Zeligmans assured him that they could treat the arbitration clause in the Framework Agreement as applying to the tax loan agreement. Given that it was Mr Kontsevoy who sent a draft agreement containing the English jurisdiction clause, this version of events is inherently implausible. I accept Mr Zeligmans' evidence that it is preposterous because they never discussed jurisdictional points. I am quite satisfied that the jurisdiction clause did form part of the tax loan agreement and was agreed by the parties.

[30] Shortly after this, later in December 2010, a second customs investigation began which resulted in the supply of refined oil products to COS drying up again. In the event supply was never restored. Mr Zeligmans pressed for supplies to resume and in that context received a letter dated 19 May 2011 from Mr Kontsevoy putting forward a claim for sums said to be due to EG. That letter was signed by Mr Kontsevoy over the stamp, as usual, of EG UK although at the bottom of the letter an address in Anguilla was given. This was the first Mr Zeligmans was aware of the involvement of the Sixth Defendant.

[31] In fact, unbeknownst to COS or Mr Zeligmans at the time, the refined oil which was for supply to COS pursuant to the outstanding addenda was sold by EG to third parties. That was carried out using two further corporate vehicles controlled by Mr Kontsevoy and Mr Buratov. First the fifth Defendant ("Skyagra"), an English registered company incorporated in June 2009. Although the shareholders are two Belize companies, it is clear that it is controlled by Mr Kontsevoy and Mr Buratov, as to which see 53 - 56 below. Between May and July 2011, Skyagra purchased refined products from the refinery, which it presumably sold on to third parties. In fact Skyagra purchased the products from a Kazakh limited liability partnership, Akkert Kazakhstan, the Eighth Defendant. That entity was incorporated in September 2009 and its sole member

was Akkert SA, to which of course the refinery had been ostensibly transferred for no consideration and of which the founders and directors are Mr Kontsevoy and Mr Buratov. In other words these two entities were used by Mr Kontsevoy and Mr Buratov as a conduit to divert product from the refinery destined for COS and for which COS had prepaid.

[32] The final change to the corporate structure of the EG group involved the use of the eleventh Defendant, Larson. This is another English registered company incorporated on 14 February 2011, of which the directors and shareholders are Mr Kontsevoy and Mr Buratov. At some point between February 2011 and February 2012 (Mr Kontsevoy asserts in February 2012) EG Group was transferred to Larson for no consideration. The effect of this transfer was that the oilfield was now an asset of Larson. It is striking that Mr Kontsevoy and Mr Buratov used a new English company to hold that asset, rather than using their existing English company, EG UK.

[33] There is no doubt that these various changes in the corporate structure of the EG group were engineered and organised by Mr Kontsevoy and Mr Buratov; indeed, Mr Kontsevoy admits as much in his affidavit, although he seeks to justify their actions. The effect of the changes was to leave the English company EG UK, which Mr Zeligmans understood (as a consequence of the representations made to him) to be the ultimate owner of the refinery through its subsidiaries, as an empty shell with no assets. In February 2010, it was nearly struck off the record for failure to file accounts, but was reprieved following an objection from an unknown source. It was in fact struck off the register in February 2011. It was restored to the register on COS' application under s 1029 of the Companies Act 2006 by order of Mr Registrar Jones dated 5 April 2012.

DECEIT

[34] The claim in deceit is advanced against the Third, Fourth and Sixth Defendants, Mr Kontsevoy, Mr Buratov and EG Anguilla. If Mr Kontsevoy is liable in deceit, given that, at least from September 2009, he asserts he was acting on behalf of EG Anguilla rather than EG UK, the vicarious liability of EG Anguilla for his tort must inevitably follow. I should add that COS has also claimed in deceit against EG UK on the same basis of vicarious liability, but in arbitration because of the London arbitration clauses in all the contracts save for the Tax Loan Agreement. That arbitration has not been progressed far given that EG UK has been stripped of its assets. The position of Mr Buratov is more complex and I will return to it below, when I have considered the position of Mr Kontsevoy.

[35] The elements of the tort of deceit require:

> (i) a representation which is
>
> (ii) false
>
> (iii) dishonestly made and
>
> (iv) intended to be relied upon and in fact relied upon: see per Rix LJ in *The Kriti Palm* [2007] EWCA Civ 1601, [2007] 1 Lloyd's Rep 555 at 251.

As I have found, Mr Kontsevoy made representations to Mr Zeligmans, before and after the Framework Agreement was entered in October 2008, that the refinery was ultimately owned by the English company EG

UK and that the corporate structure would not be changed unless EG UK sold its interest. Those representations may have been true when made, but they were continuing representations. The general principle is that a representation will be regarded as continuing until fully acted upon. The classic example of that principle in the commercial context is that of a misrepresentation made to an insurer on a proposal form for marine insurance which was accepted and the insurance was then renewed the following year without a fresh proposal form. The original misrepresentation was held to have continuing effect in the second year so as to entitle the insurer to avoid the policy: see *The Moonacre* [1992] 2 Lloyd's Rep 501 at 521 per Mr Anthony Colman QC (as he then was) sitting as a deputy High Court judge; *Spencer Bower, Turner & Handley: Actionable Misrepresentation 4th edition* 75.

[36] In the present case, COS and Mr Zeligmans continued to act upon the representations made, on each occasion that an addendum to the Framework Agreement was entered under which COS prepaid for refined oil in order to finance purchases of crude oil by the EG group and when the Reconciliation Agreement and the Tax Loan Agreement were entered into in October and December 2010 respectively. COS' case, confirmed by Mr Zeligmans' evidence, which I accept, is that if COS had been informed by Mr Kontsevoy in September 2009 of the "transfer" of EG UK and its assets to EG Anguilla, it would not have advanced any further sums. In fact all the outstanding sums which comprise COS' loss relate to the period after September 2009: see 74 and 75 of the Amended Particulars of Claim and the section of the judgment on loss and damage at 67-68 below.

[37] In their evidence filed in support of their application to challenge the jurisdiction and set aside the freezing injunction, the Defendants sought to answer the point about the representations made before the Framework agreement was entered being continuing representations, in two ways. First, they sought to rely upon cl 11.4 of the Framework Agreement which provides: "After signing of this Contract all previous negotiations and correspondence between the parties in such connection will be considered as null and void" as negativing any prior representations. As Mr Stanley submitted, this is a lawyer's point, and a bad one. That provision is an "entire agreement" clause focusing on the fact that any previous agreement or contractual negotiations will be superseded by the Framework Agreement. It says nothing about whether the Framework Agreement has been induced by a representation let alone about whether the representation continues to have effect after the Framework Agreement, as each addendum is entered.

[38] The second purported answer was that, even if the representation was made, there could be no guarantee the corporate structure would not change, there was no obligation to maintain the structure. This is not disputed by COS but it misses the point. Having made the original representations, intending that Mr Zeligmans would rely upon them and knowing that he would do so, it was incumbent upon Mr Kontsevoy, when he knew that the representations previously made were no longer true (because, for example EG UK had been "continued" into EG Anguilla or because the refinery had been transferred to Akkert) to inform COS and Mr Zeligmans about the changes to the corporate structure.

[39] Mr Kontsevoy did not inform Mr Zeligmans about the changes in the corporate structure and I find that his failure to do so was quite deliberate. He was well aware, from the earlier conversations that he had had with Mr Zeligmans, of the importance the latter attached to the fact that COS was dealing with an English registered company which was the ultimate owner of the oil refinery and that Mr Zeligmans, and thus COS, were relying upon what had been represented about the corporate structure, in continuing to advance monies to the EG group. I find that Mr Kontsevoy also knew that, if he informed Mr Zeligmans of these changes to the corporate structure, the chances were that COS would not advance any further prepayments. In the circumstances, the elements of the tort of deceit are made out against Mr Kontsevoy, in respect of his dishonest failure to correct what had become misrepresentations with the changes in the corporate structure.

[40] In fact the deceit did not consist just of the failure to correct the continuing representations. Mr Kontsevoy made a series of additional positive misrepresentations which he knew were false. First, at the meeting with BNP on 11 October 2010, he represented expressly to BNP and Mr Zeligmans that the

structure of the EG group was the same as at the time of the previous negotiations with BNP in August and September 2008, that the group owned the refinery, whereas the truth was, as he well knew, that EG UK was an empty shell, the assets of which had purportedly been moved to Anguilla and the refinery had been taken out of EG Anguilla and given for no consideration to Akkert, which was in fact outside the corporate structure altogether.

[41] Second, he continued to sign all the addenda after the purported "transfer" to EG Anguilla and, thereafter, the Reconciliation Agreement and the Tax Loan Agreement on behalf of EG UK, using the same stamp marked "En-Gin Ltd United Kingdom" as had been used prior to the "transfer". Mr Kontsevoy claims in his affidavit that this was an oversight. That might be an explanation if the wrong stamp had been used on only one document, but addenda 31 to 38 were all signed with that stamp after the "transfer", quite apart from the other contractual documentation. This is hardly explicable as an oversight and I agree with Mr Stanley that, if Mr Kontsevoy had been an honest director, when he came sign and stamp the first of these addenda he would surely have said to his staff, this is the wrong stamp, we need a stamp for EG Anguilla.

[42] That this was not an oversight but deliberate misleading of COS and Mr Zeligmans, is demonstrated by the third positive and dishonest misrepresentation, that contained in the first recital to the Tax Loan Agreement, which, as I have held above, was drafted by EG not COS. That stated expressly: "Whereas the Company [EG UK] and the group of companies is engaged in the crude oil business, and its affiliate owns oil refinery located at . . . Zhem". As Mr Kontsevoy well knew, that statement was untrue: the company EG UK was by that time in December 2010 an empty shell with no assets, the parent company was now an Anguillan company and the refinery was no longer owned by any affiliate within the group but by Akkert and Orion.

[43] As with the original representations which he failed to correct when the corporate structure changed, so with these subsequent positive and fraudulent misrepresentations, Mr Kontsevoy made them intending that they would be acted upon and knowing that Mr Zeligmans and COS were acting upon them. Mr Zeligmans was asked in oral evidence about the fact that the Framework Agreement was signed by Mr Kontsevoy, as a director of EG UK, with a stamp stating "En-Gin Ltd United Kingdom" and that the same stamp was subsequently used for all the addenda, the Reconciliation Agreement and the Tax Loan Agreement. He confirmed that if he had been told before entering the addenda or the other agreements that the company with which he was dealing was now an empty shell and that the refinery was no longer owned by the group, he would have been very concerned and would not have advanced further monies. I see no reason not to accept that evidence of reliance on the fraudulent misrepresentations and I conclude that the tort of deceit is amply made out against Mr Kontsevoy. The loss suffered by COS in consequence of the deceit is dealt with below.

[44] So far as Mr Buratov is concerned, he did not personally make any of the misrepresentations made by Mr Kontsevoy. However, I agree with Mr Stanley that he was engaged in a common design with Mr Kontsevoy to deceive COS and Mr Zeligmans. He said and did nothing at the time to correct the deliberately misleading impression about the corporate structure which Mr Kontsevoy was giving Mr Zeligmans. His affidavit simply confirmed Mr Kontsevoy's evidence. He therefore essentially adopted and repeated the evidence of Mr Kontsevoy, which I have already held was untruthful. It is clear that he was making common cause with Mr Kontsevoy and that they were engaged in a common design to deceive COS and Mr Zeligmans, albeit that Mr Kontsevoy was the principal active participant in the deceit.

[45] As Mr Stanley pointed out, there is a surprising dearth of authority on liability for joint participation in a tort, as opposed to joint participation in a criminal enterprise. Nonetheless, there are two decisions of the Court of Appeal concerned with infringements of patent or copyright, but which establish principles applicable to joint participation in torts generally. The first is the judgment of Mustill LJ in *Unilever plc v Gillette (UK) Ltd* [1989] RPC 583 at 602:

"In a case such as the present, where the infringement alleged includes (for example) the sale of the patented product made up into marketable form, and the importation of the product, a literal interpretation of the section might lead to the conclusion that only the person who has actually sold the product and imported it can be an infringer - apart, perhaps, from the exceptional case, contemplated by Sir George Jessel MR in *Townsend v Haworth* (1875) 48 LJ Ch 770 at 772 where the direct infringer is the 'mere cat's-paw' of someone else. This is not however the way the law has developed. It has gone further than this, in two stages.

The first stage concerned a general question in the law of tort, arising where two persons were acknowledged or found to have committed tortious acts which led to the same damage. The question was whether these persons had committed individual wrongs for which they were individually liable, or whether they had joined together in committing the same wrong. This was formerly of great importance, for there could only be one action in relation to one tort, so that judgment against one tortfeasor A would release any claim against the other tortfeasor B; and so also with any accord and satisfaction of the liability of A. The severity of this rule was mitigated by statute in 1935, but by then a jurisprudence had grown up concerning the distinction between joint and several tortfeasors. The most celebrated example of this is to found in the judgment of Scrutton LJ in *The Koursk* [1924] P 140 at 156 where three situations are identified where A might be jointly liable with B: ie, where A was master and B servant; where A was principal and B agent; and where the two were concerned in a joint act done in pursuance of a common purpose. This list may not be exhaustive, but it forms the basis for all subsequent statements of the law.

Thus far, the cases were concerned with the question whether A and B, acknowledged or found to be joint tortfeasors, were responsible individually or jointly for what had been done: *The Koursk* being a particularly acute case of such a dispute. In *Brooke v Bool* [1928] 2 KB 578 however a bold step was taken, by applying the gist of *The Koursk* to determine, not whether the two acknowledged tortfeasors A and B were responsible for the same tort, but whether in a case where B was undeniably liable, A could be held liable as well. In that case A and B had set out together to investigate the source of a gas leak which was B's direct concern alone. A had come with him to help. Because B was too old to carry out a particular task, A carried it out instead. The means of investigation were ill-chosen, and an explosion ensued. A was plainly liable. The Divisional Court held that B was liable too, as a joint tortfeasor engaged in a common venture with A.

Brook v Bool has engendered curiously little in the way of subsequent reported authority, but no doubt has been cast in the intervening 60 years on the proposition that participation in a common venture may cause someone to become directly liable as a tortfeasor, together with the person who actually did the damage."

[46] Having analysed earlier cases on whether there was a tort of procuring breach of copyright which are not relevant for present purposes, Mustill LJ continued at 608:

"I have set out these cases in some detail in deference to the care with which they were analysed during the argument on this appeal. In truth, however, I believe that they do little more than illustrate how in various factual situations the courts have applied principles which are no longer in doubt, save perhaps as regards the relationships between indirect infringements by procuring and by participation in a common design. There may still be a question whether these are distinct ways of infringing, or different aspects of a single way. I prefer the former view, although of course a procurement may lead to a common design, and hence qualify under both heads. We need not however explore this question . . . . I use the words 'common design' because they are readily to hand, but there are other expressions in the cases, such as 'concerted action' or 'agreed on common action' which will serve just as well. The words are not to be construed as if they formed part of a statute. They all convey the same idea. The idea does not, as it seems to me, call for any finding that the secondary party has explicitly mapped out a plan with the primary offender. Their tacit agreement will be sufficient. Nor, as it seems to me, is there any need for a common design to infringe. It is enough that the parties combine to secure the doing of acts which in the event prove to be infringements."

[47] That judgment was applied and approved by Chadwick LJ (with whom Simon Brown and Tuckey LJJ agreed) in *MCA Records Inc v Charly Records Ltd* [2001] EWCA Civ 1441, [2003] 1 BCLC 93, [2002] FSR 401 at 31 - 36. The principle which emerges from these cases is not dissimilar to that applicable in the criminal law: parties will be liable in tort as joint tortfeasors if they are "in it together" pursuant to a common design.

[48] In the present case, Mr Stanley relies upon three matters as demonstrating that Mr Kontsevoy and Mr Buratov were acting together, were "in it together", so as to make Mr Buratov liable in deceit even though the misrepresentations were made by Mr Kontsevoy: (i) that wherever you find Mr Kontsevoy in the various

entities you find Mr Buratov, they are directors or shareholders or ultimate beneficial owners or controllers together; (ii) the deceit is being committed for the benefit not just of Mr Kontsevoy, but of both of them and (iii) the adoption by Mr Buratov of Mr Kontsevoy's evidence leads to the inference that Mr Kontsevoy is not acting alone but with at least the tacit agreement of Mr Buratov. I agree with Mr Stanley that the material before the court, and those three matters in particular, does demonstrate that Mr Kontsevoy and Mr Buratov were acting together pursuant to a common design and that that is sufficient to make Mr Buratov liable in deceit as well.

CONSPIRACY

[49] As Mr Stanley readily admits, the purpose of the additional claim in conspiracy is essentially to widen the net of Defendants who are liable to COS and thus to improve the prospect of enforcement of this judgment against the assets of one or more of the Defendants. This is said to be a conspiracy to cause loss to COS by unlawful means. That is a tort which is committed where two or more persons agree to perform unlawful acts, which need not be torts, with the intention, whether or not it is the sole or dominant intention, of causing loss to the Claimant: see *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174 at 44, [2008] 2 All ER 413 per Lord Hope of Craighead; 56 per Lord Scott of Foscote; 91 per Lord Walker, 116 per Lord Mance and 226 per Lord Neuberger.

[50] In the present case, Mr Stanley submits that all the Defendants (with the exception of the tenth Defendant who has not been served and the twelfth Defendant Larson against whom no allegation of conspiracy is made) are liable for this unlawful means conspiracy. I accept that submission in relation to all the Defendants and that, on analysis, all the Defendants, including Skyagra, (to whose position I will return in more detail below) were involved in the conspiracy at all material times. In terms of the unlawful means, the deceit itself is sufficient unlawful means and it is not therefore strictly necessary to decide whether entering a transaction defrauding creditors within the meaning of s 423 of the Insolvency Act 1986 is sufficient unlawful means as well, although I see no reason in principle why it should not be.

[51] Furthermore, it is well established that, as in criminal conspiracy, it is not necessary to show that there is anything akin to an express agreement to constitute the tort of conspiracy. That point was made by Nourse LJ in *Kuwait Oil Tanker Co SAK v Al Bader and others* [2000] 2 All ER (Comm) 271 at 111 giving the judgment of the Court of Appeal:

> "A further feature of the tort of conspiracy, which is also found in criminal conspiracies, is that, as the judge pointed out at page 124, it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end."

[52] That case also demonstrates, from a consideration of one of the conspirators, Captain Stafford, that a party can be party to a combination or conspiracy to use unlawful means even if he does not himself commit some or all of the relevant unlawful acts: see 133 of the judgment of the Court of Appeal quoting with approval the judgment of Moore-Bick J at first instance.

[53] It is also well established that a director can conspire with his company: see *Clerk & Lindsell on Torts 20th edition* 24-93 and *Barclay Pharmaceuticals Ltd v Waypharm AP* [2012] EWHC 306 (Comm) at 220 - 229. As Mr Stanley correctly submitted, applying the analysis of Chadwick LJ in *MCA Records* at 49 - 52 there is no impediment to the liability of a director unless he is acting strictly and solely via the constitutional organs of the company concerned, which Mr Kontsevoy and Mr Buratov were not doing here, so their liability for conspiracy is not affected by the fact that they were directors of the various companies.

[54] So far as Skyagra is concerned, it was incorporated in June 2009 but was not ostensibly used actively by Mr Kontsevoy and Mr Buratov until it was used as a conduit for the disposal of the refined oil products in the period May to July 2011, which is right at the end of the conspiracy period. Initially, I had some concern that it was difficult to say that it should be party for all the losses suffered by COS throughout the conspiracy period. However, there is material before the court which demonstrates that, although the shareholders in Skyagra are two Belize companies, it is controlled by Mr Kontsevoy and Mr Buratov and is their creature so that the court can and should draw the inference that Skyagra was involved in the conspiracy throughout.

[55] Of particular significance in this context is the breach of the freezing orders which occurred in about May 2012 when Skyagra divested itself of one of its assets Projector Kazakhstan LLP, another trading vehicle of Mr Kontsevoy and Mr Buratov. Watson Farley & Williams sought an explanation in correspondence with Zaiwalla & Co acting then for the Defendants as to how this breach had come about, pointing out that Mr Kontsevoy and Mr Buratov were the ultimate beneficial owners or at least controlling minds of Skyagra. That elicited the reply from Zaiwalla & Co in their letter of 26 June 2012 on instructions, that Mr Kontsevoy and Mr Buratov had no control or interest in Skyagra. That was simply untrue.

[56] The charter of Projector Kazakhstan LLP dated 25 June 2011 was signed by Mr Kontsevoy on behalf of Skyagra and in the notarisation on it, the notary describes Mr Kontsevoy as director of Skyagra. Furthermore, in a letter to Watson, Farley & Williams dated 20 April 2012 from B2B Company Secretary Ltd which supplied secretarial and administrative services to Skyagra, it is stated:

> "Please further note that according to our records [Skyagra] is managed by Mr Alexander Kontsevoy . . . . We have contacted Mr Kontsevoy who has confirmed that he is aware about this matter and has already undertaken necessary steps on behalf of [Skyagra] as well."

Yet, two months later Zaiwalla were saying on instructions that Mr Kontsevoy and Mr Buratov had no control or interest in Skyagra. It is also striking that Mr Kontsevoy says nothing about Skyagra at all in his affidavit evidence.

[57] In the circumstances and given the absence of any explanation about Skyagra, which clearly is one of the corporate creatures of Mr Kontsevoy and Mr Buratov, I accept Mr Stanley's submission that the court can and should draw the inference that Skyagra was involved in the conspiracy at all material times from its incorporation in June 2009.

[58] The question then is what was it that the Defendants agreed to do and whether the intention of the conspiracy was to cause damage to COS. Mr Stanley submits that he does not have to show (and is not alleging) that, at some point in 2009, Mr Kontsevoy and Mr Buratov sat down and planned meticulously every step they were going to take. There was, as he puts it, an element of improvisation, as there often is in such cases, but he submits that, if one looks at the pattern, from 2009 onwards, steps are being consistently taken to put these companies in the position they have achieved, of putting their assets out of the reach of COS and that, in the absence of any reasonable explanation to the contrary, it is perfectly legitimate for the court to infer that all this did not happen by accident, but by design, pursuant to the conspiracy. I accept those submissions.

[59] The first of the transactions which COS seeks to impugn and says occurred pursuant to the conspiracy is the "transfer" or "continuation" of EG UK to EG Anguilla. In his affidavit, Mr Kontsevoy explained that the original decision to have the holding company incorporated in the United Kingdom was taken on the advice of Parex Bank, the advice being that providing that no trading took place in the United Kingdom and that company money did not pass through bank accounts here, there would be no liability to UK tax. He then said that Parex bank was dissolved in 2008. Mr Zeligmans said it was acquired by a state bank. Mr Kontsevoy said that he became concerned that the advice was incorrect, he thought during due diligence carried out by

CITIC, a Chinese conglomerate which had some interest in buying an oilfield. A memorandum of understanding was signed with CITIC in June 2008, so presumably the concern of which he speaks must have manifested itself by then and yet it was not until September 2009 that the transfer to Anguilla took place. He fails to explain that delay at all and I agree with Mr Stanley that, if the real explanation for the transfer was a concern about the tax position with a UK holding company, something would have been done to move the holding company offshore in June 2008 and Mr Kontsevoy and Mr Buratov would not have waited until September 2009.

[60] The implausibility of the "tax" explanation for the "transfer" is further demonstrated by the explanation Mr Kontsevoy gave for deciding to choose Anguilla, itself said to be a decision based on advice from a representative from Parex Bank, which is odd, given that it was their advice to have a holding company in the United Kingdom. The explanation is said to be that, under Anguillan law, the company could be transferred in a way which would result in a continuation of the same legal entity. That explanation makes no sense whatsoever. If the concern really was that, if the holding company remained English, there would be a liability to UK tax, the obvious thing to do would be to incorporate a wholly new holding company in a tax haven, not to do something which purports to continue the same legal entity.

[61] As Mr Stanley submitted, the real significance of using Anguilla is that it is a trap for the unwary dealing with EG UK such as Mr Zeligmans and COS, who think they are dealing with the same contracting party, but unbeknownst to them, it has transformed itself into an Anguillan entity. The Defendants have produced not one piece of paper to evidence the alleged tax advice. Furthermore, there seems to have been no attempt to ascertain what tax liabilities had been incurred in the United Kingdom given the alleged concern. No accounts were filed and no tax return was made. This omission is hardly consistent with the actions of honest businessmen. Equally, if the real explanation for the transfer was a fiscal one, why did Mr Kontsevoy not explain all that to Mr Zeligmans? The answer is obvious, he knew what Mr Zeligmans' reaction would be, that he would be reluctant to provide financing for an offshore entity, in much the same way as, a little later in the story, Allianz was not prepared to refinance the group with EG Anguilla in the structure and required its replacement by an "onshore" entity, in the event, Larson, another English registered company.

[62] In my judgment the real reason for the "transfer" to Anguilla was nothing to do with fiscal concerns, legitimate or otherwise, but was an attempt to disguise from COS and Mr Zeligmans that the holding company was being moved offshore, as a first step to divesting it of its assets, which was the next stage of the corporate changes, in June 2010. The overall purpose of these corporate changes was to put those assets beyond the reach of the creditors of the EG group, specifically COS. Before leaving the transfer to Anguilla, I should note that, in a number of places in his affidavit evidence, Mr Kontsevoy seeks to suggest that COS' case, that the steps taken in 2009 were pursuant to some common design to put the assets of the group beyond the reach of COS, cannot be right because the tax investigation in Russia and Kazakhstan did not start until later in 2009, so that the parties had yet to fall out with one another. As Mr Stanley rightly submitted, that is a complete non-sequitur. What went on was not motivated by a breakdown in the relationship but was opportunistic.

[63] In June 2010, again unbeknownst to COS and Mr Zeligmans, 100% of the shares in EG Production, owner of the refinery, were transferred for no consideration to Akkert a company of which Mr Kontsevoy and Mr Buratov were the directors and shareholders. The explanation provided by Mr Kontsevoy for this transfer in his affidavit evidence is that they wanted to obtain new investment in the refinery but not the oilfield, that it is harder to arrange outside investment in an oilfield because of restrictions under Kazakh law as to who can own an oilfield and that the transfer to Akkert was simply to separate the ownership of the oilfield and the refinery, to simplify investment in the latter.

[64] As Mr Stanley rightly pointed out, this is no explanation at all, since the oilfield and the refinery were already owned by separate companies, as a consequence of the previous change in the structure in 2009, of which COS does not complain, whereby EG Production became a direct subsidiary of EG UK, whereas

Ostyurk Munai which owned the oilfield remained a subsidiary of EG Group. Furthermore, when Orion did invest in the refinery, it did so not by investing in Akkert, the separate company allegedly set up to simplify such investment, but by investing directly in EG Production. In my judgment, the real reason for the transfer to Akkert was to remove the refinery from the group and further alienate EG UK (with whom all COS' contractual arrangements were) from this valuable asset formerly owned by the group.

[65] The final change in the corporate structure was one made at some stage between February 2011 and February 2012 and thus after the loss which COS suffered, but it sheds some light on the plausibility or otherwise of Mr Kontsevoy's explanation for the changes in the corporate structure. This is the transfer of EG Group which owned Ostyurk Munai, the owner of the oilfield, to Larson, another English registered company of which Mr Kontsevoy and Mr Buratov were the directors and shareholders. Mr Kontsevoy says that this was required by Allianz who were financing the oilfield, as a condition of restructuring loans. They in fact required EG Anguilla to be removed from the structure, because it was an "offshore" company and they wanted an "onshore" English, Russian or Kazakh company as the holding company instead. The obvious question, if that is correct, is why it was necessary to use Larson and why Mr Kontsevoy and Mr Buratov did not simply revert to EG UK for that purpose, but rather allowed it to be struck off. The real explanation in my judgment, is that they did not want to clothe EG UK with assets in circumstances where a dispute had already arisen with COS which would then be able to enforce any judgment against the assets.

[66] The fact that, at the behest of the financing institutions, the oilfield was ultimately returned to an English registered company albeit not EG UK, demonstrates in my judgment the falsity of the attempts by Mr Kontsevoy to characterise the earlier corporate changes involving EG Anguilla and Akkert as having a legitimate fiscal or investment purpose. The true purpose of those changes was to put the assets of the group, specifically the refinery, out of reach of COS. I consider that COS' claim in conspiracy is made out against the First to Ninth Defendants.

LOSS AND DAMAGE

[67] The losses suffered by COS as a consequence of the deceit and of the conspiracy are the same. The principal loss is the US$7,624,010.13 agreed to be due to COS under the Reconciliation Agreement dated 1 October 2010, but still unpaid. I accept Mr Zeligmans' evidence that that sum comprises advances made by COS after 18 September 2009 when the transfer to EG Anguilla was made and the representations made became untrue. COS made subsequent advance payments in November 2010 for refined product which EG has never supplied, consisting of US$4.5 million under Addendum 37 and US$249,549 under Addendum 38. However, in November 2010 COS did receive refined product under Addendum 33 with a value of US$1,454,315.31, for which COS gives credit against the outstanding sums under Addenda 37 and 38 leaving a balance due of US$3,295,233.69.

[68] In addition to those losses suffered in respect of advance payments, COS has suffered a loss of US$682,944 paid out to EG under the Tax Loan Agreement and a small sum of US$55,000 paid out under Addendum 39 on 13 December 2010 in respect of ancillary costs of the refinery. The total loss suffered by COS is thus US$11,657,187.82 and COS is entitled to judgment for damages in that amount. COS is also entitled to interest on that sum from 31 January 2011 at 1% over LIBOR.

RESCISSION OF THE TAX LOAN AGREEMENT

[69] As I have already stated in accepting Mr Zeligmans' evidence as to the misrepresentations made, that the Tax Loan Agreement was induced by misrepresentation, quite apart from any other misrepresentation, by that set out in the recital, that an affiliate of EG UK owned the refinery. In those circumstances, COS is entitled to rescind the Tax Loan Agreement. Furthermore, despite the "transfer" to EG Anguilla (which was in

any event ineffective as a matter of English law for the reasons set out in the next section of the judgment), on its objective construction that Agreement was with EG UK so that it is against EG UK that COS is entitled to rescind the Tax Loan Agreement and recover the US$682,944 paid under it.

INEFFECTIVE TRANSFER

[70] Albeit that as I have recorded earlier, the relevant Anguillan statute is extraordinary, at least from an English lawyer's perspective, Mr Stanley accepts that, under Anguillan law, the effect of what was done on 18 September 2009 was to transfer the assets and liabilities of EG UK into EG Anguilla. However as a matter of English conflicts of laws rules, the validity of this purported amalgamation or continuation of the one company in the other is governed by the law of the place of incorporation. The relevant part of r 174 in *Dicey, Morris and Collins on the Conflict of Laws 15th edition* at 30-011 provides as follows:

> "Whether a corporation has been amalgamated with another corporation must also be determined by the law of its place of incorporation. If that law provides for a *successio in universum jus* then the amalgamated company will be recognised in England as succeeding to the assets and liabilities of its predecessors. The law of the place of incorporation must, however, provide for a true universal succession and, further, it is possible that the successor corporation may be so radically different from its predecessor that it cannot be properly described as the same legal entity."

[71] Footnote 50 to this passage provides as follows:

> "If companies incorporated in different countries are amalgamated it would seem that the law of the place of incorporation of each company must permit or recognise the amalgamation with the other: *Global Container Lines Ltd v Bonyad Shipping Co* [1999] 1 Lloyd's Rep 287 although in this case the capacity of the predecessor corporation to continue to proceed with litigation after the amalgamation was recognised since it was found to exist under the law of the place of incorporation of that corporation."

[72] It seems to me that this view must be right as a matter of first principle, since the critical question here must be whether the transfer is valid under the law of incorporation of the first company, EG UK, in other words English law, otherwise Anguillan law could trump and render effective a transfer which English law would not recognise. English law knows nothing of this Anguillan concept of "continuation" and, so far as English law is concerned, EG UK the English registered company continued in existence unless and until dissolved and has returned to existence following its restoration to the register under s 1029 of the Companies Act 2006. Clearly, as a matter of English law, the party with whom COS was contracted remained EG UK throughout and what occurred was a purported transfer of assets and liabilities from the English company to another entity for no consideration, which is not recognised by English law. I agree with Mr Stanley that the transfer was simply a nullity.

[73] At an earlier stage of the proceedings, when the Defendants were legally represented, they were seeking to argue that the flaw in this analysis was that English law did not apply, but that the validity of the transfer of EG UK's shareholding was governed by the law with which the right transferred had its most significant connection, which is Kazakh law. Quite apart from the fact that the Defendants have never adduced any evidence to show that Kazakh law is different from English law, this approach is simply wrong as a matter of conflicts of laws rules. The correct approach is that cited from *Dicey, Morris & Collins* above.

[74] I also agree with Mr Stanley that, as a matter of first principle, if the transfer to EG Anguilla was a nullity, made for no consideration, then there is a presumed resulting trust back in favour of EG UK. For the present, COS limits itself to seeking a declaration in these terms: that (i) the purported substitution or succession of EG Anguilla for EG UK under the Framework Agreement is void and of no effect; (ii) the purported transfer to EG Anguilla of EG UK's property and/or the succession of EG Anguilla to that property is void and of no effect and (iii) that property so transferred and its fruits and proceeds was held on trust by

EG Anguilla for EG UK. I will grant a declaration in those terms.

RELIEF UNDER S 423 OF THE INSOLVENCY ACT 1986

[75] Strictly speaking the claim for relief under s 423 only arises if the court determines that the transfer of assets to EG Anguilla did take effect, whereas I have held that transfer was a nullity. Nonetheless, given the importance to COS of as fully reasoned a judgment as possible to assist enforcement, I propose to consider the claim for relief under the section and to grant such relief as appropriate.

[76] The section which is headed "Transactions defrauding creditors" provides as follows:

> "(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if -
>
> (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;
>
> . . .
>
> (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.
>
> (2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for -
>
> (a) restoring the position to what it would have been if the transaction had not been entered into, and
>
> (b) protecting the interests of persons who are victims of the transaction.
>
> (3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose -
>
> (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
>
> (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.
>
> (4) In this section 'the court' means the High Court . . .
>
> (5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as 'the debtor'."

[77] The provision is a quite general one, not linked only to transactions which take place in this jurisdiction. It is well-established that s 423 can have extra-territorial effect: see most recently on this, my own judgment in *Fortress Value Recovery Fund 1 LLC v Blue Skye Special Opportunities Fund LP* [2013] EWHC 14 (Comm), [2013] 1 All ER (Comm) 973 at 113-114 citing the principle laid down by Sir Donald Nicholls V-C in *Re Paramount Airways (No 2)* [1993] Ch 223 at 239-240, [1992] 3 All ER 1, [1992] BCLC 710. As I said at 114 the question whether there is sufficient connection with England to justify relief under s 423 is a matter which depends upon all the circumstances of the case. This is not a threshold question of jurisdiction, but a

question of discretion. In the present case, there can be no doubt that there is a sufficient connection with England to justify the exercise of the discretion, since the starting point for the transactions said to be at an undervalue which are sought to be impugned is the transfer of assets out of EG UK an English registered company and the other impugned transactions all flow from that.

[78] The three transfers which COS seeks to impugn are (i) the transfer of the assets and liabilities of EG UK to EG Anguilla in September 2009; (ii) the transfer of the interest in EG Production to Akkert in June 2010 and (iii) the transfer of the interest in EG Group to Larson at some point after 14 February 2011 when Larson was incorporated. In support of his submission that the first of these, the "continuation" in Anguilla was a "transaction" within the meaning of s 423, Mr Stanley referred me *Feakins v DEFRA* [2005] EWCA Civ 1513, [2007] BCC 54, [2006] BPIR 895. That case is extremely complex, but for present purposes, only a brief summary of the relevant transaction is necessary. Mr Feakins' farm was mortgaged to the bank. He persuaded the bank to sell the farm to his girlfriend at a price which took account of the subsisting agricultural tenancy. That tenancy was then promptly terminated. The judge at first instance, Hart J, held that the tenancy had been maintained by Mr Feakins purely as a device to depress the value of the farm and induce the bank to sell it to his girlfriend at an undervalue. He held that was a relevant transaction for the purposes of s 423. His decision was upheld on appeal.

[79] At 7 Jonathan Parker LJ refers to the definition of "transaction" in s 436 of the Act: "[it] includes a gift, agreement or arrangement". Later in his judgment at 76 he gives a wide meaning to the word "arrangement" in these terms:

> "However that may be, the question remains whether the 'arrangement' which the judge found is a 'transaction' for the purposes of section 423. I agree with the judge that it clearly is. As the judge pointed out, 'transaction' includes an 'arrangement' (see section 436); and 'arrangement' is, on its natural meaning and in the context of section 423, apt to include an agreement or understanding between parties, whether formal or informal, oral or in writing. In my judgment the wide definition of 'transaction' in the context of section 423 is entirely consistent with the statutory objective of remedying the avoidance of debts . . . ."

[80] Even without the assistance of that judgment, it seems to me unarguable that the transfer to EG Anguilla is not an arrangement which falls fairly and squarely within the definition of "transaction". Once one has reached that conclusion, given that there was no consideration for the transfer, the next question is whether the transaction was made by the person for the purpose of putting assets beyond the reach of a person who is making, or may at some time make a claim against him or otherwise to prejudice the interests of such a person. The better view is that it is only necessary to show that was a substantial purpose of the transaction, not the dominant purpose: see most recently the decision of Sales J in *4Eng Ltd v Harper* [2009] EWHC 2633 (Ch), [2010] Bus LR D58, [2010] 1 BCLC 176 at 5 - 8 citing the decision of the Court of Appeal in *IRC v Hashmi* [2002] EWCA Civ 981, [2002] 2 BCLC 489, [2002] BCC 943.

[81] In the light of my conclusion at 62 above in the context of the conspiracy case that the "continuation" in Anguilla was the first step of a series of changes to the corporate structure, the overall purpose of which was to put those assets beyond the reach of the creditors of the EG group, specifically COS, I am quite satisfied that the transaction had as a substantial purpose (and probably, in actual fact, its dominant purpose), putting the assets outside the reach of the creditors or otherwise prejudicing the creditors, including COS. COS was therefore a fortiori a "victim" of that transaction within the meaning of s 423(5) since, as David Richards J stated in *Clydesdale Financial Services Ltd v Robert Smailes* [2009] EWHC 3190 (Ch), [2010] BPIR 77 at 73:

> "Section 423(5) defines a victim of a transaction as a person 'who is, or is capable of being, prejudiced by it'. In choosing the term 'victim' and this definition, it is I think clear that it was intended to be a wider category than simply creditors. The words used are ordinary English words with no technical meaning and the correct approach in any given case is to ask whether, on the facts of the case, the Claimant is a person who is, or is capable of being, prejudiced by the transaction. The fact therefore that Focus is not a creditor does not decide the case against it."

[82] In the circumstances, COS is plainly entitled to relief under s 423 in respect of the first impugned transaction, the "transfer" to Anguilla. Once that conclusion is reached, the other two transactions which are sought to be impugned which were equally for no consideration, follow on from that first transaction as part of the same change of corporate structure with the dominant or at least a substantial purpose of putting the assets of the group beyond the reach of the creditors or otherwise prejudicing the creditors, including COS and must also be unravelled under the section. Once the first transaction goes, the others follow like a house of cards.

[83] In the circumstances, COS is entitled to the relief it seeks under s 423 and 425 of the Insolvency Act 1986 in the following terms. First, I will grant a declaration in the same terms as in 74 above. COS is also entitled to an order:

> (i) requiring EG Anguilla to take steps to revest in EG UK all the property acquired by it pursuant to the purported transfer; and/or
>
> (ii) requiring the shares and/or interest in EG Production held by Akkert SA to be revested in EG UK (alternatively in EG Group) absolutely or for the benefit of COS; and/or
>
> (iii) requiring the shares and/or interest in EG Group held by Larson to be vested in EG UK absolutely or for the benefit of COS; and/or
>
> (iv) requiring Mr Kontsevoy and/or Mr Buratov and/or EG Anguilla to revest in EG UK any property representing the proceeds of sale of the property transferred and/or to make payment to EG UK in respect of any benefits received from EG UK in such sum as directed hereafter by the court.

CONCLUSION

[84] In all the circumstances, COS is entitled to judgment as follows:

> (1) Against the third, fourth and Sixth Defendants, damages for deceit in the sum of US$11,657,187.82 and interest on that sum from 31 January 2011 at 1% over LIBOR.
>
> (2) Against the First to Eighth Defendants, damages for conspiracy in the sum of US$11,657,187.82 and interest on that sum from 31 January 2011 at 1% over LIBOR.
>
> (3) Against the Ninth Defendant, US$682,944 consequent upon rescission of the Tax Loan Agreement.
>
> (4) Against the First to Ninth and Eleventh Defendants, a declaration in the terms set out at 74 above.
>
> (5) Against the First to Ninth and Eleventh Defendants, orders under s 423 of the Insolvency Act 1986 in the terms set out at 83 above.

[85] COS is also entitled to an order that the First to Ninth and Eleventh Defendants do pay COS' costs of the action, to be assessed if not agreed. Subject to any submission I may receive from the Defendants by 9 July 2013, I shall order that those Defendants make an interim payment to COS on account of those costs in the sum of £225,000 within 21 days of the date of this judgment.

[86] As a consequence of this judgment in favour of COS, it is also appropriate that I make an order extending and continuing the freezing injunction ordered by Cooke J on 16 March 2012 and extended and continued by Hamblen J on 1 May 2012, until further order of the court in aid of execution.

Judgment accordingly.

TAB 4

In the Court of Appeal of Alberta

Citation: International Association of Science and Technology for Development v. Hamza, 1995 ABCA 9

Date: 19950126
Docket: 15098
Registry: Calgary

Between:

The International Association of Science and Technology for Development and The International Society for Mini & Micro Computers

Respondents
(Plaintiffs)

- and -

Christa Madeleine Hamza

Appellant
(Defendant)

- and -

Mohamed Hamed Hamza

Respondent
(Defendant)

And Between:

Christa Madeleine Hamza

Appellant
(Plaintiff)

- and -

Mohamed Hamed Hamza

Respondent
(Defendant)

The Court:

The Honourable Mr. Justice Harradence

The Honourable Mr. Justice Bracco
The Honourable Madam Justice Conrad

Reasons for Judgment of The Honourable Madam Justice Conrad
Concurred in by The Honourable Mr. Justice Harradence
And Concurred in by The Honourable Mr. Justice Bracco

APPEAL FROM ORDER OF THE HONOURABLE MR. JUSTICE DIXON DATED THE 14TH DAY OF APRIL, 1994

COUNSEL:

G. D. Roszler, for the appellant

H. D. Lloyd and D. G. Byblow, for the respondent

REASONS FOR JUDGMENT OF
THE HONOURABLE MADAM JUSTICE CONRAD

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[1] This appeal relates to the status of foreign entities to initiate legal proceedings in Alberta.

Facts

[2] The plaintiffs/respondents, the International Association of Science and Technology for Development ("IASTD"), and the International Society for Mini & Micro Computers ("ISMM") issued a statement of claim naming Christa Hamza and Mohamed Hamza as the defendants. IASTD and ISMM seek a declaration that they are each independent legal entities with the capacity to sue, be sued and possess property within the Province of Alberta, that the assets presently held in their names are their exclusive property, and that neither Mr. Hamza nor Mrs. Hamza have any legal or equitable interest in such assets. The plaintiffs claim to be registered in Switzerland as societies and recognized as legal entities under Swiss law. Neither plaintiff is incorporated, nor registered, as any form of society or trade union under any provincial or federal law.

[3] Mrs. Hamza brought the notice of motion relating to this appeal seeking, amongst other things, an order striking out the statement of claim on the basis that IASTD and ISMM lack the legal status necessary to commence the action. The Chambers Judge dismissed that application, and the appellant now appeals that order.

[4] This lawsuit arises out of and is closely related to a matrimonial property action involving Mr. and Mrs. Hamza. Mrs. Hamza alleges that in the early to mid-1970s, she and Mr. Hamza formed IASTD and ISMM to organize and conduct scientific conferences around the world. The conferences were conducted for profit which provided income for their family. Neither IASTD nor ISMM has ever been incorporated as a society in any jurisdiction. Mrs. Hamza states that prior to the commencement of the Hamza divorce and matrimonial property actions, these entities were always referred to by Mr. Hamza as family businesses. She claims that until the petition for divorce was commenced, she and Mr. Hamza made all of the decisions regarding the organization and promotion of any conferences, or society events, for both IASTD and ISMM, and at all times throughout, Mr. Hamza was the operating mind and will of the societies. It is her position that neither IASTD nor ISMM ever filed tax returns, or prepared or produced financial reports for the benefit of government or membership. She claims that Mr. Hamza treated IASTD and ISMM as his own. When IASTD and ISMM opened numerous bank accounts and investment accounts around the world, Mrs. Hamza says that the applications and banking resolutions authorized Mr. Hamza to deal with those accounts. She states he has used society money as his own, and included Canadian income from society investments as his own on his personal tax returns. She argues, therefore, that assets held in the names of IASTD and IS MM are owned *de facto* by Mr. Hamza and are therefore to be included as matrimonial property under the matrimonial property action.

[5] Mr. Hamza refused to answer questions respecting the societies during the course of the matrimonial property proceedings on the grounds that they are independent legal entities. He was ordered by the Court of Queen's Bench to produce all information and answer all questions about IASTD and ISMM. Mr. Hamza appealed from that order and that appeal was dismissed.

[6] The matrimonial property action was stayed by court order pending resolution of the within action.

[7] The narrow issue on appeal is whether an unincorporated foreign entity, recognized within its home jurisdiction as a legal person with status to sue, should be accorded similar recognition in Alberta. On the material before the court, it is not possible to determine the location of the various assets in dispute, or whether any of the assets are within the Province of Alberta. It was likewise impossible to ascertain whether the assets are movables or immovables. Many issues relating to the jurisdiction of the Alberta Court to determine title or

ownership of foreign property were not argued at appeal, are not dealt with in this judgment, and remain outstanding. Thus, while IASTD and ISMM may have status to commence the action, this judgment goes no further than that with respect to IASTD and ISMM's claim.

Status of a Foreign Entity to Sue

[8] The first step in determining the right of a foreign entity to sue involves the identification of the applicable law for making that determination. Determination of the proper law governing an issue is made through characterization of that issue as either procedural or substantive in nature. Procedural matters usually pertain to the machinery for enforcing a right by action in the courts and include, among other things, the form of the action, the proper parties to the action, available remedies, admissibility of evidence and determination of the proper court. In contrast, substantive matters usually relate to the existence or nature of a legal right: see *Block Brothers Realty Limited v. Mollard* (1981), 27 B.C.L.R. 17 (CA).

[9] The status of a party to sue has been characterized as a procedural issue. In *Regas Ltd. v. Plotkins,* [1961] S.C.R. 566, Martland J., in determining whether a creditor was properly entitled to maintain an action in Saskatchewan, stated at p. 571:

> The question is whether [the plaintiff] can maintain his action [in Saskatchewan] in his own name and that question, in my opinion, falls to be determined by the *lex fori,* for the question, in the circumstances of this case, is one of procedure and not of substance. It is not a question of the validity of the assignment, or of the capacity of the parties to it, but as to the proper parties to the proceedings in Saskatchewan, which is a question of procedure which should be governed by Saskatchewan law.

[10] This principle has been recently applied in other provinces: for example, see *Hal Commodities Cycles Management v. Kirsh* (1993), 17 C.P.C. (3d) 320 (Ont. Gen. Div.).

[11] Thus, the right of a foreign litigant to sue is properly determined by Alberta law. That law includes the Alberta rules relating to private international law applicable to foreign litigants.

Status to Sue Under Alberta Law Generally

[12] The appellant argues that to sue in Alberta, an entity must be either a person or a corporation, and that this requirement should apply equally to foreign and resident entities. The statement of claim does not allege an incorporated body and, in fact, the respondent acknowledges that IASTD and ISMM are not incorporated.

[13] Leaving aside the question of a foreign entity, in general, a resident entity has status to sue or be sued in Alberta if it is recognized under the statutory or common law as a natural or statutory person. The term natural persons simply refers to living beings, generally required to be of full age and mentally competent, but also includes aliens, nonresidents, convicts and accused persons, and in a representative capacity, mentally incompetent persons and infants.

[14] Statutory persons are non-living entities recognized by law as possessing legal personalities separate and apart from those of their constituent members. In Alberta, corporations are deemed legal persons by virtue of section 15(1) of the *Alberta Business Corporation Act,* S.A. 1981, c. B-15 which reads:

> 15.(1) A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.

[15] Societies duly registered pursuant to the *Societies Act,* R.S.A. 1980, c. S-18 are deemed to be corporations and are thus granted the status of a statutory person pursuant to section 10 of that *Act* which reads:

> 10. From the date of the certificate of incorporation, the subscribers to the application and the other persons that from time to time become members of the society are a corporation and have all the powers, rights and immunities vested by law in a corporation.

[16] Other statutorily recognized or juridical persons include the Crown (federal and provincial), as may be represented by the Attorney General, designated Ministers, officials or other entities depending on legislative provision, as well as foreign sovereigns and states.

[17] Generally speaking, subject to certain statutory exceptions, other entities which are neither natural nor statutory persons will lack the status to commence an action. Thus, unincorporated associations and clubs are not legal entities capable of suing or being sued: see *Re Cummings and Ontario Minor Hockey Association* (1979), 26 O.R. (2d) 7 (C.A.); *Ladies of the Sacred Heart* v. *Armstrong's Point Association* (1961), 36 W.W.R. 364 (Man. C.A.). Actions involving an unincorporated association must be brought in the name of the members involved, either personally or in a representative capacity.

[18] Having stated the general rule, the right to sue or be sued may be conferred upon certain unincorporated associations by statute, either expressly or by legal implication. For example, in Alberta, a trade union is a legal entity capable of suing or being sued, in its own

name, for limited purposes, by virtue of s. 23(1) of the *Labour Relations Act,* S.A. 1988, c. L-1.2 which states:

> 23(1) For the purposes of this Act, a trade union is capable of
>
> (a) prosecuting and being prosecuted, and
>
> (b) suing and being sued.

[19] Similarly, pursuant to Rule 80 of the *Alberta Rules of Court,* any two or more persons claiming to be entitled or alleged to be liable as partners in respect of a cause of action and carrying on business within the jurisdiction may sue or be sued in the name of the firm of which they were partners at the time when the cause of action accrued. I note, however, Rule 80 does not deprive or release the legal persons behind the firm name from rights or liabilities which may arise from legal proceedings. The section simply provides an administratively simple way of collectively naming all individuals behind the partnership. So, while the action is brought in the name of a firm, there is behind that name legal persons who do have status to sue. It must be realized that what is essential is that some legal entity exists who is subject to court directions, judgments and costs. With respect to Rule 80, the law relating to partner liability would identify those legal entities responsible, and on whose behalf suit is really brought.

[20] In this case, the appellant notes there is no statutory exception to the general rule which would allow an unincorporated resident entity, similar in nature to the respondents, to sue. This appears to be an accurate assessment of the law in this regard and were the respondents resident in Alberta, they would lack the status to commence an action. However, as the respondents are foreign litigants, it is necessary to consider Alberta private international law rules.

Alberta Law Relating to Foreign Litigants

(i) Foreign Persons

[21] The term person is not defined by the *Alberta Rules of Court or* the *Alberta Business Corporations Act, supra*. A definition provided by the *Interpretation Act,* R.S.A. 1980, c. I-7, s. 25(1)(p) states a person "includes a corporation and the heirs, executors, administrators or other legal representatives of a person". Nothing in the legislative enactments of Alberta or the common law appears to limit the definition of a person to Alberta or even Canadian residents.

[22] In relation to natural persons, it is trite law to state that a foreign individual has status to commence an action in Alberta. An alien or foreign person (excluding enemies of Canada) who voluntarily comes before an Alberta court undoubtedly has the legal status to sue or be sued; see *Porter v. Freudenberg,* [1915] 1 K.B. 857 (C.A.) at 867-69. Whether the court has jurisdiction to hear the cause or grant the relief sought is another issue. As mentioned earlier, that issue is not the subject of this appeal.

(ii) Foreign Corporations

[23] The capacity of a foreign corporation to commence and maintain legal proceedings in Alberta seems to be constrained only by section 282(1) of the *Alberta Business Corporations Act, supra,* which reads:

> 282(1) An extra-provincial corporation while unregistered is not capable of commencing or maintaining any action or other proceeding in any court in Alberta in respect of any contract made in the course of carrying on business in Alberta while it was unregistered.
>
> [emphasis added]

Section 282(1) curtails only legal action relating to contracts made in the course of carrying on business in the province. One might infer that unregistered foreign corporations are competent to commence legal action relating to any other substantive rights other than those derived from contracts "made in the course of carrying on business in Alberta". The prohibition is not to status itself. Rather, only particular causes are prohibited.

[24] This issue was dealt with by the Alberta Court of Queen's Bench in Williston *Basin State Bank v. Shearer and Wall* (1983), 28 Alta. L.R. (2d) 341. The case involved an American bank which sued on guarantees signed in Alberta by Alberta defendants. The defendants applied to dismiss the action by reason of s. 196(1) of the *Companies Act,* R.S.A. 1980, c. C-20, the wording of which was equivalent to s. 282(1) of the *Business Corporations Act, supra*. In interpreting the intent of s. 196(1), Decore J. stated at p.344:

> The important question though that must be answered concerning s. 196(1) of the Act is the effect of the words "in respect of as contained in the Act. In my opinion, the placement of those words indicates that a foreign company which is not registered in the province of Alberta cannot commence action in respect of or concerning a contract which was entered into in full or in part in the province of Alberta. This does not prevent a foreign company from commencing and maintaining an action in the province of Alberta concerning a contract which was not entered into in the province either in whole or in part.
>
> [emphasis added]

[25] This proposition was also recognized by the Saskatchewan Court of Appeal in *Alexander Hamilton Institutes v. Chambers,* [1921] 3 W.W.R. 520. In that case the plaintiffs had proceeded to carry on business in Saskatchewan without prior registration as required by a provincial law similar in substance to s. 282(1) of the *Alberta Business Corporations Act.* Their action to enforce a contract made in the course of business was dismissed by the court for their failure to comply with the strict statutory registration requirements. However, in considering the general status of a foreign corporation to sue in the province, Turgeon J. stated at p.521:

> In the first place, the general rule is that while foreign corporations may sue in the Courts of this province, they must prove that they are incorporated in the foreign country. (*National Bank of St Charles v. De Bernales,* 1 Car. & P. 569, 1 R. &M. 193).

[26] This general rule was relied upon by the same court in the later case of *Bondholders Security Corporation v. Manville,* [1933] 4 D.L.R. 699 (Sask. C.A.). The foreign corporate plaintiff in that action sought relief against persons domiciled in the province upon contracts made in another country. The court found that proof of the plaintiff's incorporation under the law of the country in which it alleged to be incorporated was sufficient to allow it to sue in the province notwithstanding it was neither licensed nor registered in the province. This principle has also long been recognized by the English courts: see *Henriques v. Dutch West India Co.* (1728), 2 Ld. Raym 1532 at 1534-35; *Lazard Brothers & Co. v. Midland Bank Ltd.,* [1933] A.C. 289 (H.L.) at 297.

[27] Statutory and common law suggest therefore, as a general rule, that a foreign corporation, duly incorporated under the laws of a recognized foreign state and given power to sue, may sue in a common law province in its corporate name.

[28] Questions concerning the status of a foreign corporation within its home jurisdiction fall to be determined, on the analogy of natural persons, by the law of the place of formation of the corporation: see *Skyline Associates v. Small et al.,* (1974), 50 D.L.R. (3d) 217; *Von Hellfeld v. E. Rechnitzer,* [1914] 1 Ch. 748; J.G. Castel, *Canadian Conflict of Laws:* 3rd ed. (Toronto: Butterworths, 1993) at 534. For the sake of consistency, I will refer to the place of formation, place of incorporation, or domicile of the corporation as the "home jurisdiction". This status must be specifically pleaded by the party relying on it and proven as a matter of fact. Expert testimony is often used to meet this burden.

[29] The status to sue afforded foreign corporations is possibly founded upon general principles relating to the comity of nations. These principles, as they relate to the recognition of foreign corporations, were considered by the Supreme Court of Canada in *Canadian Pacific Railway v. Ottawa Fire Insurance Co.* (1907), 39 S.C.R. 405. Idington J., in considering the right of an Ontario company to contract abroad, stated at p.447:

> What happens, once the corporation is thus created, is, that other provinces and foreign states either by the comity of nations, or perchance, in case of treaty, by force thereof, recognize the existence of such a corporate body as a legal entity, doing the like kind of business for the carrying on of which it was created.
>
> Its contracts are thus recognized, when made beyond, or in relation to property beyond, the bounds of its parent province. It may plead and be impleaded beyond such bounds, as effectually as in its home.
>
> It may, however, by the laws of the foreign province, or state, where it attempts to carry on business, be prohibited in whole, or in part, or conditionally.
>
> ...
>
> Once incorporation, for some specific purpose, within the field or sphere of subjects assigned to the exclusive jurisdiction of a province, has been effected, the comity of nations may and generally does all that is required, beyond the province.
>
> This doctrine of the comity of nations, carrying with it, subject to those limitations I have mentioned, this recognition of a foreign corporation, is as firmly embedded in, and an ever growing part of, international law as anything can well be.
>
> Short of treaties, securing a more definite basis, these legal entities, of the greatest nation, and the humblest province, stand on the same level, and receive but the same sort of recognition from a foreign state.
>
> This comity is but an extension of the earlier recognition of the individual foreigner.
>
> The corporation is but a combination of individuals.
>
> The recognition abroad of either the individual or the corporation, is begotten of the needs of civilized men. The alien individual or corporation formerly had no rights abroad.

(iii) Unincorporated Foreign Entities

[30] *Robinson Engineering Co. Ltd. et al. v. Wasabi Resources Ltd.* (1988), 32 C.L.R. 243 (Alta. Q.B.) appears to be the only reported Alberta case in which the status of an unincorporated foreign entity to sue is considered. In that case, the foreign plaintiffs brought a motion to amend their statement of claim by naming individuals as plaintiffs rather than a trust. The plaintiffs conceded at the outset of argument that, notwithstanding they were legal entities in their home jurisdiction, they were incapable of commencing an action in Alberta in

the trust name. The court was not required, therefore, to consider the merits of the issue of status to sue. The issue has, however, been considered in other jurisdictions.

[31] In *Skyline Associates v. Small et al., supra*, a decision of the British Columbia Supreme Court, a B.C. defendant attempted to strike the action brought by a Washington plaintiff on the basis the plaintiff had no status to sue in B.C. under its own name. The plaintiff was a partnership which did not carry on business in the province. The court seems to accept, as a general proposition, that a foreign legal entity, separate and distinct from its constituent members, is in the same position as a foreign corporation and may sue in British Columbia in its own name. Aikins J., whose decision was affirmed by the Court of Appeal, 56 D.L.R. (3d) 471 (B.C.C.A.), stated at p. 219:

> The position then is that in the present matter there is only one issue before the Court. It is this: is Skyline Associates, by the law of the State of Washington, a juridical person, separate and distinct from its members? If it is, then Skyline Associates may sue in its firm name...

Mr. Justice Aikins ultimately determined, following consideration of Washington law, that the plaintiff was not recognized by the laws of its home jurisdiction as a juridical person, separate and distinct from its members, and thus it could not be accorded status to sue in British Columbia.

[32] The general principles in *Skyline Associates* relating to recognition of foreign juridical persons were applied by the same court in *United Services Funds v. Richardson Greenshields of Canada Ltd.* (1987), 16 B.C.L.R. (2d) 187 (S.C.). In issue was the capacity of a Massachusetts business trust to sue in its own name in British Columbia. Gibbs J., as he then was, stated at p. 189:

> There is no provision in the statutes of this jurisdiction or the rules of this court under which the plaintiff trust can sue in the name which it has adopted for business purposes. However, if it has standing or capacity to sue in the trust name in its "home" jurisdiction, it may commence and conduct an action in that name here. That is the gravamen of the decision of Aikins J. (as he then was) in *Skyline Associates* ...

This reasoning seems to allow status to sue in a name, even if the entity is not an entity separate and distinct from its members.

[33] Reasoning similar to that found in the above quoted B.C. cases also appears to have been the basis of the decision in the earlier Quebec case of *Society Brand Clothes Ltd. v. Amalgamated Clothing Workers of America,* [1931] S.C.R. 321. However, it must be noted

that the reasoning in this case was dependent on Article 79 of the Code of Civil Procedure which reads as follows:

> All foreign corporations or persons, duly authorized under any foreign law to appear in judicial proceedings, may do so before any court in the province.

The Court held that the foreign labour union was not a suable entity in Quebec as it was not a juridical person under the laws of its home jurisdiction.

[34] A general statement of the law in Canada relating to the status of foreign corporations to sue in Canada is offered by J.G. McLeod in *The Conflict of Laws,* (Calgary: Carswell, 1983) at p. 455:

> The willingness of the local courts to recognize the status of the foreign corporation as defined by the domicile (or place of formation) may be pointed up in connection with the recognition of legal personality. In certain systems of law an association of persons may be endowed with the attribute of a legal personality without express legal incorporation or formal recognition. In a number of continental countries partnerships and other unincorporated associations are regarded as persons or separate legal entities distinct from the members of the association in law. In dealing with such associations, the status granted to the association by the law of the country where the association was formed (the domicile) will be recognized by the local courts.

Mr. McLeod relies on the *Skyline Associates* case and two early English cases, *Wenlock v. River Dee Co.* (1883), 36 Ch. D. 675, affd. 10 App. Cas. 354 (H.L.) and *Von Hellfeld v. Rechnitzer (E.) & Mayer Freres & Co.*, [1914] 1 Ch. 748 (C.A.) in support of this position.

[35] The status of a foreign entity to sue in another jurisdiction was also addressed by the House of Lords in *Arab Monetary Fund v. Hashim,* [1991] 2 A.C. 114. The issue before the court was whether an organization created by agreement between certain Arab states and Palestine should be afforded status to sue in the English courts. A decree of the foreign states had conferred legal personality on the organization and created a corporate body. The Court held that by the comity of nations, the courts of the United Kingdom could and should recognize the organization as being entitled to sue in the United Kingdom. Lord Templeton appears to cite, with approval, at p. 161, the following proposition drawn from Australian case law:

> In *Chaff and Hay Acquisition Committee v. J.A. Hemphill and Sons Pty. Ltd.* (1947) 74 C.L.R. 375, a committee of four persons created under a statute of South Australia to acquire property in its collective name and to sue and be sued in its collective name was held by the High Court of Australia not to be a corporation but though unincorporated it was a legal entity in South Australia and as such was entitled to recognition outside the state in accordance with the principle of the comity of nations. McTiernan J. said

> succinctly at p. 390: "The courts of one country give recognition, by a comity of nations, to a legal personality created by the law of another country". The courts of the United Kingdom can therefore recognise the [organization] as a legal personality created by the law of the [foreign states].

[36] It is important to note that the foreign entity in *Arab Monetary Fund, supra,* was incorporated in the foreign states. The strict precedential value of the case is therefore limited to the proposition that a foreign entity incorporated by a foreign state will be recognized by the courts of the United Kingdom. However, the proposition of law drawn from the case of *Chaff and Hay Acquisition Committee, supra,* appears to be persuasive dictum in support of courts extending recognition to all foreign entities which have legal status to sue under the law of their domicile. The fact the foreign entity in *Chaff and Hay Acquisition Committee* was not incorporated, but was nonetheless a legal entity by the laws of its home jurisdiction, is particularly relevant in this regard.

Conclusion

[37] Overall, the law tends to support a granting of status in cases where the entity in question is recognized as a legal or juridical person by the laws of its home jurisdiction, in the sense of having status to sue. The principle of comity of nations appears to further strengthen that position.

[38] The appellant suggests such broad recognition of foreign entities by Alberta courts could result in preferable rules for foreign litigants over Alberta litigants. A foreign unincorporated entity could be extended a status denied a comparable domestic entity. Superficially, this may appear to be the case. However, the appellant overlooks what is, in my view, the main concern. The entity before the court must be capable of assuming fully the rights and liabilities of a legal person. Someone must be answerable for judgments, court directions, costs, etc. The court can satisfy itself this concern will be met if the foreign litigant is proven to be a legal person, separate and apart from its members, under the law of the foreign jurisdiction. If the foreign jurisdiction recognizes an entity, such as a partnership, as a legal entity with status to sue, even if it is not for all purposes an entity separate and apart from its members, the above concern can still be satisfied if the law of the foreign jurisdiction is such that the actual legal persons who are responsible and subject to the court's directions and judgments are readily identifiable. For example, if the entity were a foreign partnership, able to sue in the partnership name under foreign law and the foreign law provides that the partners are liable for the actions of the partners, the concern may be satisfied. This court is

entitled to know that its directions and judgments are enforceable against identifiable legal persons. If satisfied of that, by proof of the foreign law, I am of the view the foreign entity with status to sue in its home jurisdiction should be allowed to sue in Alberta. If a foreign litigant is incapable of proving it has status to sue in the foreign jurisdiction, or that there are identifiable legal persons who are answerable for court directions and orders against the foreign litigant, then the court should require that proper parties be named.

[39] Moreover, the practice rules in Alberta are broad enough to address concerns which the appellant raises relating to an award of costs against unsuccessful litigants. The *Alberta Rules of Court* provide for security for costs from foreign litigants.

[40] In conclusion, the status of IASTD and ISMM to sue in Alberta is, at the very least, a triable issue of law, subject to proof. The respondent societies in this appeal correctly state in paragraphs 11 and 12 of their supplemental factum that the court may strike an action only where it is "plain and obvious" and "beyond any reasonable doubt" that there is no genuine issue for trial: see *Hunt* v. *Carey Canada Inc.*, [1990] 6 W.W.R. 385 (S.C.C.); *Korte* v. *Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337 (CA). The plaintiffs in this action might very well be accorded legal status to pursue their claim should they prove their existence as a legal person under Swiss law at trial. If they are the wrong party, they have sought leave to substitute named persons. Thus, I agree with the Chambers Judge that the statement of claim should not have been struck at this stage of the proceedings due to lack of status. I note the Chambers Judge found in his reasons that IASTD and ISMM had capacity to sue. In my view "capacity" must be understood as limited to the right to proceed to prove they do have status to sue in Alberta. It may well be this narrow issue should be determined prior to any substantive issue of ownership in the property. But the way to do that is not by application to strike on the basis of the pleadings.

Other Related Jurisdictional Issues

[41] As mentioned previously, many other jurisdictional issues were not raised. Is the property in Alberta? If not, can Alberta determine title to such property? Such questions may, in turn, depend on the classification of the property. Is it movable or immovable? What law is determinative of the classification? Many questions arise with respect to the independent action of IASTD and ISMM which are not dealt with in this appeal.

Consolidation of Actions

[42] The last issue relates to whether the action of IASTD and ISMM should be tried prior to the matrimonial property action. Counsel for the respondent acknowledged that the claims of IASTD and ISMM are brought solely as a result of the issues raised in the matrimonial property action. They concede they could have applied to be added as interested parties to the matrimonial property action and, in my view, that is the more appropriate step in order to avoid multiplicity of proceedings. At the hearing of this appeal, counsel for IASTD and ISMM agreed that we were at liberty to consolidate this action with the matrimonial property action for the purpose of determining the issue of ownership of property if counsel for Mrs. Hamza preferred and we considered it more appropriate. We have not heard from her counsel in that regard.

[43] Certainly, in the determination of the matrimonial property action, Mrs. Hamza is entitled to full participation in establishing the value of any assets owned by Mr. Hamza, either directly or indirectly. She has already had to resort to this court once for an order directing full disclosure by Mr. Hamza. Her rights to full participation and disclosure should not be hampered in any way. Moreover, if Mr. Hamza has so conducted his affairs that assets to which he once had full access have been placed in another name, that is a relevant consideration in any matrimonial property action.

[44] Yet Mrs. Hamza's interest in an independent property action between Mr. Hamza and IASTD and ISMM may be limited, as her claim is not solely one of existing, direct title. Counsel for IASTD and ISMM agreed she should have full rights to participate in the title action. She is interested in all the facts surrounding those assets and the manner with which they have been dealt. His conduct in dealing with assets may be one of the considerations that would prompt an unequal division of matrimonial property in her favour. Notwithstanding there may be issues with respect to an Alberta court's power to determine title and assets outside the jurisdiction, the court has the right to deal with Mr. Hamza and the matrimonial assets. It is open to Mr. Hamza to raise as a defence his non-ownership of certain assets. That can be done in the property action. If IASTD and ISMM can prove they are legal persons within the foreign jurisdiction they can be added as an interested party in the matrimonial action as they may have an interest in any order that would direct Mr. Hamza to deal with property to which they claim title. It was conceded that the only reason for the IASTD and ISMM actions is the matrimonial property action.

[45] In my view, the facts relating to all the dealings surrounding use and title to the property in question are relevant in the matrimonial property action, and a trial of title prior to that action will simply result in a multiplicity of proceedings, and potential delay and prejudice to the matrimonial claim, a claim which already has a litigious history. I vacate the order allowing for the trial to title to proceed separately in advance of the matrimonial property action.

[46] Counsel for the respondents conceded that the issue of status could and would have to be proved at a trial. He also agreed that he was flexible as to the manner of proceeding and that being added to the matrimonial cause was a possibility, as was consolidation of the two actions for trial on that issue.

[47] In view of counsel's position, I direct that IASTD and ISMM be added as parties to the matrimonial action. The issue of their status to participate will be an issue to be tried in that action, either at the commencement of the trial or in a trial of an issue prior to the trial of the main action. That decision is left to the case management judge. If status is proven, they will have the right to participate as an interested party in the matrimonial property action. Duplicitous litigation can be avoided, and yet the needs of the parties can be met, particularly when the respondents acknowledge that their interest in proceeding relates solely to the matrimonial property action.

[48] In summary, the appeal of the application to strike out the statement of claim is dismissed. With respect to consolidation, the appeal is allowed, in part, and this matter is referred back to the case management judge to deal with the issues in litigation between Mr. and Mrs. Hamza and the two entities known as IASTD and ISMM.

JUDGMENT DATED at CALGARY, Alberta,
this 26th day of January,
A.D. 1995

TAB 5

Citation: JTI-MACDONALD v. AG-BC ET AL
2000 BCSC 0312

Date: 20000221
Docket: C985777
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JTI-MACDONALD CORP.

PLAINTIFF

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

DEFENDANT

Docket: C985780
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

IMPERIAL TOBACCO LIMITED, a division of IMASCO LIMITED

PLAINTIFF

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

DEFENDANT

Docket: C985781
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ROTHMANS, BENSON & HEDGES INC.

PLAINTIFF

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

DEFENDANT

Docket: C985776
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

PLAINTIFF

AND:

IMPERIAL TOBACCO LIMITED, IMASCO LIMITED, BRITISH AMERICAN TOBACCO (INVESTMENTS) LTD., B.A.T. INDUSTRIES p.l.c., BRITISH AMERICAN TOBACCO p.l.c., BROWN & WILLIAMSON TOBACCO CORPORATION, AMERICAN TOBACCO COMPANY, B.A.T. #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, ROTHMANS, BENSON & HEDGES INC., ROTHMANS INC., ROTHMANS INTERNATIONAL LIMITED, ROTHMANS INTERNATIONAL p.l.c., ROTHMANS INTERNATIONAL N.V., ROTHMANS #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, PHILIP MORRIS COMPANIES INC., PHILIP MORRIS INCORPORATED, PHILIP MORRIS INTERNATIONAL INC., PHILIP MORRIS #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, RJR-MACDONALD INC., R.J. REYNOLDS TOBACCO COMPANY, RJR NABISCO INC., R.J. REYNOLDS TOBACCO INTERNATIONAL INC., RJR #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, LIGGETT GROUP INC., CANADIAN TOBACCO MANUFACTURERS' COUNCIL, THE COUNCIL FOR TOBACCO RESEARCH - U.S.A. INC., THE TOBACCO INSTITUTE INC.

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HOLMES

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Counsel for the Defendants, Philip Morris Companies Inc., Philip Morris Incorporated and Philip Morris International Inc., in Action No. C985776:	D. Ross Clark and Cynthia A. Millar
Counsel for the Defendants, R.J. Reynolds Tobacco Company and RJR Nabisco Inc., in Action No. C985776:	Jack Giles, Q.C., Jeffrey J. Kay and Ludmila B. Herbst
Counsel for the Defendants, The Council for Tobacco Research-U.S.A. Inc., and The Tobacco Institute Inc., in Action No. C985776:	Richard B.T. Goepel, Q.C. and Kathryn Seely
Place and Date of Trial:	October 5-8, 12-15, and 18 - 22, 1999 Vancouver, B.C.

TOBACCO ACTION

[1] The three actions for trial concern the constitutional validity of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 1997 c.41 [the "*Act*"]. The plaintiffs in the three actions are named defendants ["manufacturers"] in the Supreme Court of British Columbia, Vancouver Registry Action No. C985776 commenced by Her Majesty the Queen in Right of British Columbia (the "government action") pursuant to the statutory cause of action conferred by Section 13 of the *Act*. They are the Canadian manufacturers of tobacco products whose products have been marketed in British Columbia.

[2] The plaintiffs seek declaratory judgments that the *Act* is *ultra vires* the Constitution of Canada and consequently of no force and effect.

[3] The Council for Tobacco Research-U.S.A. Inc. and Tobacco Institute, Inc. ["Tobacco Institute"]; British America Tobacco p.l.c, British American Tobacco Investments, British American Tobacco Industries ["B.A.T."]; Brown & Williamson Tobacco Corporation ["Brown & Williamson"], American Tobacco Company; and Phillip Morris Companies Inc., Phillip Morris Incorporated and Phillip Morris International Inc.; collectively termed the "*ex juris* defendants", are defendants named in the government action who have been served *ex juris*.

[4] The *ex juris* defendants have motions pending pursuant to Rule 13(10) of the *Rules of Court* to set aside service of the Writs of Summons and Statements of Claim but by agreement they appear in these proceedings to argue in support of the constitutional invalidity of the *Act*. The balance of their Rule 13 motions are to be heard at a later date.

[5] The manufacturers' and the *ex juris* defendants' attack upon the *Act* is broadly based and essentially tripartite. They allege the *Act* exceeds the territorial jurisdiction of the Province; that it is an unconstitutional interference with judicial independence; and that it violates the rule of law protection of equality under the law and against retroactive penal legislation.

LEGISLATIVE HISTORY OF THE *ACT*

[6] The *Tobacco Damages Recovery Act*, S.B.C. 1997, c.41 received Royal Assent July 28, 1997. It was to be brought into force by regulation. By virtue of the *Interpretation Act*, R.S.C. 1985, c.I-21, only the title of the *Act* and the commencement section came into force July 28, 1997 and the balance of the *Act* remained unproclaimed.

[7] For convenience, I refer hereafter to the manufacturers and the *ex juris* defendants collectively as "the manufacturers".

[8] The *Act* remained dormant for approximately a year. On July 30, 1998 the *Tobacco Damages Recovery Amendment Act*, S.B.C. 1998, c.45, which provided for extensive amendments to the original *Act*, received Royal Assent. The original *Act* and the Amendments were brought into force by Regulation, November 12, 1998 [Order in Council No. 1357]. The three manufacturers' actions now being tried were commenced immediately thereafter.

[9] The status of the *Act* following the amendment was that Section 1 and Sections 13 to 19 were added to the title and the commencement section (s.20) previously in force. Sections 2 to 12 of the original *Act* remained unproclaimed.

[10] The *Act* was further amended by Sections 61 to 65 of the *Miscellaneous Statutes Amendment Act* (No.3), 1999. On July 16, 1999, Royal Assent was given and on July 19, 1999, Order in Council No. 870 brought Sections 61 to 65 into force. The unproclaimed Sections 2 to 12 of the original *Act* were repealed.

[11] It is not contentious that the Province has an exclusive right to make laws in respect of Property and Civil Rights in the Province; in respect of the Administration of Justice in the Province including matters of Civil Procedure in the Courts; and generally all matters of a merely local or private nature in the Province. [Sections 92(13),(14), and (16) of the *Constitution Act, 1867* (U.K.) 30 & 31 Victoria, c.3, rep R.S.C. 1985 App. II No. 5].

[12] The *Act* creates a new civil cause of action in British Columbia permitting the government to directly recoup a cost incurred on behalf of another and in addition deals substantively with rights and obligations. It is therefor legislation that deals with "Civil Rights in the Province" under s.92(13). [***General Motors of Canada Ltd. v. City National Leasing*** (1989), 58 D.L.R. (4th) 255 (S.C.C.); ***Attorney General (Ontario) v. Scott,*** [1955] 1 D.L.R. (2d) 433 (S.C.C.)].

[13] There are several provisions of the *Act* directed to "Procedure in Civil Matters" coming under s.92(14). [***Reference re Status of the Supreme Court of British* Columbia** (1882), 1 B.C.R. 243 (S.C.C.); ***Re Joseph Jacob Holdings Ltd. and City of Prince George*** (1980), 118 D.L.R. (3d) 243 (B.C.S.C.); ***Hunt v.***

T&N plc, [1993] 4 S.C.R. 289 at 320, 109 D.L.R. (4th) 16 at 37].

[14] The *Act* may also be said to relate to an aspect of the organization and delivery of health care within a Province which comes within s.92(16).

[15] One illustration of prior Canadian legislation that provides government a direct cause of action to recoup from a third party costs incurred on behalf of another is found in the *Canada Shipping Act*, R.S.C. 1985, c.S-9, at ss.284-286. The federal government is accorded a right of action to recover from a ship owner, regardless of fault, the medical expenses paid to treat an illness of a seaman.

[16] In fact, industry specific liability laws have long existed in the area of worker compensation legislation in England, U.S.A., and Canada.

[17] A number of British Columbia statutes currently have liability provisions relating to specific industries, including:

Mines Act, R.S.B.C. 1996, c.293, s.17

Pipeline Act, R.S.B.C. 1996, c.364

Securities Act, R.S.B.C. 1996, c.418, at s.131

Livestock Act, R.S.B.C. 1996, c.270, at s.11

Architects Act, R.S.B.C. 1996, c.17, at s.66

[18] The *Act* is modelled in significant degree on the State of Florida's *Medicaid Third-Party Liability Act*, 409.910 Fla.Stat. (1995). On challenge in the Supreme Court of Florida, in ***Agency for Health Care Administration et al v. Associated Industries of Florida Inc. et al*** 678 So. 2d 1239 at 1257(Florida Supreme Court 1996), the Court upheld the statutory cause of action conferred on the state to recover health care costs on the basis that the state "… must have the freedom to craft causes of action to meet society's changing needs".

[19] The arguments of the manufacturers here are predicated upon alleged constitutional inconsistencies that require the *Act* be invalidated entirely rather than remedied by severance or reading down. The Attorney-General without conceding that *Act* is unconstitutional in any way takes the position that reading down or severance could be appropriate in the event certain aspects of the *Act* are found to be unconstitutional.

[20] The provisions of the *Act* have application to actions brought by the government and provide for a direct action for recovery of the cost of health care benefits incurred on

behalf of an individual insured person, a number of individual insured persons or "on an aggregate basis".

[21] It is the statutory cause of action under s.13(5)(b) in respect of the "aggregate action" that is the focus of the present declaratory actions. That is essentially because the provisions of the *Act* that formulate an aggregate cause of action are a radical departure from traditional common law damage actions requiring proof of individual causation and damages.

[22] All arguments advanced cannot necessarily be segregated to the three main headings of constitutional analysis. There is some overlap and a flow of reasoning and analysis in common.

INTERFERENCE WITH INDEPENDENCE OF THE JUDICIARY

[23] The manufacturers claim that the *Act* constitutes an impermissible interference by the government with the judicial independence of the Court. The manufacturers argue that the effect of the scheme allowing the government an aggregate action for recovery of health care costs interferes with the Court's right to hear from relevant witnesses and receive the evidence necessary and appropriate to a determination of the facts. The manufacturers perceive the *Act* to involve the Court in a process that gives the appearance of partiality to the government's case and is, in reality, inherently unfair.

[24] The argument of the manufacturers is grounded upon interference with judicial function and though centered upon the principle of judicial independence also raises issues as to separation of powers, the rule of law, and inviolability of the core judicial function of fact-finding, which in combination renders the *Act* constitutionally invalid.

[25] The principle of independence of the functions of the judiciary is grounded in the preamble to the *Constitution Act* and Section 96. Chief Justice Lamer traced the origins of judicial independence in ***Reference Re: Public Sector Pay Reduction Act***, [1997] 3 S.C.R. 3 at 76, 150 D.L.R. (4th) 577:

> The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the *Act of Settlement* of 1701. And as we said in *Valente, supra,* that Act was the "historical inspiration" for the judicature provisions of the *Constitution Act, 1867*. Admittedly, the Act only extends protection to judges of the English superior courts. However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms have grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

[26] And concluded at pp. 77-78 that:

> … the express provisions of the *Constitution Act, 1867*, and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. …

[27] The *Act* is specific legislation for the benefit of the government who is plaintiff in the recovery action commenced. A new and unusual statutory cause of action is created that incorporates specific evidentiary rules and procedures and targets only the tobacco industry.

[28] The *Act* gives the government:

> … a direct and distinct action against a manufacturer to recover the cost of health care benefits …
>
> [Section 13(1)].

[29] The action is neither a subrogated action of individual claims, nor is it a class action. [Section 13(2)]. It permits two separate and divergent routes by which the government may recover health care benefits:

> In an action under subsection (1), the government may recover the cost of health care benefits
>
> (a) that have been provided or will be provided to particular individual insured persons, or
>
> (b) on an aggregate basis, that have been provided or will be provided to that portion of the population of insured persons who have suffered disease as a result of exposure to a type of tobacco product
>
> [Section 13(5)(a) and (b)].

[30] The *Act* provides that if the government in an aggregate action proves, on a balance of probabilities, in respect of a type of tobacco product:

> (a) the defendant manufacturer breached a common law, equitable or statutory duty or obligation owed to persons who have been exposed or might become exposed to the type of tobacco product,
>
> (b) exposure to the type of tobacco product can cause or contribute to disease, and
>
> (c) during all or part of the period of the breach referred to in paragraph (a), the type of tobacco product, manufactured or promoted by the defendant manufacturer or the manufacturers

> related to the defendant manufacturer, was offered for sale in British Columbia
>
> [Section 13.1(1)(a), (b) and (c)].

[31] The Court must presume:

> 13.1(2) Subject to subsections (1) and (4) … that
>
> (a) the population of insured persons who were exposed to a tobacco product, manufactured or promoted by the defendant manufacturer or the manufacturers related to the defendant manufacturer, would not have been exposed to the product but for the breach referred to in subsection (1)(a), and
>
> (b) the exposure described in paragraph (a) caused or contributed to disease in a portion of the population described in paragraph (a).

[32] The manufacturers argue this shifts the onus to them to disprove the presumptions, while s.13(6) denies them access to the evidence necessary to rebut the inference:

> 13(6) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,
>
> (a) it is not necessary
>
> (i) to identify particular individual insured persons,
>
> (ii) to prove the cause of disease in any particular individual insured person, or

(iii) to prove the cost of health care benefits that have been provided or will be provided to any particular individual insured person,

(b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits to particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,

(c) no person is compellable to answer questions with respect to the health of, or the provision of health care benefits to, particular individual insured persons

[33] The manufacturers therefore allege that these legislative provisions allow the government, a party before the Court as plaintiff in the recovery action, to manipulate and interfere with the adjudicative process. More specifically, the manufacturers allege the inter-relationship of the sections of the *Act* structuring the aggregate form of action creates an interference striking at the core judicial fact-finding function, thus impairing the Court's ability to fairly determine the action. They rely upon judicial independence to safeguard against what they consider as legislative abuse.

[34] The manufacturers, as an ancillary argument, point to the lack of separation between the legislative and executive branches of government in the present circumstance. They allege the effect is that the government as a party to the action has conscripted the legislature to interfere with the independence of the trier of fact.

[35] The manufacturers' view the *Act* as the executive seeking a method to recover health care costs from the tobacco manufacturers by employing their controlling legislative capacity to create an entirely new cause of action. Clear and explicit language is required to extinguish rights that have been previously conferred. [***Wells v. Newfoundland*** (September 15, 1999), No. 26362 (S.C.C.), [1999] S.C.J. No. 50 (Q.L.) p.41-42].

[36] There is however no strict separation of powers doctrine in Canada. In any event, I do not accept that the *Act* does violate the separation of powers doctrine:

> There is no general "separation of powers" in the Constitution Act, 1867. The Act does not separate the legislative, executive and judicial functions and insist that each branch of government exercise only "its own" function. As between the legislative and executive branches, any separation of powers would make little sense in a system of responsible government; and it is clearly established that the Act does not call for any separation. As between the judicial and the two political branches, there is likewise no general separation of powers.

> [Peter W. Hogg, Constitutional Law of Canada (4th ed.) (Toronto: Carswell, 1997), p.190].

[37] In ***Reference re Secession of Quebec,*** [1998] 2 S.C.R. 217 at 233, 161 D.L.R. (4th) 185, the Court noted:

> … the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to s.96 courts.

[38] I accept that research by counsel for the Attorney-General disclosed only four cases attempting a challenge to the validity of legislation in Canada based on separation of powers and none succeeded on that ground. The most notable was ***Singh v. Canada (Attorney General),*** [1999] F.C.J. No. 1056 (T.D.) affirmed on appeal January 14, 2000 in ***Westergard-Thorpe et al v. The Attorney General of Canada,*** docket number A-426-99, Federal Court of Appeal.

[39] I do not accept as tenable the manufacturers' argument that the right to a fair trial is a component of the rule of law. Comparison to s.7 or 11(d) *Charter* rights, although not directly relied upon, is a poor analogy as the *Charter* does not guarantee property rights.

[40] In regard to economic interests within the context of a civil action:

> The omission of property rights from s.7 greatly reduces its scope. It means that s.7 affords no guarantee of compensation or even of a fair procedure for the taking of property by government. It means that s.7 affords no guarantee of fair treatment by courts, tribunals or officials with power over the purely economic interests of individuals or corporations. It also requires … that [liberty and security of the person] be interpreted as excluding economic liberty and economic security; otherwise, property, having been shut out of the front door, would enter by the back.
>
> [Hogg, *supra*, at p.1074; **Wells *v.* *Newfoundland***, *supra*].

[41] Madam Justice McLachlin, in ***MacKeigan v. Hickman***, [1989] 2 S.C.R. 796, 61 D.L.R. (4th) 688, noted a distinction between independence of the judiciary and impartiality of the judiciary:

> It should be noted that the independence of the judiciary must not be confused with impartiality of the judiciary. As Le Dain J. points out in *Valente v. The Queen*, impartiality relates to the mental state possessed by the judge; judicial independence, in contrast, denotes the underlying relationship between the judiciary and other branches of government which serves to ensure that the court will function and be perceived to function impartially. Thus the question in a case such as this is not whether the government action in question would in fact affect a judge's impartiality, but rather whether it threatens the independence which is the underlying condition of judicial impartiality in the particular case.

> [***Reference Re: Public Sector Pay Reduction Act***, *supra*; ***R. v. Beauregard***, [1986] 2 S.C.R. 56 at 84, (1986), 30 D.L.R. (4th) 481].

[42] Chief Justice Lamer noted in ***R. v. Lippe***, [1991] 2 S.C.R. 114 at p.139 "… the overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality.

[43] Chief Justice Dickson in ***R. v. Beauregard***, *supra*, described the principle of judicial independence as:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider - be it government, pressure group, individual or even another judge - should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.
>
> [***R. v. Beauregard***, p.420, para.71].

[44] A test to determine judicial independence emphasizing that the legislation must be viewed objectively from the standpoint of an informed reasonable person was proposed by Chief Justice Lamer in ***R. v. Valente (No. 2)*** (1983), 2 C.C.C. (3d) 417, 145 D.L.R. (3d) 452 (Ont.C.A.), [1985] 2 S.C.R. 673, 24 ED.L.R. (4th) 161, that:

> … a reasonable person, who was informed of the relevant statutory provisions, their historical

> background and the traditions surrounding them, after viewing the matter realistically and practically [would conclude that the tribunal or court was independent].
>
> [***R. v. Valente (No. 2)***, *supra*, at p.684].

[45] The Court in ***Canada v. Tobiass***, [1997] 3 S.C.R. 391, after considering these prior comments on how to determine whether the appearance of judicial independence has been maintained, formulated as a simple objective test:

> … whether a reasonable observer would perceive that the court was able to conduct its business free from the interference of the government and of other judges.
>
> [***Canada v. Tobiass***, *supra*, para.72].

[46] The manufacturers' central contention is that, where the government purports to go beyond creating a cause of action and enacts legislation which interferes with the fact-finding process required of the judge to determine the action, the judicial independence of the Court is compromised. The manufacturers' view is that the "blocking" provisions of s.13(6), restricting the admissibility of evidence, creates this impermissible effect.

[47] The manufacturers argue the legislature having dealt with the creation of a cause of action and necessary procedural matters then engages the judicial fact-finding function.

Having done so it may not immediately interfere and frustrate the independence of the judge in a core adjudicative function by keeping from him or her the evidence necessary to a fair decision.

[48] The manufacturers see the government's cause of action as founded upon a breach of duty to an individual or a group of individuals. The definition of the "cost of health care benefits" in s.1(1) of the *Act* relates to the treatment of an individual person. The definition of an "insured person" in the *Act* is "a person … provided with [or entitled to] health care benefits" [Section 1(1)].

[49] The plaintiffs analyze the government's aggregate cause of action as giving rise to four major issues of fact to be determined by the Court; regardless of the party upon whom the onus of proof lies:

1. What was the knowledge of the person or persons to whom the duty was owed as to the facts related to the acts or omissions, which are the basis of the alleged breach of duty?

2. Did any of the acts or omissions of the defendants cause individuals to start smoking, or fail to quit smoking?

3. Did smoking cause disease to individuals and did smoking cause the government to incur the health care costs claimed?

4. Were the health care costs incurred properly in all respects?

[50] The manufacturers, stressing the need in their view for proof in regard to "individual persons", argue that the pool of evidence available for the Court to determine these necessary factual issues consists of:

1. Direct evidence of the individuals who received health care;

2. Direct evidence of doctors and others involved in delivering the health care;

3. Other relevant direct evidence from persons relating to 1 & 2;

4. Health care records of the government and others;

5. Statistical evidence that correlates the direct and the documentary evidence.

[51] Section 13(6)(a)(i),(ii), and (iii) together provide that the government is not required to identify any particular individual insured person, to prove the cause of disease in any particular insured person, or to prove the cost of health care benefits provided to any individual insured person.

[52] Section 13(6)(b),(c),(d), and (e) together effectively bar access to records and evidence relating to individual insured persons.

[53] First the production of individual health care records is restricted:

> 13(6) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,
>
> …
>
> (b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits to particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,

[54] Secondly:

> 13(6) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,
>
> …
>
> (c) no person is compellable to answer questions with respect to the health of, or the provision of health care benefits to, particular individual insured persons[.]

[55] However the Court has a discretion and may on application of a defendant:

> 13(6)(d) despite paragraphs (b) and (c), … order discovery of a statistically meaningful sample of the documents referred to in paragraph (b) and the order must include directions concerning the nature, level of detail and type of information to be disclosed[.]

[56] Additionally, in any statistical sample ordered:

> 13(6)(e) if an order is made under paragraph (d), the identity of particular individual insured persons must not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons must be deleted from any documents that are disclosed.

[57] In sum, the manufacturers characterize s.13(6) as a "blocking" provision, effectively eliminating the defendants' access to direct evidence of the individuals the cost of whose health care benefits have been aggregated in the action. They view this as ensuring their inability to defend themselves in rebutting the onus shifted upon them. They urge these provisions demonstrate legislative interference, by preventing the Court receiving the evidence necessary to fairly perform its core adjudicative fact-finding function.

[58] They urge the effect of the provisions of the *Act* compels the Court to determine the facts on a fictional, statistical basis because the *Act* effectively bans any inquiry into the medical history of the actual individuals whose costs of health care benefits are aggregated. The manufacturers argue the Court is left without the ability to test the statistical

evidence of experts against the direct evidence of the persons who comprise the cohort from which samples are taken.

[59] The manufacturers argue the process mandated by the *Act* prevents and interferes with the ability to hear, test and weigh evidence on the issues to be decided and forces the trier of fact to rely on secondary hypothetical evidence of questionable accuracy.

[60] The concept of a constitutionally protected core judicial function was recognized by the Supreme Court of Canada in ***MacMillan Bloedel Ltd. v. Simpson***, [1995] 45 S.C.R. 725. At issue was s.47(2) of the *Young Offenders Act*, R.S.C. 1985, c.Y-1, which granted to the youth court exclusive jurisdiction in respect of *ex facie* contempt by a youth of any Court. A Superior Court was thus deprived of jurisdiction to deal with an *ex facie* contempt of its own Court.

[61] The Court held that the grant of jurisdiction to the youth court of the power to deal with contempt of a Superior Court was within the test for s.96 of the *Constitution Act, 1867*, in ***Re Residential Tenancies Act, 1979***, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554. The Court however was divided on the issue of whether it was constitutionally permissible to remove the contempt jurisdiction from the Superior Court.

[62] The majority of the Court, led by Chief Justice Lamer, held that where a non-section 96 body received a grant of exclusive jurisdiction which formed part of the core jurisdiction of a Superior Court it was constitutionally invalid.

[63] In ***MacMillan Bloedel Ltd. v. Simpson,*** *supra,* a specific jurisdiction of the Court was entirely removed. By contrast, an interference with jurisdiction by a concurrent grant to the youth court was insufficient to constitutionally invalidate the grant.

[64] In relation to the case at bar the Province clearly has power to legislate in the field of civil procedure. The facts of this case do not trigger s.96. There is no core jurisdiction of Court that is removed when it is directed by legislation in regard to evidentiary or procedural matters ancillary to a civil cause of action. The *Rules of Court* and *B.C. Evidence Act* are examples.

[65] I do not accept that the principle of judicial independence can be extended to a trier of fact in a civil action having an unfettered right to determine what evidence may be adduced.

[66] The provisions of the *Act* do not remove from the Court its function of finding the facts necessary to reach a decision. The fact-finding process may at most be said to suffer some interference or constraint as a result of procedural provisions, but I do not consider that inference impairment of a core judicial function.

[67] The manufacturers draw an analogy to the decision in ***R. v. Seaboyer,*** [1991] 2 S.C.R. 577 striking down the Rape Shield Law. Madam Justice McLachlin said at p.609:

> It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues. This goal is reflected in the basic tenet of relevance which underlies all our rules of evidence.
>
> ...
>
> In general, nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is probative should be received unless its exclusion can be justified on some other ground. A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial.

[68] The issue concerned a criminal law of general application. There was no reverse onus, and the application of the *Act* was specific not general. The restrictions in the

case at bar apply only to the government's ability to bring an aggregate action and do not apply to an individual action.

[69] The manufacturers also rely upon the recent decision of the Supreme Court of Canada in ***R. v. Mills***, [1999] S.C.J. No. 68 (Q.L.); 248 N.R. 101, concerning the constitutionality of ss.278.1 to 278.91 of the *Criminal Code* and the production of records in sexual offence proceedings. McLachlin and Iacobucci JJ. write at para.89:

> From our discussion of the [accused's] right to make full answer and defence, it is clear that the accused will have no right to the records in question so far as they contain information that is either irrelevant or would serve to distort the search for truth, as access to such information is not included with the ambit of the accused's right … However, the accused's right must prevail where the lack of disclosure or production of the record would render him unable to make full answer and defence. This is because our justice system has always held that the threat of convicting an innocent individual strikes at the heart of the principles of fundamental justice. However, between these extremes lies a spectrum of possibilities regarding where to strike a balance between these competing rights in any particular context.

[70] Certainly, the case at bar invokes the right of the manufacturers to make "full answer and defence", but the right applies to a set of facts significantly different from the position of an individual defending against an accusation of sexual misconduct in the criminal context. Moreover, as both

R. v. Seaboyer, *supra*, and ***R. v. Mills***, *supra*, clearly indicate, the threshold requirement that triggers any analysis of the content of the right to make full answer and defence is that the information sought must be relevant to the inquiry. But the relevance of the evidence is precisely what is disputed when access to individual health records is sought for the purposes of defending against an aggregate cause of action.

[71] I do not agree that the analysis of the manufacturers which focuses on evidence of insured individuals and the application of traditional rules regarding tort-based actions and conventional civil procedures may be fairly transferred to the statutory aggregate cause of action created under the *Act*.

[72] The aggregate action is intended to provide for relief where the traditional, individually oriented tort action does not realistically meet the need of a large-scale loss-recovery action, where very substantial numbers of people have been exposed to toxic substances said to have resulted in adverse health effects through non-observable means of causation.

> Fleming, "Probabilistic Causation in Tort Law" (1989), 68 Can. Bar. Rev. 661.
>
> Fleming, "Probabilistic Causation in Tort Law: A Postcript" (1991), 70 Can. Bar. Rev. 136.

[73] The legislature has accepted that the conduct of tobacco companies and the related effect of tobacco smoking on health has become a tort of a dimension which, to approach on an individual basis, is entirely uneconomic, an unreasonable strain on judicial resources, but may be fairly dealt with on an aggregate basis utilizing evidence based on statistical, epidemiological and sociological studies.

[74] The basic tenet that causation within a population may be more accurately identified statistically than by means of attribution of individual causation in a multiplicity of conventional tort-based actions appears sound.

[75] The use of statistical and epidemiological evidence is an essential aspect of an aggregate action. The question in issue becomes causation in the group rather than of any individual group member.

[76] It is important to note the *Act* provides only for the admission of the evidence. The credibility and weight remain for the trier of fact.

[77] The central focus of the argument of the manufacturers, that the *Act* is "unfair" and that the independence of the judge charged with deciding the facts becomes compromised, is

that s.13(6) severely restricts access to and use of particular evidence of individual group members.

[78] The argument of the manufacturers tends to mischaracterize the *Act* and fails to accord recognition of the main feature of an aggregate action. The group is not simply a collection of individual claimants such that proof is the product of the evidence supplied by each constituent member.

[79] The aggregated claims are at once a collection and a mixture in which individual identity is lost.

[80] The evidence, histories, and medical and health records of individuals within the population lose their individual relevance but assume a statistical relevance as part of the cohort of the larger group from which statistical conclusions are drawn.

[81] The most reliable and relevant evidence in an aggregated claim becomes statistical and epidemiological, and access to those forms of evidence is of import.

[82] As the individual records of members of the aggregate group have only statistical relevance the shielding of the identification of individuals prevents the action reverting to an individualized action permitting individual forms of discovery. The information in respect of the individuals

subsumed in the aggregate group has statistical relevance; their personal identification does not. In this case, there is sufficient reason for names being protected from disclosure.

[83] Recognizing however the statistical relevance and importance of the individual records, the *Act* provides the Court with the power to order a "meaningful sample" of the population and to control the detail required to be disclosed [Section 13(6)(d)].

[84] A "meaningful sample" is not defined in the *Act* and might therefore, in appropriate circumstances, approach the whole of the population.

[85] A similar direct and aggregate action to that contemplated by the *Act* was upheld in ***State of Florida et al v. The American Tobacco Company et al*** (October 18, 1996) (District Court Case No. CL 95-1466 AH). The enabling statute was there held defective because it prohibited disclosure of the identification of Medicaid recipients without providing a mechanism that would permit the manufacturers to challenge improper payments made to persons as the result of fraud, misdiagnosis or unnecessary treatment; the resulting prohibition thus amounted to an irrebuttable presumption regarding such payments. The provisions were struck down on

the basis of protection of "life, liberty and property" pursuant to due process under Florida law.

[86] This defect in the Florida statute however was later remedied by a mechanism for disclosure of records, subject to a restriction on the identification of individuals.

[87] That concept appears analogous in effect to the controlled disclosure allowed in section 13(6)(d) of the *Act*.

[88] The *Act* contains two rebuttable presumptions in regard to causation. When the government proves a breach of duty by a tobacco manufacturer it is presumed:

> 13.1(2) Subject to subsections (1) and (4) … that
>
> (a) the population of insured persons who were exposed to a tobacco product, manufactured or promoted by the defendant manufacturer or the manufacturers related to the defendant manufacturer, would not have been exposed to the product but for the breach referred to in subsection (1)(a), and
>
> (b) the exposure described in paragraph (a) caused or contributed to disease in a portion of the population described in paragraph (a).

[89] The first presumption is necessary to remove the need in an aggregate action to provide proof of individual causation. There is a rational connection between the facts that are

required to prove a breach of duty and the fact of exposure the presumption mandates.

[90] The reversal of onus in respect of a causation issue is an accepted remedial procedure. As Sopinka J. wrote in ***Snell v. Farrell***, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289 at 299:

> … If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives. …

[91] In ***Kripps v. Touche Ross & Co.*** (1997), 33 B.C.L.R. (3d) 254 (C.A.) the court held that a plaintiff alleging a negligent misrepresentation need not prove their decision or action would not have been made but for the misrepresentation. This is where there may have been a number of reasons of which the misrepresentation was only one.

[92] Another example where the general rule that a plaintiff must establish the reasonableness of a variation in proof of causation is found in ***Hollis v. Dow Corning Corp.,*** [1995] 4 S.C.R. 643, 129 D.L.R. (4th) 609. The Supreme Court of Canada held that a patient who suffered injury because of a manufacturer's failure to warn her doctor about the medical risks of a product did not have to prove causation by showing the doctor would have communicated the warning to her.

[93] Section 131 of the *Securities Act*, R.S.B.C. 1996, c.418 is an example of a statutory assumption of detrimental reliance once a misrepresentation is shown. The Court of Appeal in ***Sidhu Estate v. Bains*** (1996), 25 B.C.L.R. (3d) 41 (C.A.) held that upon establishing a misrepresentation which might reasonably lead to a claimed loss the onus shifts to the defendant to prove the misrepresentation was not in fact relied upon.

[94] It is the Attorney-General's position that the constitutional challenge is premature as there is no proper factual basis to test whether the challenged "blocking" provisions of s.13(6), after exercise of the Court's discretion as to a "meaningful sample", prevents access to any information relevant to a required factual decision. I agree that it would be preferable.

[95] The Court in ***R. v. Mills***, at paragraph 105, supports the view that constitutional complaint should not precede utilization of procedures the legislation may provide to access disputed records.

[96] I do not accept on present evidence that the inability to identify individual insured persons or to have unlimited access to the records of all insured persons unfairly prevents manufacturers from presenting evidence to rebut the

presumption that their breach of duty caused persons to be exposed to tobacco products.

[97] The manufacturers may present evidence as outlined by the Attorney-General in argument including:

> … direct and particularistic evidence of health officials, medical professionals and smokers themselves regarding what causes persons to smoke. They may bring expert medical, behavioural and psychological evidence, based on studies and surveys to support their claims about smoking behaviour - for example, to show that a portion, or all, of their customers would have smoked and would have incurred disease in any event, even if the Manufacturers had not breached any duty to them.
>
> [Attorney-General Brief, p.62]

[98] The second presumption, namely that exposure to tobacco causes disease, provides that if the government is able to establish a breach of duty by a manufacturer, and that exposure to a tobacco product causes disease it should be presumed the exposure to the product caused or contributed to disease in a portion of the population who were exposed to the product.

[99] The presumption provides that if exposure to a generic tobacco product causes or contributes to disease, it will be presumed that exposure to a specific type of that tobacco product also caused or contributed to disease in a portion of the population.

[100] The presumption eliminates the necessity of proof on a brand by brand basis. The presumption appears neither illogical nor unfair. Section 13.1(4) provides that the manufacturer may offer evidence in rebuttal. It may be assumed a manufacturer would be most familiar with the effects of his own product and have access to the necessary evidence to demonstrate a brand differential. [***Snell v. Farrell***, *supra*, Sopinka J., at p.300]:

> In many malpractice cases, the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary. …

[101] I do not accept that the impugned legislation here predetermines the result. The presumptions involved have a logical connection to the factual issues.

[102] The aggregate action, after resolution of issues of breach of duty, causation and disease, requires the government to introduce evidence as to cost of health care benefits in respect of those diseases.

[103] The *Act* requires the Court to determine the aggregate cost of health care benefits that have been provided after the date of breach and the defendants then become liable

on the basis of proportionality in market share. [Section 13.1(3)].

[104] An award is a matter of assessment by the Court. There is no award upon certification by the government as to the amount of the health care costs it has or will incur. The amount of any award is to be by assessment based upon the evidence. As in many tort actions the assessment would not be without difficulty or amenable to precise measurement. However, as Cory J.A. observed:

> The court, I believe, would be shirking its duty if it were to say that no damages should flow because of the difficulty of calculating and assessing such damages and that they are therefore too remote. An assessment of future loss of profits must, of necessity, be an estimate. … The task will always be difficult but not insurmountable. It poses no greater obstacle to a court than the assessment of general damages in a serious personal injury claim.
>
> [***Canlin v. Thiokol Fibres Canada Ltd.*** (1983), 40 O.R. (2d) 687 (C.A.) at 691].

[105] Equally, the "market" share theory appears a logical and fair method in an aggregate action to ensure that a defendant manufacturer is held responsible only for that portion of injury that represents their product's contribution to the market place.

[106] The provisions of the *Act* preclude a combination of market share and joint and several liability, the two being

THE RULE OF LAW

[110] The manufacturers argue that the *Act* breaches the equality rights and principles enshrined within the rule of law. They argue that the *Act* offends against both equality between subjects and between subject and Crown.

[111] It is also the manufacturers' position that if the *Act* is not compensatory in nature it is retroactive and penal, a designation rendering even legislation of a civil nature unconstitutional under the rule of law.

[112] The manufacturers complain the *Act* singles out tobacco manufacturers from all others and applies a different standard of product liability law in respect of them.

[113] They argue that inequality arises because the effect of the legislation permits a defendant manufacturer to be found liable without having committed any actionable wrong against anyone and to be required to pay large sums of money to the government which may have suffered no loss.

[114] In the result, a retrospective penalty occurs because the *Act* targets a specific group of politically vulnerable manufacturers based on past acts related to the manufacture, sale and use of tobacco products that have passed

beyond their control and are now associated with the payment of health care benefits.

[115] Section 11(g) of the *Charter* deals specifically with retroactive criminal offences and s.15 with aspects of equality rights under law. The manufacturers argue that protection to similar effect exists based on the rule of law. The manufacturers therefore do not rely directly on provisions of the *Charter*, rather they rely upon the rule of law as an integral aspect of the Constitution to invalidate the *Act*.

[116] The manufacturers argue that the rule of law, which is constitutionally entrenched, is a source of the prohibition on retroactive penal legislation and of equality rights. It is part of the foundation of the *Charter* and specifically referenced in its preamble.

[117] The rule of law is an unwritten component of the Canadian Constitution and without need for specific provision; it is taken to be "… a fundamental principle of the Canadian constitutional order." [***Reference re Manitoba Act (1870) s.23***, [1985] 1 S.C.R. 721 at 724, (1985), 19 D.L.R. (4th) 1, W.W.R. 385].

[118] That unwritten constitutional principles form part of the fabric of the Canadian Constitution is clear. As

expressed by Chief Justice Lamer, the provisions of the preamble to the *Constitution Act, 1867* provide "organizing principles" that may be used to "fill out gaps in the express terms of the constitutional scheme. [***Reference Re: Public Sector Pay Reduction Act***, at paras. 83 and 95].

[119] Section 52(2) of the *Constitution Act, 1982* does not purport to provide an exhaustive list of instruments defining the ambit of the Canadian constitution.

[120] Section 26 of the *Charter of Rights and Freedoms* expressly excludes the fact of express *Charter* rights "… denying the existence of any other rights or freedoms that exist in Canada".

[121] ***Reference re Secession of Quebec***, *supra*, affirms that there are unwritten rules that are considered an integral part of our Constitution.

[122] ***R. v. Beauregard*** recognized that judicial independence was passed to Canada as a constitutional principle by the language of the preamble to the *Constitution Act, 1867*.

[123] Our system of government has evolved to a system of constitutional supremacy rather than just parliamentary supremacy [***Reference re Secession of Quebec***].

[124] The manufacturers' position is that retroactive legislation obviously violates the rule of law, on which the Constitution rests, as it changes the law in respect of past events making discovery of law unascertainable until after the event.

[125] The rule against Bills of Attainder is suggested by the manufacturers to represent one of the component parts of an implied bill of rights. The manufacturers equate any non-compensatory view of s.13 of the *Act* as targeting tobacco manufacturers for punishment for acts that attracted no penalty at the suit of government at the time they occurred.

[126] Bills of Attainder are expressly prohibited under the *American Constitution Article 1*, s.9, CL.3. Although there is no equivalent written *Charter* or constitutional prohibition in Canada:

> … it would surely be unthinkable today that Parliament could enact a Bill of Attainder or a Bill of Pains and Penalties …
>
> …
>
> In England and in Canada, such methods of Parliamentary trial and punishment have passed into desuetude. As I have said, it may be assumed that, even apart from the Charter, such a method of finding guilt and imposing punishment would be generally regarded as beyond the power of Parliament in a country like Canada which has "a Constitution similar in Principle to that of the United Kingdom"
> …

> [*R. v. Bowen*, [1989] 2 W.W.R. 213 (Alta.Q.B.) at 259-60, aff'd at [1991] 1 W.W.R. 466 (Alta.C.A.); p.32 *Ex Juris* Brief].

[127] The experience in American law has been that governments should not be permitted to manipulate the form of proceeding and Courts have recognized that criminal prohibition in the guise of a civil statute will not succeed. [***Cummings v. Missouri***, 71 U.S. 277 (1866); and ***United States of America v. Lovett***, 328 U.S. 303 at 315-16 (1946)].

[128] I do not consider that any party has raised a serious issue as to the *Act* being interpreted as other than compensatory legislation intended to recoup health care costs incurred by the government. In my view, no reasonable interpretation of the *Act* would make it penal legislation. It imposes neither prohibitions nor penalties. [***United States of America v. Ivey et al***, [1995] 26 O.R. (3d) 533 at 544 (Ont.Ct.Gen.Div.), aff'd (1996) 139 D.L.R. (4th) 570 (Ont.C.A.)]:

> The scope of the category "penal" laws was defined by the Privy Council in *Huntington v. Attrill*, [1893] A.C. 150 at p.157, 20 O.A.R. App. 1, as (quoting Gray J. in *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265):
>
> > … all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection

> of its revenue or other municipal laws, and to all judgments for such penalties.

In my view, the C.E.R.C.L.A. provisions imposing liability against the defendants cannot be classified as penal in nature. In *United States v. Monsanto*, 878 F.2d 160 (4th Cir., 1988) at pp.174-75, C.E.R.C.L.A. was characterized as follows:

> C.E.R.C.L.A. does not exact punishment. Rather it creates a reimbursement obligation on any person judicially determined responsible for the costs of remedying hazardous conditions at a waste disposal facility. The restitution of cleanup costs was not intended to operate, nor does it operate in fact, as a criminal penalty or a punitive deterrent.

The measure of recovery is directly tied to the cost of the required environmental clean-up. The court must be satisfied that the amounts it seeks to recover were actually expended in response to the environmental threat, and that those costs were incurred in the manner prescribed by C.E.R.C.L.A. and the National Recovery Plan. While the nature of liability imposed may be unexpected, it is restitutionary in nature and is not imposed with a view to punishment of the party responsible.

[129] The manufacturers urge that the *Act* offends against four basic tenets of the rule of law.

1. It is presumed the legislature did not intend one law for one class and a different law for others.
2. It is presumed there is no departure from an existing system of law except by words of irresistible clearness.

3. It is presumed no vested rights are abolished, such as defenses or immunity to suit prospectively or retrospectively unless plainly expressed.

4. It is presumed there is no retrospectivity or retroactivity except to the extent made unavoidable by 1 or 2 or any reasonable construction to the contrary.

[130] The *Act* is clearly intended to apply only to the tobacco industry but it treats all within that industry equally. The intent is that there be departures from the existing product liability and tort law is patently manifest.

[131] The manufacturers argue that the *Act* should be interpreted according to the statutory language. Extra-statutory material such as the Minister's speeches in the Legislature or the views of the executive are of assistance only in understanding a problem calling for a legislative solution and are not to be considered in interpretation of the solution adopted.

[132] The gist of the Attorney-General's position is that the *Act* does not offend against any principle of the rule of law, and, in any event, the rule of law is not capable of

being used to strike down legislation in the manner the manufacturers advocate.

[133] The manufacturers' view is that by any reasonable interpretation the *Act* singles out the tobacco industry for special treatment. They stress the *Act* creates a new wrong but fails to provide a customary fundamental protection requiring there be proof of damage to someone. It abolishes vested rights on limitation of claims for compensation and, in light of the Reply pleading of the Attorney-General in the government action, has removed or abolished all defences traditionally available to a person defending a damage action.

[134] I agree with the submissions on behalf of the Attorney-General that it is premature to rule in the abstract on the limitation provisions in the *Act*. I do not consider it a constitutional issue to be determined at this time. It should be decided in the progress of the action when clothed with factual context.

[135] I also make no determination as to the status of affirmative defences raised and pleaded in the action commenced. The *Act* does not appear to specifically abolish any particular defence although in respect of aggregate actions the nature of some defences may by necessary implication become inapplicable or change in form. I do not

take either the fact, in the recovery action commenced, that the manufacturers have plead a particular defence, or that the Attorney-General has denied the existence of the defence, as a definitive interpretation of the *Act*.

[136] It is alleged the words of the *Act* have not conveyed with the "irresistible clearness" required the intention of the legislature to override the application of the principle of the rule of law.

> … The principle of the sovereignty of Parliament requires judicial obedience to the strict terms of the statute. In the process of applying a statute, however, uncertainties concerning its scope or effect in particular circumstances are bound to arise. The rule of law requires that these uncertainties be resolved, so far as possible, in a manner which would most conform to the reasonable understanding of the subject to whom the statute is primarily addressed. Implicit in this understanding is the expectation that Parliament will conform to the generally accepted notions of fairness and justice -- that punishment will not be authorized for acts which were not known to be unlawful when committed, that vested rights will not be destroyed without reasonable compensation, that the powers of officials are to be limited by proper respect for the liberty of the citizen. "If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognized as a matter fairly to be taken in account".
>
> [T.R.S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985), 44 C.L.J. 111 at 121].

[137] The manufacturers argue that when legislation creates a wrong without damage to an individual or the government, for example, a departure from the principles in ***Moran v. Pyle National (Canada) Ltd.***, [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239, it is necessarily arbitrary and penal.

[138] The manufacturers say the cumulative effect of the wide and encompassing breaches of the principle of the rule of law should therefore lead to invalidation of the legislation.

[139] It is of some significance, as the Attorney-General has noted, that the cases upon which the manufacturers rely to demonstrate a constitutional entrenchment of the rule of law and its application to invalidate the legislation arose only in circumstances where the legislation was also found unconstitutional on the basis of specific provisions of the *Charter* or a specific written provision of the *Constitution Act, 1867*.

[140] Examples include ***R. v. Valente***; ***R. v. Lippe***, *supra*; ***Reference Re: Public Sector Pay Reduction Act***; ***R. v. Seaboyer***, all these cases were decided on the basis of s.11(d) of the *Charter*; ***R. v. Beauregard***, was decided on the basis of s.100 of the *Constitution Act, 1867* and s.1(b) of the *Canadian Bill of Rights*; ***MacMillan Bloedel v. Simpson***, was decided on the basis of s.96 of the *Constitution Act, 1867*.

[141] The ability to use the rule of law in sword-like fashion to strike down legislation was directly considered in ***Singh v. Canada (Attorney General)***, [1999] F.C.J. No. 1056 (T.D.) (Q.L.). The issue in that case concerned provisions of the *Canada Evidence Act*, R.S.C. 1985, c.C-5, that prohibited the production of cabinet documents. There is factual similarity to the issue raised in this proceeding, specifically the provisions of s.13(6) of the *Act* which deny access to the records and information on individual insured persons. The applicants in ***Singh v. Canada (Attorney General)***, *supra*, at para.18, relied upon the constitutional supremacy view expressed in ***Reference re Secession of Quebec***:

> The applicant argues that, given the supremacy of the Constitution, Section 39 should be declared invalid.

[142] In the analysis, the following was at issue (at para.28):

> The applicants submit that the decision in the Quebec Human Rights case, … is not determinative of this application since the Supreme Court of Canada "has now made it clear that Canada is a constitutional democracy". To support their position that the Constitution and not Parliament is now supreme, the applicants rely on the *Quebec Secession* case … at p.258:
>
> > The constitutional principle bears considerable similarity to the rule of

> law, although they are not identical. The essence of constitutionalism in Canada is embodied in s.52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. … The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p.455). They may not transgress its provisions; indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

[143] The position argued, founded on the ***Reference re Secession of Quebec***, is the essence of the manufacturers' argument here.

[144] Mr. Justice McKeown held at para.39:

> The Supreme Court of Canada has concluded that unwritten constitutional norms may be used to fill a gap in the express terms of the constitutional text or used as interpretive tools where a section of the Constitution is not clear. However, as noted by La Forest J., dissenting in *Provincial Court Judges Reference*, the principles of judicial review do not enable a Court to strike down legislation in the absence of an express provision of the Constitution which is contravened by the legislation in question.

[145] Mr. Justice Edwards in ***Babcock et al v. The Attorney General*** (28 July 1999), Vancouver Registry No. C963189 (S.C.B.C.), followed ***Singh v. Canada (Attorney General)***.

[146] The decision of McKeown J. in ***Singh v. Canada (Attorney General)*** was upheld in ***Westergard-Thorpe et al v. The Attorney General of Canada,*** *supra*.

[147] Justice of Appeal Wakeling writing for the Saskatchewan Court of Appeal in ***Bacon v. Saskatchewan Crop Insurance Corporation*** (14 May 1999) S.J. No. 302 (Sask.C.A.), 9 W.W.R. 258 (Sask.Q.B.) provides an insightful analysis of the "… one law for all" concept based on the rule of law providing the law be supreme over both the acts of government and private persons:

> The observation of the Supreme Court (para.78) that the rule of the law and the constitution are not in conflict is a compelling statement. It is a statement made in 1998 with full knowledge that on many occasions over the preceding years Parliament has passed and relied upon legislation restricting or eliminating contractual and property rights which would otherwise have been available. Since the Supreme Court does not find this historical background to constitute a conflict with the rule of law, it must of necessity indicate they accept that legislation constitutes an important source of the laws which rule us and the sole restriction on that right to legislate is contained in the relevant Constitution.
>
> I am unable to accept that these justices of the Supreme Court, whilst providing an analysis of our

> federal system, were at the same time engaged in changing that system. That is particularly so when we are not talking of a subtle or marginal change, but one which would reduce the supremacy of Parliament by subjecting it to the scrutiny of superior court judges to be sure it did not offend the rule of law and if it did, to determine whether it was an arbitrary action. If the Supreme Court of Canada meant to embrace such a doctrine, I would expect it would see the need to say so very clearly in a case where that was the issue before them. This is particularly so when they are not only cognizant of the many cases in various jurisdictions acknowledging the supremacy of Parliament, but must also be aware of their own previous judgments which have endorsed that principle such as: *PSAC v. Canada*, [1987] 1 S.C.R. 424, *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525, *Attorney General for British Columbia v. Esquimalt & Nanaimo Railway*, [1950] A.C. 87 (P.C.). Furthermore, I am unable to accept that when the justices were laying a foundation for their decisions in the *Secession* case by reviewing the historical and legal development of federalism in this country, that they were also engaged in changing that foundation. If that were so, it would surely not be done in such a subtle manner as to be questionable whether it had happened at all.
>
> [***Bacon v. Saskatchewan Crop Insurance Corporation,*** *supra*, at pp.14-15].

[148] In ***Bacon v. Saskatchewan Crop Insurance Corporation,*** the Court held that ***Reference re Secession of Quebec*** does not provide authority that allows the Courts on the basis of the preamble to the *Constitution Act, 1867* to strike down legislation as offending the rule of law.

[149] I find the manufacturers have not shown that the provisions of the *Act* offend against specific principles of the rule of law in constitutional context.

[150] I also accept the reasoning and the result in ***Singh v. Canada (Attorney General)***, and ***Bacon v. Saskatchewan Crop Insurance Corporation***, and by Edwards J. in ***Babcock et al v. The Attorney General***, *supra*, that in any event the rule of law of itself is not a basis for setting aside legislation as unconstitutional.

EXTRA-TERRITORALITY

[151] Analysis of the purpose and effect of the *Act* demonstrates its dominant characteristic or pith and substance. The purpose of the *Act* is the recovery by the Province of the tobacco related health care costs it has incurred from the tobacco industry nationally and internationally.

[152] The effect of the *Act* is to impose a new form of liability on the mostly extra-territorial defendants founded on shareholdings and other types of property ownership, wherever those rights may be situate, for the acts or omissions attributable to some of them. This result follows regardless of whether the locus of the acts or omissions was within British Columbia, Canada, or elsewhere in the world.

[153] The purpose and effect of the *Act* at this stage is to be discerned from the history of the legislation and analysis of the *Act*'s provisions, as assisted by what may be gleaned from the Statement of Claim and Reply to Defences in the government action commenced pursuant to the statutory cause of action.

[154] Sections 1(5) and 17.1(1)(a) impose a Group liability on the defendants. Foreign and federally

incorporated defendant companies are divided into four major Groups: namely, Imperial Tobacco Limited, a division of Imasco Limited; Rothmans, Benson & Hedges Inc.; British American Tobacco ("B.A.T."); and JTI-Macdonald Corp.

[155] The conduct of a member of a Group in any country with adverse consequences in that country or in any other country can result in liability to all the members of the Group if any one member of that Group has offered a tobacco product for sale in British Columbia. [Section 1(1), "tobacco related wrong"; Section 13.1 and Section 17.1].

[156] Group membership is determined by the comprehensive definition of "manufacturer" in s.1(1) and ss.1(2),(3), and (4), the relation and affiliation provisions.

[157] Affiliation between companies is based on shareholdings that entitle election of a director, or have a market value equal to 50% of the total shares [Section 1(3)(a)]; a partnership, trust or joint venture having an entitlement to 50% of the profits or assets on dissolution [Section 1(3)(b)]; control by direct or indirect influence [Section 1(4)].

[158] In Section 1(1), manufacturers, by definition, include owners of tobacco trademarks or persons who generate

10% of their worldwide income from the manufacture or promotion of tobacco products.

[159] The effect of the *Act* is that the conduct of foreign manufacturers in foreign countries is to be judged by a British Columbia Court. [Section 13.1(1)(a)]. The result is that the cost of health care benefits is imposed on all members of the Group to which the foreign manufacturer belongs. [Section 13.1(3)].

[160] If a Group member acquires a tobacco related part of the business of another manufacturer by any means, the Group is liable for any past wrongful conduct of the acquired business regardless of the contractual terms of acquisition or the law of the Province or country that governs the terms of the purchase contract. [Section 17.1(2)].

[161] The locus of the acquired business or of the wrongful conduct does not affect or modify the determination of liability. The vendor need not be a member of the Group to effect this result.

[162] Each Group has one British Columbia resident corporation. An immediate effect of the *Act* therefore is to impose an artificial "real and substantial" connection to British Columbia on all Group members since the members of a

Group must be considered "one manufacturer" for purposes of determining liability arising from a tobacco related wrong.

[163] Four of the defendants in the government action commenced are federally incorporated and manufacture cigarettes sold in British Columbia. They are registered as extra-provincial companies under British Columbia law. The balance of the defendants are foreign companies, incorporated under foreign law, with registered offices or places of business in foreign countries.

[164] None of the companies were incorporated in British Columbia. The Statement of Claim describes the Groups as "four worldwide multinational tobacco enterprises".

[165] Section 17.1 and sections 1(2), (3) and (4) of the *Act*, which encompass what the Attorney-General terms the "theory of enterprise liability", were not part of the original *Act*. They were added by amendment in 1998. The Attorney-General argues an amendment to an *Act* could not have the effect of transforming its essential character. I disagree. The addition of the enterprise liability provisions given the wide meaning of manufacturer indicates a deliberate shift in the territorial reach and is designed to give the *Act* global application.

[166] That is not an incidental effect of the legislation. It becomes a central feature and an integral part of the aim and focus of the amended *Act*.

[167] The Minister's speech relating to the amendments lends substance to the view that the *Act* attacks national and international companies and makes them accountable for tobacco related health care benefit costs in British Columbia:

> Another important set of changes involves the corporate structure of the tobacco industry. The nature of these changes is to broaden the definition of what constitutes a tobacco "manufacturer", and to widen the linkages to related companies. The effect of these changes is to establish a more accurate and realistic description of what constitutes a tobacco manufacturer. Provisions have been added to ensure that various corporate entities which effectively own, control, are related to or have a substantial interest in the manufacture, promotion or sale of tobacco products, will be subject to this legislation.
>
> Any legal entity, whether in the form of an affiliate, a joint venture, a trust, a partnership or some other arrangement which has a beneficial interest in a corporation which produced, promoted or sold tobacco products that may give rise to a claim under the legislation will not be able to avoid liability behind some kind of corporate veil.
>
> [British Columbia, *Debates of the Legislative Assembly*, Vol.12, No. 11 (July 29, 1988) at 10713].

[168] It is difficult to characterize such sophisticated and specifically crafted amendments to the *Act* as intending to produce only an incidental effect on the territorial reach of

the legislation. The provisions demonstrate, as a dominant aspect, the targeting of extra-territorial entities, ensnaring a variety of legal personalities including shareholders, control persons, foreign purchasers and lessors, trademark holders, and substantial investors. These consequences are too purposeful and far-reaching to qualify as an incidental aspect of seeking recovery from manufacturers directly marketing or selling tobacco products in British Columbia.

[169] The Attorney-General submits that the manufacturers ought not to "lump together a series of qualitatively different extra-provincial rights that are or might be adversely affected by the legislation and ask the Court to deal with all those rights concurrently". I am of the view that the cumulative effect of the provisions evinces a legislative intention to craft the *Act* in a form that ensures in a global basis that no action of the international tobacco industry or location of their assets would be beyond the reach of the Province's attempt to recover health care costs under the *Act*.

[170] The legislative power of a Province is to be found under Section 92 of the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c.3. The section contains words of clear territorial limitation.

[171] The federal parliament, in the *Statute of Westminster 1931*, (U.K.), 22 & 23 Geo. 5, c.4, reprinted in R.S.C. 1985, App. II, No. 27, gained extra-territorial legislative competence, but the Provinces did not. [***Re Seabed & Subsoil, Continental Shelf Offshore Nfld.***, [1984] 1 S.C.R. 86 at pp.102-103, (1984), 5 D.L.R. (4th) 385 at pp.400-401; ***Interprovincial Co-operatives Ltd. et al v. The Queen in the Right of Manitoba***, [1976] 1 S.C.R. 477 at 512, (1975), 53 D.L.R. (3rd) 321 at p.356; ***Reference re Offshore Mineral Rights of British Columbia***, [1967] S.C.R. 792; See Edinger, E., *"Territorial Limitations on Provincial Powers"* (1982), 14 Ottawa L. Rev. 57 at pp.60-61; *Sullivan: Interpreting the Territorial Limitations on the Provinces* (1985), Supreme Court L. Rev. 511 at pp.525-527].

[172] The combined effect of Sections 1, 13, 13.1, 17 and 17.1 purport to affect the status, structure and corporate personality of foreign corporations and the rights of their shareholders.

[173] The *Act* has the effect of abolishing the separate corporate personalities of companies incorporated under federal or foreign law with domiciles outside British Columbia.

[174] A company's registered office establishes its domicile. [***Gasque v. Inland Revenue Commissioners***, [1940], 2 K.B. 80; Fraser & Stewart, op. cit. at p.144; ***National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.***, [1954], 3 D.L.R. 326 (Ont.H.C.); ***Voyage Co. Industries v. Craster***, [1998] B.C.J. No. 1884 (Unreported) (B.C.S.C.)].

[175] A corporation's domicile determines the law respecting its creation and continuation (corporate personality), matters of internal management, share capital structure, and shareholder rights. [Castel, J.G., Canadian Conflict of Laws 4th ed., (Toronto: Butterworths, 1997) pp.574-575; ***Voyage Co. Industries v. Craster***, *supra*; ***National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.***, *supra*; Fraser & Stewart, op. cit. p.144; Palmer's Company Law (looseleaf ed.) Vol. I, (London: Sweet & Maxwell, 1997) pp.2105-2106]:

> Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation. This domicile is in the state or province of incorporation or organization and cannot be changed during the corporation's existence even if it carries on business elsewhere. Thus, the law of the state or province under which a corporation has been incorporated or organized determines whether it has come into existence, its corporate powers and capacity to enter into any legal transaction, the

> persons entitled to act on its behalf, including the extent of their liability for the corporation's debts, and the rights of the shareholders.
>
> [Castel, *supra,* at p.574-575].

[176] It is a fundamental principle of company law that a corporation is a legal entity distinct from its shareholders. [***Salomon v. Salomon & Co. Ltd.***, [1897] A.C. 22 (H.C.); Palmer's Company Law 24th ed., Schmitthoff, C.M. Ed., (London: Stevens & Sons, 1987) pp.200-201; Fraser & Stewart Company Law of Canada 6th ed., (Carswell, 1993) at p.17; *Canada Business Corporations Act*, R.S.C. 1985, c.C-44, S.15(1)].

[177] This distinction is operative in a parent and subsidiary relationship and applies to related corporations owned by a common shareholder. [Fraser & Stewart, op. cit. at p.21, Davies, P.L., Gower's Principles of Modern Company Law 6th ed. (London: Sweet & Maxwell, 1997) at pp.80, 159-163; ***BG Preeco I (Pacific Coast) Ltd. v. Bon Street Developments Ltd.*** (1989), 60 D.L.R. (4th) 30 (B.C.C.A.)].

[178] There is a distinction in Canadian constitutional law between the power to incorporate and the power to regulate the activities of a company. The power to incorporate a company is the ability to bestow legal personality on an

association of persons, regulate a corporate structure and define the rights of shareholders.

[179] A company once incorporated however will be responsible to the laws of jurisdictions in which it operates. A federally incorporated company is, for example, accountable under provincial security laws.

[180] The provisions of the *Act*: Sections 1(1), 1(2), 1(3), 1(5), 13 and 17.1 attempt to alter or derogate from the rights of shareholders of federal and foreign companies.

[181] The *Act* makes shareholders liable, where they hold a sufficient number of shares, for the conduct of the company itself.

[182] A company domiciled anywhere in the world that owns the majority of shares of any company, which by the terms of the *Act* is a member of a Group and obtains 10% of its revenue from tobacco, becomes a member of the Group and is liable for the conduct of the other members.

[183] In such a manner may a completely passive foreign investor be made liable under the *Act*.

[184] An example of the destruction of immunity from liability of a federally-incorporated company by the operation

of the provisions of the *Act* is the claim the government makes in its action against the defendant ***Rothmans Inc.***

[185] The government alleges in its Statement of Claim that ***Rothmans Inc.*** owns the majority of the shares of the defendant ***Rothmans, Benson & Hedges Inc.*** It is alleged ***Rothmans Inc.*** sold the tobacco related part of its business in 1985 and this business is now that of ***Rothmans, Benson & Hedges Inc.*** The effect of the provisions of the *Act* make ***Rothmans Inc.***, solely on proof of its shareholdings, liable for any tobacco related wrong on the part of ***Rothmans, Benson & Hedges Inc.*** since it commenced business and will be assessed for recovery of health care benefit costs based on the market share of ***Rothmans, Benson & Hedges Inc.***

[186] All the *ex juris* defendants appear, on the extremely limited evidence before the Court, to have been made parties because of the *Act*'s extended definitions relating to manufacturers. Those definitions include the associated, related, and grouping of company provisions in the *Act* that make all related manufacturers one and each jointly and severally liable for the acts of any other in their group.

[187] It does not appear from the recovery action commenced by the government that any of these defendants are

alleged to actually have manufactured or to have sold tobacco products in British Columbia.

[188] Several of the *ex juris* companies are not operating companies but are joined because of their shareholdings, derivation of income, control positions, by virtue of past acquisition, or because they are a trade association.

[189] The *Act* therefore attempts to alter and derogate from what are clearly domiciliary rights under the law of foreign jurisdictions, a legislative manoeuvre that is impermissible and against the rule in ***Churchill Falls (Labrador) Corp. Ltd. v. A.G. Newfoundland (Attorney General)***, *supra*.

[190] The *Act* extends to and attaches legal consequences to the conduct of a defendant manufacturer outside of British Columbia. The definition of a tobacco related wrong envisages a breach of duty owed by a manufacturer to a person who has or might become exposed to a tobacco product.

[191] The manufacturer referenced is a Group and its members [Section 17.1(1)(a)]. The conduct of any member of the Group becomes the conduct of all, without territorial limitation.

[192] The *Act* defines both "persons" and "insured persons". Section 13.1(1)(a) refers to persons to whom a duty is owed. The definition of tobacco related wrong imposes the duty in respect of persons who have been exposed or might be exposed to a tobacco related wrong". There appears to be no territorial boundary to the use of "persons" and it could have global reach.

[193] In contrast, Section 13.1(1)(c) contains a territorial limitation, namely, "… the type of tobacco product [that] … was offered for sale in B.C."

[194] The wide and territorially unrestricted use of the word "persons" in Section 13.1(1)(a) is to be contrasted with the precisely defined term "insured persons", which by definition of "health care benefits" is territorially restricted to British Columbia, and was not used. Those who qualify as "insured persons" are British Columbia residents who qualify as beneficiaries under the *Medicare Protection Act*, R.S.B.C. 1996, c.286 or the *Hospital Insurance Act*, R.S.B.C. 1996, c.204 that comprise under the Provincial universal medicare system nearly the entire population of British Columbia.

[195] The *Act* therefore provides that the duty on which liability is based is not necessarily a duty owed in British

Columbia; the person affected may be domiciled outside British Columbia and the alleged breach may occur elsewhere.

[196] In ***Interprovincial Co-operatives Ltd. et al v. The Queen in the Right of Manitoba,*** *supra*, at 516 (per Pigeon J.) a Provincial statute conferring a statutory cause of action on government against parties in the Province, but applied to conduct outside the Province giving rise to liability, was held to be *ultra vires*:

> … [I]n respect of injury caused by acts performed outside its territory, I cannot accede to the view that this can be treated as a matter within its legislative authority when those acts are done in another province any more than when they are accomplished in another country. In my view, although the injurious acts cannot be justified by or under legislation adopted in the province or state where the plants are operated, by the same token, Manitoba is restricted to such remedies as are available at common law or under federal legislation.

[197] In ***Tolofson v. Jensen,*** [1994] 3 S.C.R. 1022, (1995), 120 D.L.R. (4th) 289 La Forest J. notes that the *lex loci delecti* rule relating to the jurisdiction of a claim in tort is based partly on constitutional considerations. The effect of the rule is that a Province cannot, by attaching new consequences to extra-territorial acts or omissions, impose its law on a tort which occurs beyond its borders.

[198] A Province may not pass legislation that has the effect of imposing obligations outside the Province or has other extra-provincial consequences unless the effect is merely collateral or incidental to legislation otherwise within its power. [***Churchill Falls (Labrador) Corp. Ltd. v. A.G. Newfoundland (Attorney General)***, [1984] 1 S.C.R. 297, (1984), 8 D.L.R. (4th) 1; Hogg, Constitutional Law of Canada (looseleaf ed.) pp.13-14].

[199] In particular, section 17.1(2) purports to alter and affect the contractual terms of the acquisition of part of a tobacco related business by imposing upon the purchasers or lessee the assumption of liability for any wrongful conduct on the part of the vendor or lessor that would qualify as a tobacco related wrong.

[200] Additionally, retroactive consequences arise pursuant to Sections 17.1(2) and 20(2) in any commercial transaction of this type. Where the transaction involves an extra-territorial purchaser or lessor, the legislation affects adversely the extra-territorial contractual rights of the parties and therefore offends the rule in ***Churchill Falls (Labrador) Corp. Ltd. v. A.G. Newfoundland (Attorney General)***.

[201] The *Act* also attaches consequences to the ownership of a tobacco trademark or a right to the use of a trademark.

Each of these rights is caught by the extended definition of "manufacturer".

[202] Trademark ownership is governed in Canada by the *Trade Marks Act*, 1985 c. T-13 and jurisdiction under section 91(2) of the *Constitution Act, 1867* is with the Parliament of Canada.

[203] But the *Act* does not restrict the application of its provisions to trade mark use in British Columbia, and the legislation consequently has an extra-territorial effect, thus derogating from extra-provincial property rights and offending against the rule in ***Churchill Falls (Labrador) Corp. Ltd. v. A.G. Newfoundland (Attorney General)***.

[204] The *Act* by its manifold effects imposes the law of British Columbia on the extra-territorial status, contracts, property, and conduct of parties.

[205] The *Act* overrides the substantive laws of extra-territorial Canadian or foreign jurisdictions in four major areas:

(a) in respect of the status and corporate personalities of corporate tobacco manufacturers with domiciles outside British Columbia;

(b) in respect of legal consequences of acts or omissions outside British Columbia, characterized as tobacco related wrongs;

(c) in respect of contracts relating to the purchase, lease or acquisition by any means whatsoever of any part of a tobacco related business wherever situate and whatever the proper law of contract applicable; and

(d) in respect of shareholder's rights and liabilities regarding shares of federal or foreign corporations.

[206] The Supreme Court of Canada has held that a tortious act committed in another Province involving extra-Provincial parties makes the applicable law the substantive law of that Province and must be applied by the Courts of the Province where the action is tried:

> … [A]n attempt by one province to impose liability for negligence in respect of activities that have taken place wholly in another province by residents of the latter or, for that matter, residents of a third province, would give rise to serious constitutional concerns.
>
> [***Tolofson v. Jensen***, *supra*, at 1066]
>
> …
>
> … because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal

> with such circumstances. I can, however, imagine few cases where this would be necessary.
>
> [***Tolofson v. Jensen***, at 1054]

[207] The *Act* does not require a connection between "a tobacco related wrong" and the health care benefits claimed. The connection is artificial, a presumption, and contrary to ***Tolofson v. Jensen***.

[208] The rationale of the choice of law rule requires the Court to connect the alleged wrongful conduct to the place of its occurrence. The parties will be judged under the law governing them where they took the action in question.

[209] A "tobacco related wrong" includes a breach of "statutory duty". There are statutory duties imposed under British Columbia statutes like the *Trade Practice Act*, R.S.B.C. 1996, c.457. These can lead to foreign corporations with no presence in British Columbia, conducting their affairs in conformity with their domestic law, being judged under Section 13.1(1)(a) according to standards of conduct under British Columbia statutes for acts or omissions that occur in their own country.

[210] A provincial legislature has no power to impose its own laws on extra-territorial status, contracts, conduct or property.

[211] Choice of law rules are part of the Provinces' common law and subject to the same constitutional limits as are all legislative endeavors. [Hogg, op. cit. At pp.13-23].

[212] There are four federally-incorporated defendants in the government action. Parliament has an exclusive legislative power to incorporate companies with other than provincial objects under the residual power of the peace, order and good government provisions of Section 91 of the *Constitution Act, 1867*.

[213] Sections 1, 13, 13.1, 17, and 17.1, when they purport to govern the status, structure and corporate personality of a federally-incorporated company under the *Canada Business Corporations Act* are not only extra-territorial in effect they trench upon the exclusive jurisdiction of the Parliament of Canada.

[214] There is much force to the argument that a practical cumulative effect of these provisions of the *Act* is to "amalgamate" or "merge" defendant tobacco companies such that those "amalgamated" by the operation of the provisions of the *Act* incur liability for civil claims against others in the involuntary merger. That is a fundamental interference with a federal jurisdiction reserved under Part XV of the *Canada Business Corporations Act*.

[215] The combined effect of Sections 1(2), (3), (4), (5) and 17.1(1)(a) of the *Act* ignores the separate identities of federally-incorporated companies for the purpose of establishing a tobacco related wrong committed by a related company and for the purpose of calculating amounts assessed against them.

[216] The separate legal personality conferred under s.15(1) of the *Canada Business Corporations Act* is removed and the corporation loses its legal status as distinct from its shareholders.

[217] The reach of the *Act* encompasses the conduct of the national and international tobacco industry worldwide to found liability for costs incurred by the government on behalf of tobacco users in British Columbia.

[218] The provisions of the *Act* appear not so much designed to "pierce the corporate veil" as they are to strip away separate identities and treat them as if they had legally merged or amalgamated. The effect of provisions of the *Act* is not to look through the façade of a company shell; it is to deny the right to any separate corporate existence.

[219] The plaintiff manufacturers in these proceedings have shown a strong case that the *Act* in pith and substance,

according to its purpose and effect, is extra-territorial and beyond the powers of the Province under the *Constitution Act, 1867* and the *Statute of Westminster, 1931*.

[220] I have not found it necessary as a result of my finding to address the paramountcy argument which assume both valid, but conflicting, federal and provincial legislation.

CONSTITUTIONAL INVALIDITY, SEVERANCE OR READING DOWN

[221] I have found the dominant characteristic, or pith and substance of the *Act*, to be the pursuit nationally and internationally of the tobacco industry for the cost of health care benefits incurred by the government of B.C relating to residents of the Province who suffered from a tobacco related disease.

[222] The extra-territorial reach of the *Act* places it beyond the constitutional competence of the Province.

[223] The Attorney-General argues if the enterprise liability provisions of the *Act* give rise to constitutional concern, as I find they do, they may be easily severed or read down as appropriate and the balance of the *Act* would remain viable and conform to the original legislative intent.

[224] The course suggested is that the *Act* could be read down as required so it applies only to tobacco related wrongs with the requisite real and substantial connection to British Columbia; a ***Moran v. Pyle***, *supra*, type of analysis.

[225] The Attorney-General reasons that as the impugned provisions were added to an existing *Act* by amendment in 1998 they could be as easily removed. The basic intent of the legislature would then still be fulfilled relying on a ***Moran***

v. Pyle view of liability. This would treat the impugned provisions of the present *Act* as embellishments that did not change its essential character.

[226] The manufacturers urge that the *Act* is a carefully integrated legislative scheme, the central purpose of which is the ability to recover the very substantial costs of health care benefits related to tobacco disease from the national and international tobacco industry following upon a unique streamlined civil proceeding. The *Act* cannot be unraveled in piecemeal fashion and is rendered *ultra vires* in its entirety.

[227] Reading down is a doctrine of constitutional remedy that may be employed as an interpretive technique to preserve the validity of statutory provisions. When alternative constructions exist the Court should select a construction that is consistent with the legislative intent and constitutionally valid.

[228] However, the reading down doctrine is not to be employed if the effect is to alter the essence of the legislation:

> … In this respect, I agree with the following comment made by Carol Rogerson in her article …
>
> While the courts continue to describe reading down as a technique of interpretation rather than of invalidation, as a practical matter reading down is

> difficult to distinguish from a remedy which would operate to declare particular applications of a law unconstitutional. Reading down does require an initial determination by the court that particular applications of the statute would be unconstitutional.
>
> The process of interpreting a statutory provision that is susceptible of more than one meaning was traditionally governed by the basic precept that the Court's function is to discover the intention of the legislature. In a case in which the ordinary rules of construction yield two equally plausible meanings, policy considerations are a factor in resolving the conflict. In constitutional cases before the *Charter* this was reflected in the practice of interpreting statutes by applying a presumption that a legislative body does not intend to exceed its powers under the Constitution.
>
> ...
>
> In the final analysis, a law that is invalid in so many of its applications will, as a result of wholesale reading down, bear little resemblance to the law that Parliament passed and a strong inference arises that it is invalid as a whole.
>
> [***Osborne v. Canada (Treasury Board)***, [1991] 2 S.C.R. 69, Sopinka J., at pp.103-105].

[229] The use of severance as a technique to preserve the constitutional validity of legislation is described by Hogg in the following terms:

> Occasionally, however, it is possible to say that part only of a statute is invalid, and the balance of the statute would be valid if it stood alone. Of course, the balance does not stand alone; and the question arises whether the court should "sever" the bad part, thereby preserving the good part, or whether the court should declare the entire statute to be bad. The rule which the courts have developed

> is that severance is inappropriate when the remaining good part "is so inextricably bound up with the part declared invalid that what remains cannot independently survive"; in that event, it may be assumed that the legislative body would not have enacted the remaining part by itself. On the other hand, where the two parts can exist independently of each other, so that it is plausible to regard them as two laws with two different "matters", then severance is appropriate, because it may be assumed that the legislative body would have enacted one even if it had been advised that it could not enact the other.
>
> [Hogg, at 15-21, 15-22, Tab 4].

[230] In ***Schachter v. Canada***, [1992] 2 S.C.R. 679 at 697, Chief Justice Lamer refers to a classic test for severance:

> Where the offending portion of a statute can be defined in a limited manner, it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are.

[231] It is an essential feature of severance that in deleting some legislative provisions the Court must be satisfied the legislature: "… would have enacted what survives without enacting the part that is *ultra vires* at all." [***Attorney-General for Alberta v. Attorney-General for Canada***, [1947] A.C. 503 at 518].

[232] The impugned *Act* does not impose liability in the ***Moran v. Pyle*** context where a tobacco manufacturer breaches a duty that causes disease in a person in British Columbia resulting in a health care cost to the government.

[233] The design of the *Act* imposes liability upon a foreign defendant not on the basis of wrongful conduct but on the basis of being deemed a member of a group in which another member commits a wrongful act.

[234] The constituent provisions of the theory of enterprise liability resulting in the *Act*'s extra-territorial effect are inextricably bound up with the remaining features of the *Act*. I do not have confidence they may be read down or severed in a manner that would leave remaining an *Act* clearly identifiable with the original intent of the legislature.

[235] There are several provisions of the *Act* necessary to the consideration of a reading down or severance. They include the s.1(1) definition of "manufacturer" with its several subsections; s.1(2), (3) and (4), the "related" and "affiliate" provisions; s.1(5), the definition of market share on a related company basis; s.13, concerning whether it imposes a duty upon a person not in British Columbia; and s.17.1.

[236] I am of the view that any attempt to craft change through severance or reading down would inevitably result in a form of legislative redrafting.

[237] In the result, the plaintiff manufacturers have shown entitlement on the basis of the extra-territorial reach of the *Act* to the declaration they seek. I find the *Tobacco Damages and Health Care Costs Recovery Act* to be inconsistent with the provisions of the Constitution of Canada as *ultra vires* the Legislative Assembly of British Columbia.

[238] It follows that action C985776, **Her Majesty the Queen in Right of British Columbia v. Imperial Tobacco Limited et al**, that is founded entirely upon a statutory cause of action under the invalidated *Tobacco Damages and Health Care Costs Recovery Act*, is dismissed.

"R. R. Holmes, J."

February 22, 2000 -- Memorandum issued advising the addition of counsel to the Action No. C985780. Amendment has been made to judgment.

February 28, 2000 -- Corrigendum issued by Justice Holmes advising the above.

TAB 6

Macmillan Inc v Bishopsgate Investment Trust plc and others (No 3)

COURT OF APPEAL, CIVIL DIVISION

STAUGHTON, AULD AND ALDOUS LJJ

4–6, 9–12 OCTOBER, 2 NOVEMBER 1995

Conflict of laws – Shares – Priority between competing interests in shares – Proprietary restitutionary claim – Applicable law – Shares of New York company held by English company as nominee for plaintiff – Shares pledged in England to banks as security for loans without plaintiff's knowledge or consent – Shares registered by banks under New York law when loan not repaid – Whether plaintiff entitled to recover shares – Whether English or New York law appropriate law for determining issue of priority of ownership in shares – Whether priority between competing interests to be determined according to lex situs or lex loci actus.

The plaintiff, a Delaware corporation controlled by RM, had a majority holding in B Inc, a company incorporated in New York, where the shares were registered. In November 1990 the shares were transferred out of the plaintiff's name to the first defendant, an investment trust which was also controlled by RM, to be held as nominee for the plaintiff under an agreement governed by New York law. Thereafter, in breach of that trust agreement and without the plaintiff's knowledge or consent, RM agreed in London to pledge the shares to the second, third and fifth defendant banks as security for loans made by them to companies privately owned by him. After default following the collapse of RM's group of companies on his death in 1991, the shares were ultimately transferred to the three banks through the New York central depository system in accordance with New York law. The plaintiff thereupon brought an action against, inter alia, the three banks, claiming recovery of the shares or their proceeds of sale on the grounds that they had been pledged to the banks in breach of trust, that the plaintiff's interest was superior to that of the banks, and that the shares were held on constructive trust by the banks. The banks claimed that they were the owners of the shares and that their title had priority over any claim of the plaintiff because they acquired title to the shares in good faith and for value, without notice of any beneficial interest in the plaintiff. The judge held that the question whether the banks were bona fide purchasers for value of the legal estate without notice should be determined in accordance with the lex loci actus, namely the law of New York where the transfer of the shares took place, and applying that law he held that the banks' right to the shares ranked in priority to the plaintiff's equitable title. The plaintiff appealed. The question whether the appropriate law for determination of the issue of priority of ownership of the shares was to be resolved by English law or New York law was ordered to be tried as a preliminary issue in the appeal.

Held – The system of law which governed a cause of action did not necessarily govern all the issues in the suit, and therefore the rules of conflict of laws had to be directed at the particular issue of law which was in dispute, rather than at the cause of action on which the plaintiff relied. In the present case the issue was not whether the plaintiff had a cause of action for restitution, but whether the

defendants had a defence to the claim on the ground that they were purchasers for value in good faith without notice of adverse claims, so as to obtain a good title to the shares. Consistently with the general rule relating to movables and land, the appropriate law to decide questions of title to shares in a company was the law of the place where the shares were situated (the lex situs) which was in the ordinary way the law of the place where the company was incorporated. Since New York law was not only the lex situs of the shares at the time of the transfer, but also the place of incorporation and of the share register, the applicable law for determination of the issue of priority of ownership of the shares was the domestic law of the State of New York. It followed that, since the judge had also applied New York law to determine that same issue (albeit as the lex loci actus), the appeal on the preliminary issue would be dismissed (see p 596 *b* to *e*, p 601 *g*, p 602 *a c f*, p 603 *j*, p 608 *c g* to *j*, p 610 *e f* and p 620 *j* to p 621 *c h j*, post).

Decision of Millett J [1995] 3 All ER 747 in respect of the preliminary issues affirmed on other grounds.

Notes

For the effect of conflict of laws on the assignment of choses in action, see 8 *Halsbury's Laws* (4th edn) para 662, and for cases on the effect of conflict of laws on title to movables, see 11(2) *Digest* (2nd reissue) 349–354, *2042–2066*.

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Braun v Custodian (1944) 3 DLR 412, Can Exch Ct; *affd* [1944] SCR 339, Can SC.

British South Africa Co v Companhia de Moçambique [1893] AC 602, [1891–4] All ER Rep 640, HL.

Brown v Beleggings-Societeit NV (1961) 29 DLR (2d) 673, Ont HC.

Cammell v Sewell (1860) 5 H & N 728, 157 ER 1371, Ex Ch; *affg* (1858) 3 H & N 617, 157 ER 615.

Canada Deposit Insurance Corp v Canadian Commercial Bank [1993] 3 WWR 302, ACJQB, *affd* [1993] 8 WWR 751, Alberta CA; subsequent proceedings (1994) 21 DLR (4th) 360, ACJQB.

Chase Manhattan Bank NA v Israel-British Bank (London) Ltd [1979] 3 All ER 1025, [1981] Ch 105, [1980] 2 WLR 202.

Colonial Bank v Cady, London Chartered Bank of Australia v Cady (1890) 15 App Cas 267, HL; *affg* sub nom *Williams v Colonial Bank, Williams v London Chartered Bank of Australia* (1888) 38 Ch D 388, CA.

Cranstown (Lord) v Johnston (1796) 3 Ves 170, 30 ER 952.

Dearle v Hall (1828) 3 Russ 1, [1824–34] All ER Rep 28, 38 ER 475, Rolls Ct.

Deschamps v Miller [1908] 1 Ch 856.

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Goodwin v Robarts (1875) LR 10 Exch 337; *affd* (1876) 1 App Cas 476, [1874–80] All ER Rep 628, HL.

Hesperides Hotels Ltd v Muftizade [1978] 2 All ER 1168, [1979] AC 508, [1978] 3 WLR 378, HL.

Holroyd v Marshall (1862) 10 HL Cas 191, [1861–73] All ER Rep 414, 11 ER 999, HL.

Holthausen, ex p, Re Scheibler (1874) LR 9 Ch App 722, LJJ.

Hongkong and Shanghai Banking Corp Ltd v United Overseas Bank Ltd [1992] 2 SLR 495, Sing HC.
Hunt v R (1968) 67 DLR (2d) 373, Can SC.
Inglis v Robertson [1898] AC 616, HL.
Jellenik v Huron Copper Mining Co (1900) 177 US 1, US SC.
Jogia (a bankrupt), Re, ex p the trustee v D Pennellier & Co Ltd [1988] 2 All ER 328, [1988] 1 WLR 484.
Kelly v Selwyn [1905] 2 Ch 117.
Koechlin et cie v Kestenbaum Bros [1927] 1 KB 889.
Le Feuvre v Sullivan (1855) 10 Moo PCC 1, 14 ER 389, CA.
Lipkin Gorman (a firm) v Karpnale Ltd [1992] 4 All ER 512, [1991] 2 AC 548, [1991] 3 WLR 10, HL.
London Joint Stock Bank v Simmons [1892] AC 201, [1891–4] All ER Rep 415, HL.
Maudslay Sons & Field, Re, Maudslay v Maudslay Sons & Field [1900] 1 Ch 602.
Mercantile Investment and General Trust Co v River Plate Trust Loan and Agency Co [1892] 2 Ch 303.
Morson v Second National Bank of Boston (1940) 29 NE 2d 19, Mass SJC.
Norris v Chambres (1861) 29 Beav 246, 54 ER 621, MR; *affd* 3 De G F & J 583, 45 ER 1004, LC.
Norton v Florence Land and Public Works Co (1877) 7 Ch D 332.
Oliner v Canadian Pacific Rly Co (1970) 34 AD 2d 310, NY SC; *affd* (1970) 27 NY 2d 988, NY Ct of Apps.
Paget v Ede (1874) LR 18 Eq 118, [1874–80] All ER Rep 902, V-C Ct.
Penn v Lord Baltimore (1750) 1 Ves Sen 444, [1558–1774] All ER Rep 99, 27 ER 1132, LC Ct.
Pennsylvania Co for Insurance on Lives and Granting Annuities v United Rlys of Havana (1939) 26 F Supp 379, Me District Ct.
Picker v London and County Banking Co Ltd (1887) 18 QBD 515, CA.
Queensland Mercantile and Agency Co, Re, ex p Australasian Investment Co, ex p Union Bank of Australia [1891] 1 Ch 536; *affd* [1892] 1 Ch 219, CA.
Rodick v Gandell (1852) 1 De G M & G 763, 42 ER 749, LC.
Royal Brunei Airlines Sdn Bhd v Tan [1995] 3 All ER 97, [1995] 2 AC 378, [1995] 3 WLR 64, PC.
Simultaneous Colour Printing Syndicate v Foweraker [1901] 1 KB 771.
Swiss Bank Corp v Lloyds Bank Ltd [1981] 2 All ER 449, [1982] AC 584, [1981] 2 WLR 893, HL.
United Cigarette Machine Co Inc v Canadian Pacific Rlys Co (1926) 12 F (2d) 634, US Ct of Apps (2nd cir).
US Surgical Corp v Hospital Products International Pty Ltd [1982] 2 NSWLR 766, NSW SC; *varied* [1983] 2 NSWLR 157, NSW CA; *rvsd* sub nom *Hospital Products Ltd v US Surgical Corp* (1984) 156 CLR 41, Aust HC.
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Appeal

By three notices of appeal dated 12 April 1994 the plaintiff, Macmillan Inc, a company incorporated in Delaware, USA, appealed from the judgment of Millett J ([1995] 3 All ER 747, [1995] 1 WLR 978) given on 10 December 1993 in the Chancery division of the High Court dismissing the plaintiff's action against (1) the second defendant, Shearson Lehman Bros Holdings plc, (2) the third defendant, Swiss Volksbank, incorporated in Switzerland, and (3) the fifth defendant, Crédit Suisse, incorporated in Switzerland, in which it claimed the return of certain shares in Berlitz International Inc, a New York corporation, or compensation for their loss. By order dated 7 April 1995 (set out at p 590, post) Staughton LJ directed that the issue as to the system of law, i e whether New York or English law, applicable to determining the dispute between the parties, should be heard and determined as a preliminary issue in the appeal. The facts are set out in the judgment of Staughton LJ.

David Oliver QC and *Murray Rosen QC* (instructed by *Herbert Smith*) for Macmillan.
Charles Aldous QC and *Robert Hildyard QC* (instructed by *Freshfields*) for Shearson Lehman.
William Blair QC (instructed by *Watson Farley & Williams*) for Swiss Volksbank.
Simon Mortimore QC and *William Trower* (instructed by *Clifford Chance*) for Crédit Suisse.

Cur adv vult

2 November 1995. The following judgments were delivered.

STAUGHTON LJ. In any case which involves a foreign element it may prove necessary to decide what system of law is to be applied, either to the case as a whole or to a particular issue or issues. Mr David Oliver QC, for Macmillan Inc, has referred to that as the proper law; but I would reserve that expression for other purposes, such as the proper law of a contract, or of an obligation. Conflict lawyers speak of the lex causae when referring to the system of law to be applied. For those who spurn Latin in favour of English, one could call it the law applicable to the suit (or issue) or, simply, the applicable law.

In finding the lex causae there are three stages. First, it is necessary to characterise the issue that is before the court. Is it, for example, about the formal validity of a marriage? Or intestate succession to movable property? Or interpretation of a contract? The second stage is to select the rule of conflict of laws which lays down a connecting factor for the issue in question. Thus, the formal validity of a marriage is to be determined, for the most part, by the law of the place where it is celebrated; intestate succession to movables, by the law of the place where the deceased was domiciled when he died; and the interpretation of a contract, by what is described as its proper law. Thirdly, it is necessary to identify the system of law which is tied by the connecting factor found in stage two to the issue characterised in stage one. Sometimes this will present little difficulty, though I suppose that even a marriage may now be celebrated on an international video link. The choice of the proper law of a contract, on the other hand, may be controversial.

In an ideal world the answers obtained in these three stages would be the same, in whatever country they were determined. But unfortunately the conflict rules are by no means the same in all systems of law. In those circumstances a choice of conflict rule may have to be made. It is clear that, in general, the second and third stages are to be determined by the law of the place where the trial occurs (lex fori). That law must tell one what the connecting factor is for the issue before the court, and what system of law it points to. But the first stage, characterisation of the issue, presents more of a problem. *Dicey and Morris on the Conflict of Laws* (12th edn, 1993) vol 1, p 35 contains this passage:

> 'The problem of characterisation has given rise to a voluminous literature, much of it highly theoretical. The consequence is that there are almost as many theories as writers and the theories are for the most part so abstract that, when applied to a given case, they can produce almost any result.'

Fortunately the next sentence reads: 'They appear to have had almost no influence on the practice of the courts in England.' The authors conclude (pp 44, 47):

> 'The way the court should proceed is to consider the rationale of the English conflict rule and the purpose of the rule of substantive law to be

characterised. On this basis, it can decide whether the conflict rule should be regarded as covering the rule of substantive law. In some cases, the court might conclude that the rule of substantive law should not be regarded as falling within either of the two potentially applicable conflict rules. In this situation, a new conflict rule should be created ... the way lies open for the courts to seek commonsense solutions based on practical considerations.'

Before leaving these preliminary matters, I would add that if at all possible the rules of conflict should be simple and easy to apply. One might say that all rules of law should be of that character; but we have less control over rules of domestic law. The litigant who is told by his advisers that his case may or may not involve the application of a foreign system of law, and that he must be armed with expensive expert evidence which may, in the event, prove unnecessary, deserves our sympathy. For many years even cases of tort/delict involved uncertainty and the analysis of five different speeches in the House of Lords. Academic writers of distinction concern themselves with conflict, not surprisingly since it is a subject of great intellectual interest. We must do our best to arrive at a sensible and practical result.

These proceedings

Macmillan Inc, a Delaware corporation, started an action against eight defendants claiming the return of 10·6m shares in Berlitz International Inc, a New York corporation of renown in the language teaching field, or compensation for the loss of the shares. The action continued against the second defendants (Shearson Lehman Bros Holdings plc), the third defendants (Swiss Volksbank) and the fifth defendants (Crédit Suisse). The trial lasted for the best part of a year, from October 1992 to November 1993, before Millett J. He gave judgment in favour of the defendants, dismissing the claims of Macmillan. One of the problems which he had to resolve on the route to that conclusion (one might say the first) was whether the dispute should be resolved by English law or the law of and prevailing in the State of New York. In other words, which was the lex causae? The judge held that it was New York law.

Macmillan have appealed. All parties agreed that we should first determine that same question as a preliminary issue in the appeal; and an order has been made to that effect. The order reads as follows:

'(2) that the said hearing of these appeals commence with and be limited in the first instance to the following issues ("the Proper Law Appeal Issues") on which argument is estimated to occupy the court for 10 days namely:—a. paragraph 2 of the Notice of Appeal as against the Second Defendant and paragraph 1 of the Second Defendant's Respondent's Notice; b. paragraph 2 of the Notice of Appeal as against the Third Defendant; c. paragraph 2 of the Notice of Appeal as against the Fifth Defendant, and paragraph 1 of the Fifth Defendant's Respondent's Notice.'

The paragraphs in the three notices of appeal are all the same in substance. One of them reads as follows:

'2.1 The Learned Judge was wrong to hold that the Plaintiff's claim against Shearson was governed by New York law rather than English law. That claim is to be governed by the law which has the closest and most real connection with Shearson's alleged obligation to make restitution of the relevant Berlitz shares to the Plaintiff and not by the *lex loci actus*.'

The respondents' notices of the second and fifth defendants introduce alternative reasons for choosing New York law.

I am not entirely happy with the way that the preliminary issue is drafted, although I have to confess that I certainly approved it, and may have had a hand in its drafting. However, the right course would seem to be first to arrive at an answer to the problem, and then to see if the question needs redrafting.

There are in essence three issues before us, corresponding to the three stages in a conflict case which I have mentioned. They are: (a) How does one characterise the question in this action? (b) What connecting factor does our conflict rule provide for questions of that character? (c) What system of law does that connecting factor require to be applied?

The facts

There are differences in the material facts relating to each of the second, third and fifth defendants. But some are common to all. Macmillan were a wholly owned subsidiary of Maxwell Communications Corporation plc, a company owned partly by the public and partly by Mr Robert Maxwell and his family. Macmillan in turn had a majority holding of 10·6m shares in Berlitz, registered in Macmillan's name in New York. (In point of fact it would seem that the transfer sheets of the company's transfer agent, Manufacturers Hanover Trust Co, constituted the register.)

On 5 November 1990 the shares were transferred out of Macmillan's name to a company called Bishopsgate Investment Trust plc (Bishopsgate), which was in a part of the Maxwell Group that was owned and controlled by Mr Robert Maxwell and his family. This was done on the instructions of Mr Maxwell, and (as the judge found) with the authority of a resolution of the executive committee of the board. Macmillan's share certificates were cancelled, and replaced by 21 certificates in the name of Bishopsgate. They were brought to London from the United States by Miss Ghislaine Maxwell on the following day. But not long afterwards Mr Maxwell signed a nominee agreement in which Bishopsgate acknowledged that it held the shares as nominee for the account and benefit of Macmillan, and had 'no power or right to take any action with respect thereto without the express consent of Macmillan'. That agreement provided that it should be governed by the law of New York.

To say that this pious declaration was disregarded before the ink on it was dry may be something of an exaggeration. But a practice began whereby numbers of the shares were used as security for debts owed to creditors by companies in the private ownership of Mr Maxwell and his family. Thus, the property of Macmillan, a company which was in part publicly owned through its parent and no doubt had creditors of its own, was used to secure loans to the private side of the Maxwell empire.

In order to facilitate that process, in March 1991 7·6m of the shares were deposited with the Depository Trust Co (DTC) in New York. That is said to be a paperless transfer system, and is much used in the United States. Shares are transferred to DTC and registered in the name of their agents, a partnership called CEDE & Co. In order to deal with DTC it was necessary to go through a DTC agent. In the case of the Maxwell Group the agent was Morgan Stanley Trust Co, a company incorporated in New Jersey. So, after the shares entered the DTC system, they were registered in the Berlitz register in the name of CEDE & Co, in the records of CEDE & Co as held for Morgan Stanley, and in the records of Morgan Stanley as held for an associated company of Bishopsgate. But not for

long. Various transactions followed in which the shares were used as security, until we come to those which give rise to the present dispute.

(1) *Shearson Lehman*

A total of 1·9m Berlitz shares were deposited with Lehman Bros International Ltd by a Bishopsgate company in three parcels in November and December 1990 and September 1991. The deposit was as security for the obligations of the borrowers under a stock lending agreement. I need not enter upon the detail of that agreement; it had the effect of making money available on loan to one or more companies in the private ownership of Mr Maxwell.

The security was created by the deposit of the share certificates in London accompanied by duly executed share transfer forms. In July and October 1991 the security was, as the judge found, perfected in New York by deposit in the DTC system. This was done by Lehman Bros sending the certificates to Bankers Trust, their agent in the DTC system. So CEDE & Co became the registered owners, and held the shares for Bankers Trust who, in turn, held them for Lehman Bros.

On 6 November 1991, the day after the death of Mr Robert Maxwell, Lehman Bros sold the 1·9m shares to Shearson Lehman, in the exercise of their power of sale. It is said that Shearson Lehman thereby obtained as good a title as Lehman Bros previously had, even if they now had notice of a breach of trust by Bishopsgate. That sale was completed on 4 December 1991, when the shares were registered in the name of Shearson Lehman in place of CEDE & Co; and Shearson Lehman obtained a stock certificate.

(2) *Swiss Volksbank*

On 12 November 1991 2·4m Berlitz shares which were already in the DTC system were transferred to Swiss Volksbank. This was achieved by CEDE & Co holding the shares for Citibank NA, who were Swiss Volksbank's agents in the DTC system. The purpose of the transaction became clear on the following day, when security documents were executed in London. This was to cover a loan of some $35m by Swiss Volksbank to a company privately owned within the Maxwell empire. The pledge agreement was expressed to be governed by New York law, and other documents by English law.

On 3 December 1991 Macmillan's solicitors wrote to Swiss Volksbank demanding the return of the Berlitz shares. Swiss Volksbank thereupon realised their security, and on 6 December were registered as owners with the company's transfer agents in place of CEDE & Co, and obtained a share certificate.

(3) *Crédit Suisse*

In this instance there were two parcels of shares that were treated differently, although both were pledged as security for a loan of £50m to a privately owned company in the Maxwell empire. There were memoranda of deposit and a facility letter, expressed to be governed by English law.

First, 500,000 shares in Berlitz were deposited with Crédit Suisse on 27 September 1991, together (as it happened) with shares in other companies incorporated in other countries. The deposit was of a single share certificate in the name of the Bishopsgate company, with a stock power executed in blank by the Maxwell brothers, who were directors of that company.

Secondly, on 12 November 1991, 1m Berlitz shares already in the DTC system were transferred to Crédit Suisse. This was achieved by debiting Morgan Stanley's account with CEDE & Co (Morgan Stanley being, as I have mentioned,

the DTC agents of the Bishopsgate companies), and crediting Swiss American Securities Inc, who were Crédit Suisse's agents.

An interim injunction was in force between 20 January and 13 April 1992, restraining Crédit Suisse from dealing with the 1·5m Berlitz shares. On the later date an extension was refused by Hoffmann J, on the ground that Macmillan's undertaking in damages was not sufficiently secured. In the view of Millett J this was a critical event for part of the shares. For in May 1992 Crédit Suisse withdrew the 1m shares from the DTC system and secured their registration in the name of their own nominee company; and in June they achieved the same result for the 500,000 shares which had never been in the DTC system. All that happened while the action was in progress.

There were thus two different routes by which the shares were pledged in the first instance: by deposit of share certificates in London, and by a transaction in the DTC system in New York. Shearson Lehman (or rather Lehman Bros) were an example of the first, and Swiss Volksbank of the second. Crédit Suisse received one parcel by each of the two methods. In all cases the pledgees eventually became registered as owners of the shares. And in all cases the pledge of shares was, as the judge found, a breach of trust by Bishopsgate.

The issues

The relief sought in the amended statement of claim comprised, so far as is material for present purposes: (1) a declaration that Macmillan is still beneficially entitled to the 10·6m shares transferred to Bishopsgate on 5 November 1990; (2) a declaration that the shares subsequently transferred to Shearson Lehman, Swiss Volksbank and Crédit Suisse are held on constructive trust for Macmillan; (3) such orders as are required for restoring the shares to Macmillan; and (4) inquiries as to compensation and/or damages for breach of constructive trust and/or conversion.

Paragraph 5.2 reads:

> 'Macmillan has expressly notified each defendant ... that they hold the said various shares respectively on constructive trust on its behalf. It will (so far as may be necessary) deny any claim by Shearson Lehman, Swiss Volksbank and/or Crédit Swiss ... to have acquired legal ownership thereof and to have done so bona fide for value and without any notice of Macmillan's rights.'

During the trial and with the co-operation of all parties the 5·8m shares with which this action is concerned were sold to a Japanese company for $137m in cash and other consideration. The proceeds of sale have now replaced the shares, to the extent that they were the object of the claim.

All three defendants pleaded that the statement of claim did not disclose any cause of action. Had that been the main issue, or indeed a significant issue, it may well be that it would affect the law applicable to the suit, for reasons which will appear. But, so far as I can detect, that plea was not persisted in. What has been sustained is the plea of all three defendants that they acquired title to the shares in good faith and for value, without notice of any beneficial interest in Macmillan. That is said to be the case both by English and by New York law.

Millett J made findings as to the effect of New York law. They may be in issue at a later stage in this appeal; but I quote his summary now so as to show briefly why there is a contest as to the applicable law.

The Berlitz shares were 'certificated securities' within art 8 of the New York Uniform Commercial Code (the NYUCC). That was the case whether or not the shares were entered in the DTC system. They were negotiable instruments by

New York law. Since property in a negotiable instrument passes both at law and in equity by delivery, no distinction is made in art 8 between legal estates and equitable interests. The priority rules are consequently much simpler than in English law. The main differences are: (1) as between the parties to a transfer and persons claiming under the transferor, the transfer of a certificated security (including a security interest in it) takes place when the purchaser or a person designated by him acquires possession of the certificate, not when he obtains registration; (2) special provision is made for delivery of shares through the DTC system; (3) a bona fide purchaser for value who takes delivery of a certificated security, including delivery through the DTC system, takes free from any adverse claim of which he had no notice at the date of delivery, whether he subsequently obtains registration or not; (4) notice is defined more narrowly than in English law, and does not include constructive notice.

The judge held that the applicable rule of conflict of laws required him to apply the law of the place of the transaction (lex loci actus), which in turn he held to be New York law. Both those conclusions are challenged. Macmillan argue for the law of the restitution obligation, which in turn they claim to be the law of the place where the benefit was received, or the law with which the transaction has its closest and most real connection. Alternatively, they say that the place of the transaction, even applying the judge's rule, was England and not New York.

The defendants are content with the judge's conclusions as they stand. But the preferred view of Shearson Lehman and Crédit Suisse is that the applicable law is the lex situs of the shares, or (if there is any difference) the law of the place of incorporation or where the register is kept. All these tests point to New York in this case. Swiss Volksbank, on the other hand, adopt the judge's solution as their primary case, but are content with the lex situs or the law of the place of incorporation as alternatives.

STAGE 1: CHARACTERISATION

Macmillan contend, as they did before the judge, that their claim is restitutionary in nature; and that in consequence the appropriate conflict rule is r 201 in *Dicey and Morris* vol 2, p 1471:

> '(1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation. (2) The proper law of the obligation is (*semble*) determined as follows: (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract; (b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (*lex situs*); (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.'

The rule appears in the section of *Dicey and Morris* which deals with the law of obligations. It is sub-para (c) which is said to be relevant here.

Chase Manhattan Bank NA v Israel-British Bank (London) Ltd [1979] 3 All ER 1025, [1981] Ch 105 was cited in support of the rule. That was a case of money paid under a mistake of fact; but, the defendants being in liquidation, there was a proprietary claim to trace the money asserted as well as a common law claim for money had and received. It was, as Goulding J said ([1979] 3 All ER 1025 at 1029, [1981] Ch 105 at 115)—'common ground that the legal effects of the mistaken payment must in the first instance be determined in accordance with New York

law as the lex causae.' Counsel (Mr Chadwick) had cited the predecessor of r 201(2)(c) (i e r 176(2)(c)) from *Dicey and Morris* (9th edn, 1973) p 924.

El Ajou v Dollar Land Holdings plc [1993] 3 All ER 717 was about a claim to trace the proceeds of fraud. Millett J, at first instance, held that 'The law governing such claims is the law of the country where the defendant received the money' (at 736), and referred to *Dicey and Morris* (11th edn, 1987) r 203(2)(c) and the *Chase Manhattan* case. In the Court of Appeal the decision was reversed, but not upon any consideration of the applicable law—perhaps because there had been no evidence of foreign law (see [1994] 2 All ER 685).

Re Jogia, (a bankrupt), ex p the trustee v D Pennellier & Co Ltd [1988] 2 All ER 328, [1988] 1 WLR 484 concerned claims for money paid under a mistake and/or for money had and received. Browne-Wilkinson V-C said ([1988] 2 All ER 328 at 338, [1988] 1 WLR 484 at 495):

> 'As at present advised, I am of the view that quasi-contactual obligations of this kind arise from the receipt of the money. I find it difficult to see how such obligation can be said to be made or arise in any place other than that of receipt. As to the proper law, *Dicey and Morris on the Conflict of Laws* (10th edn, 1980) vol 2, p 921, r 170 expresses the view that, save in cases where the obligation to repay arises in connection with a contract or an immovable, the proper law of the quasi-contact is the law of the country where the enrichment occurs. This accords with the American Restatement and seems to me to be sound in principle.'

This passage was not essential to the decision, but rather obiter. Rule 201 was followed by Hwang JC in the High Court of Singapore in *Hongkong and Shanghai Banking Corp v United Overseas Bank Ltd* [1992] 2 SLR 495 in relation to money purloined from a bank account.

Millett J in the present case accepted (as he had done in *El Ajou*'s case) that *Dicey*'s rule applied to some restitutionary claims; but he held that it did not apply to all. He drew a distinction between the claim of an equitable owner to recover his property, or compensation for the failure to restore it, from the person into whose hands it had come, and a claim by a plaintiff in respect of a breach of a fiduciary obligation owed to him. Whilst the latter class of case would be within r 201(2)(c), the former would not. The issue in the former case was one of priority, to be governed by the law selected by a conflict rule as appropriate to that issue.

It is clear that Macmillan's claims in the present case are to some extent proprietary. Mr Oliver asserts that they are receipt-based. But he needs to do more than show that the defendants received the shares; he must also plead, in effect, that they are Macmillan's shares; and the statement of claim does indeed say that. Millett J described this requirement as 'an undestroyed proprietary base' (see [1995] 3 All ER 747 at 758, [1995] 1 WLR 978 at 989). Against that it is said that, whilst Macmillan do have an equitable title to the shares, equity acts in personam and gives effect to that title only by orders directed at those who would disturb it. Hence the fact that, while the English courts do not have jurisdiction to decide questions of title to foreign land (see *Dicey and Morris* (12th edn, 1993) vol 2, p 945, r 116), there are many instances where they will grant a remedy against defendants who are here and who are sued here: see *Mercantile Investment and General Trust Co v River Plate Trust Loan and Agency Co* [1892] 2 Ch 303 and *Webb v Webb* Case C-294/92 [1994] 3 All ER 911, [1994] QB 696. Mr Oliver points out that Macmillan claim not only a declaration as to their proprietary rights, but

also an order that the defendants restore the shares to Macmillan, and compensation or damages.

In my judgment the considerable learning directed at those issues does not need to be considered in the present case. This part of this appeal is not, in my opinion, the place to confront the law of restitution 'in a logical, consistent and coherent fashion' (see Joanna Bird 'Restitution's uncertain progress (*Macmillan v Bishopsgate*)' [1995] Lloyd's MCLQ 308 at 313). I am prepared to accept that Macmillan's claim is restitutionary in nature; and I would accept, without deciding, that r 201 of *Dicey and Morris* determines what system of law governs such a claim. But the issue is not, or not any longer, whether Macmillan have a cause of action for restitution; it is whether the defendants have a defence on the ground that they were purchasers for value in good faith without notice of Macmillan's claim. As the judge said, and Mr Oliver asserts, 'Shearson Lehman cannot resist Macmillan's claim unless it can establish the defence of bona fide purchaser for value without notice'. The same applies to Crédit Suisse and Swiss Volksbank. Mr Oliver went so far as to submit that, once one has determined the law which governs the cause of action, that same system governs all issues which arise in the suit. That cannot be right. Procedure, for instance, which sometimes includes limitation, is governed by the law of the place of trial; or, to take a rare example, a contract to exchange one currency for another may be invalid by its proper law, or by the law of the place of performance, or by the law of the forum, or by the law of the country whose currency is involved. I would regard it as plain that the rules of conflict of laws must be directed at the particular issue of law which is in dispute, rather than at the cause of action on which the plaintiff relies. We should translate lex causae as the law applicable to the issue, rather than the suit. In this case the issue is whether in law the defendants were purchasers for value in good faith without notice, so as to obtain a good title to the shares.

Macmillan still assert, against Crédit Suisse only, a claim in conversion, although the judge thought that it had been abandoned during the trial. That claim, it is said, must be governed by English law. But again it is the defence which identifies the issue. If Crédit Suisse have by New York law a good title as purchasers for value in good faith and without notice, they are not liable in damages; or if for some reason they became liable at one stage, there are now no damages. That, I suppose, is an issue to be determined at a later stage of this appeal; so we must not be taken to have made a definite ruling upon it. But Mr Oliver mentioned the point in his reply, and I feel that we should make it plain that it has not been overlooked.

STAGE 2: THE APPROPRIATE CONFLICT RULE

(i) *For property issues in general*

The general rule, which is subject to exceptions, appears to me to be that issues as to rights of property are determined by the law of the place where the property is. That is shown in relation to land (including priorities) by *Norton v Florence Land and Public Works Co* (1877) 7 Ch D 332.

The same applies to chattels: see *Cammell v Sewell* (1860) 5 H & N 728 at 744–745, 157 ER 1371 at 1378, where Crompton J quoted Pollock CB in the court below ((1858) 3 H & N 617 at 638, 157 ER 615 at 624): 'If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere.' This was treated as the general rule, although subject to exceptions, in *Winkworth v Christie Manson & Woods Ltd* [1980] 1 All ER 1121, [1990] Ch 496. It was applied by the House of Lords to a

dispute about priority in *Inglis v Robertson* [1898] AC 616, although the purist might say that the decision was as to the Scots as opposed to English rules of conflict. As was pointed out by Mr Blair for Swiss Volksbank, the law of the place of the transaction (lex loci actus), in the case of the sale of a chattel, will almost invariably be the same as the law of the place where the chattel is (lex situs). But the courts have chosen situs as the test rather than locus actus.

There is, in my opinion, good reason for the rule as to chattels. A purchaser ought to satisfy himself that he obtains a good title by the law prevailing where the chattel is, for example in Petticoat Lane, but should not be required to do more than that. And an owner, if he does not wish to be deprived of his property by some eccentric rule of foreign law, can at least do his best to ensure that it does not leave the safety of his own country.

Thirdly, there are negotiable instruments. These are assimilated to chattels, so that the lex situs applies: see *Alcock v Smith* [1892] 1 Ch 238 (although arguably this supports the law of the place of the transaction) and *Embericos v Anglo-Austrian Bank* [1904] 2 KB 870. See also *Dicey and Morris* vol 2, p 1420: 'In the conflict of laws, negotiable instruments are therefore treated as chattels, *i.e.* as tangible movables.' In *Brown v Beleggings-Societeit NV* (1961) 29 DLR (2d) 673 a Canadian court held that title to bearer shares in a company should be determined by the law of the place of incorporation, not the law where the certificates are. This decision might appear to be out of line, unless (as Mr Mortimore for Crédit Suisse suggests) the certificates had ceased to be negotiable.

Then a question arises as to which system of law is to determine whether an instrument is negotiable. One might have thought that in principle this should be the lex fori, since one is still at the stage of choosing a lex causae. *Dicey and Morris* vol 2, p 1420 appear to suggest otherwise, and to prefer the law of the place where negotiation is said to have occurred. I find this a difficult question, and we do not need to decide it. By English law, whether as the law of the forum or the law of the place of alleged negotiation, the share certificates are not negotiable; so English law is not applicable. By New York law they may be negotiable; but New York is not the forum nor the place of alleged negotiation. So, one must look elsewhere for a choice of law rule in this case, and not apply the rule for negotiable instruments.

I turn now to other movable but intangible property, that is to say choses in action. The general rule for this kind of property is stated by *Dicey and Morris* vol 2, p 979 as follows:

> 'Rule 120—(1) The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") are governed by the law which applies to the contract between the assignor and assignee.
>
> (2) The law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and the question whether the debtor's obligations have been discharged.'

Paragraph (1) of the rule raises a topic to which I shall have to return later, in relation to *Colonial Bank v Cady, London Chartered Bank of Australia v Cady* (1890) 15 App Cas 267; *affg* sub nom *Williams v Colonial Bank, Williams v London Chartered Bank of Australia* (1888) 38 Ch D 388. It also leaves a question as to what happens if there is no contract between the assignor and the assignee; but that does not arise in the present case. The rule is based on art 12 of the Rome Convention on

the Law Applicable to Contractual Obligations, set out in Sch 1 to the Contracts (Applicable Law) Act 1990. It is said by *Dicey and Morris* vol 2, p 979 to represent the common law.

The law governing the right to which the assignment relates, in para (2) of the rule, in the case of a debt, points to the proper law of the contract or other obligation by which the debt was created. The corresponding rule in *Dicey and Morris* (11th edn, 1987) vol 2, p 964 was as follows:

> '*Rule 123.* The priority of competing assignments of a debt or other intangible thing is governed by the proper law of the debt or the law governing the creation of the thing.'

The commentary has this passage (p 965):

> 'It is obvious that questions of priorities cannot be governed by the *lex loci actus* of the assignment or by its proper law, because the assignments may have been made in different countries or may be governed by different proper laws, and there is no reason why one law should govern rather the other.'

The commentary in *Dicey and Morris* (12th edn, 1993) vol 2, p 981 reads:

> 'Since the law governing the creation of the right assigned determines the rights and obligations of the debtor that result from the assignment, it must also decide questions of priorities between competing assignments.'

Cheshire and North's Private International Law (12th edn, 1992) p 812 makes the same point:

> '... where there have been assignments in different countries, no confusion can arise from a conflict of laws since all questions are referred to a single legal system. The same merit is not shared by the law of the situs, since this follows the residence of the debtor and is not therefore a constant ... It is suggested, then, that the most appropriate law to govern the question at any rate of priorities is the law governing the transaction by which the subject-matter of the various assignments was created.'

In the case of a simple contract debt the lex situs is thus rejected, because it is uncertain. That was not always *Dicey's* view. *Re Maudslay Sons & Field, Maudslay v Maudslay Sons & Field* [1900] 1 Ch 602 was a case concerning competing claims to a debt from a French firm. Cozens-Hardy J said (at 610):

> 'It seems to me that I am bound to hold that that assignment which alone is recognised by the law of France ought to prevail ... This is the view taken by Mr Dicey in his work on the Conflict of Laws, rule 141: "An assignment ... of a debt, giving a good title thereto according to the lex situs of the debt (in so far as by analogy a situs can be attributed to a debt) is valid."'

Situs is now replaced by the proper law of the contract by which the debt was created. But with other monetary obligations the choice of 'the law governing the creation of the thing' approximates closely, in my opinion, to the lex situs. Thus, in *Kelly v Selwyn* [1905] 2 Ch 117 there was a contest between competing assignees of an interest in reversion under a will. Warrington J said (at 122):

> 'The ground on which I decide it is that, the fund here being an English trust fund and this being the Court which the testator may have contemplated as the Court which would have administered that trust fund,

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> the order in which the parties are to be held entitled to the trust fund must be regulated by the law of the Court which is administering that fund.'

The obligees in such a case are not likely to be mobile, and there is less risk that the lex situs will turn out to be transient.

Another example is to be found in *Re Queensland Mercantile and Agency Co, ex p Australasian Investment Co, ex p Union Bank of Australia* [1891] 1 Ch 536, which was b concerned with competing claims to moneys due to the company in respect of unpaid calls on its shares. North J said (at 545):

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> '... there is another equally well-known rule of law, viz., that a transfer of moveable property, duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by shewing that such transfer as carried out is not in accordance with what would be required by law in the country where its owner is domiciled.'

His decision was upheld on appeal (see [1892] 1 Ch 219). But it seems that there had been a stay of proceedings in Scotland on terms that the dispute should be d decided in England in exactly the same way as it would have been decided in Scotland. As Lindley LJ observed ([1892] 1 Ch 219 at 226), that involved the application of Scots rules of the conflict of laws, even if they led to a different view from that which an English court would take.

But at all events, for choses in action in general the lex loci actus has been rejected. So has the proper law of the assignment,except for the limited purposes e of r 120(1). There have been cases where other solutions have been reached: see for example *Canada Deposit Insurance Corp v Canadian Commercial Bank* [1993] 3 WWR 302, where it was held that priorities were governed by the law of the forum, an invitation to forum shopping if ever there was one; and *US Surgical Corp v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, where it appears f to have been held that the availability of equity and equitable remedies was governed by the law of the forum, provided the defendant was in New South Wales (but we were told that the case had gone to a higher court: see [1983] 2 NSWLR 157; (1984) 156 CLR 41). I would not follow either of those decisions.

(ii) *Shares in particular*

g I now turn to the specific case of an issue as to the ownership of shares in a company. It is not argued that shares are within art 12 of the Rome Convention, and therefore within r 120 of *Dicey and Morris*. Indeed it may be that shares have a rule of their own. I must consider the authorities as to shares separately, but against the background of the law relating to land, chattels, negotiable h instruments and other debts which has already been discussed.

We have the authority of the House of Lords for the proposition that to some extent, as between transferor and transferee, the effect of an assignment of shares is determined by the law of the place where the assignment takes place. As with r 120(1) in *Dicey and Morris*, it is important to determine the limits of that j proposition. The case is *Williams v Colonial Bank, Williams v London Chartered Bank of Australia* (1888) 38 Ch D 388 in the Court of Appeal, and *Colonial Bank v Cady, London Chartered Bank of Australia v Cady* (1890) 15 App Cas 267 in the House of Lords. The plaintiffs were the executors of the deceased holder of shares in New York Central and Hudson River Railroad Co. In order that the shares might be registered in their names, the executors signed blank transfers, together with powers of attorney, which were indorsed on the certificates. Those would entitle the rightful holder of the certificates to be registered by the company as owner of

the shares, provided that the company was satisfied as to the genuineness of the signatures. The executors handed the certificates to their brokers, who fraudulently deposited them with the defendant banks as a security for money due from the brokers. At the time when the action was commenced the shares were still registered in the name of the deceased, and the transfers were still blank as to the transferee.

The evidence of American law was that the certificates were not negotiable instruments; but that the banks obtained a good title in law and equity, because the owners had—

> 'so dealt with [the certificates] as to lead a purchaser for value to believe honestly that he was taking a good title to it. In other words the foundation rests in the principle of estoppel.' (See (1888) 38 Ch D 388 at 399.)

In those circumstances it is scarcely surprising that the law of England was held to be applicable. Cotton LJ said that the question whether the bank obtained a good title 'depends on transactions in *England*' and so must be governed by English law, although the law of America would be 'properly referred to for the purpose of deciding what would be the effect of a valid effective transfer of the certificates on the title to shares in an American company ...' Lindley LJ said (at 403):

> 'We must look to the American law for the purpose of understanding the constitution of the railway company and the proper mode of becoming a shareholder in it. Moreover, it may be that the consequences of having acquired a title to the certificate may depend on American law, but the question how a title is to be acquired to a certificate by a transaction in this country does not depend on American law at all.'

The judgment of Bowen LJ is to the same effect. He said (at 408):

> 'The key to this case is whether the Defendants have a right to hold these pieces of paper, these certificates. What the effect upon their ulterior rights in *America* would be, if we were to declare that they were entitled to these pieces of paper, is another question.'

So, the Court of Appeal held that the issue was to be determined by the law of England, which was the locus of the transaction (and also the situs of the certificates). Other problems would have to be decided by American law, as the law of the place of incorporation, if they arose.

In the House of Lords Lord Halsbury LC recorded that the transaction of loan took place in London (see (1890) 15 App Cas 267 at 272). He added:

> '... if it were necessary to consider what law must govern, as between these parties, the right to these certificates on the one hand, and the right to detain them as pledged for the money advanced on them on the other, though the certificates themselves were the certificates of shares in a foreign corporation, I should not doubt that it is to the law of England you must look, and not to the law of the United States.'

Lord Watson said (at 276–277):

> 'That the interest in the railway company's stock, which possession of these certificates confers upon a holder who has lawfully acquired them, must depend upon the law of the company's domicil, seems clear enough, and has not been disputed by the respondents. But the parties to the various

transactions, by means of which the certificates passed from the possession of the respondents into the hands of the appellants, are all domiciled in England; and it is in my opinion equally clear that the validity of the contracts of pledge between Blakeway and the appellants, and the right of the latter to retain and use the documents as their own, must be governed by the rules of English law.'

Lord Bramwell said (at 281):

> '... the shares being of an American company domiciled in one of the United States of America, an act effectual by the law of that state to transfer the property, and no other, would transfer it.'

Lord Herschell said (at 283):

> 'I agree that the question, what is necessary or effectual to transfer the shares in such a company, or to perfect the title to them, where there is or must be held to have been an intention to transfer them, must be answered by reference to the law of the State of New York. But I think that the rights arising out of a transaction entered into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares, must be determined by the law prevailing here.'

Four points are clear from that decision. First, there is a dual conflict rule, which allocates some issues to one country and others to another. Secondly, the issue in the *Cady* case was as to who was entitled to the certificates, not as negotiable instruments, but as pieces of paper. Thirdly, that issue was to be decided by English law, since the transaction took place here or (per Lord Watson) the parties to it were domiciled here. Fourthly, any issue as to the effect of possession of the certificates, or as to how shares could be transferred, should be decided by the law of the company's domicile or (it would seem) its place of incorporation.

I do not find it easy to determine the precise borderline between points three and four in that case, or for that matter between paras (1) and (2) in r 120 of *Dicey and Morris*. But what is in my judgment clear is that the issue in the present case comes in the second class, and must be decided by the law of New York. It is not an issue as to the validity of a contract between Macmillan and one or other of the defendants; so far as the facts go they had never met each other and there was no contract between them. Nor is there any issue as to the validity of the contract of loan between one of the Maxwell companies and one or other of the defendants, or as to the validity of the pledge as between those parties. The issue is whether, in the words of Lord Bramwell and Lord Herschell, there has been an act effectual by New York law to transfer the property in the shares.

We were referred to a number of transatlantic cases. In some of them the question was decided by the law of the place where the certificates were, apparently on the ground that by the law of the place of incorporation the company was given power to issue certificates having that effect. Subject to that, the preponderance of authority is that the ownership of shares is to be determined by the law of the situs, which for this purpose is the place of incorporation. See *Jellenik v Huron Copper Mining Co* (1900) 177 US 1 at 13 per Justice Harlan, *Direction Der Disconto-Gesellschaft v US Steel Corp* (1925) 267 US 22 at 28 per Justice Holmes, *United Cigarette Machine Co Inc v Canadian Pacific Rlys Co* (1926) 12 F (2d) 634 at 636, *Pennsylvania Co for Insurance on Lives and Granting Annuities v United Rlys of Havana* (1939) 26 F Supp 379 at 390, *Morson v Second*

National Bank of Boston (1940) 29 NE 2d 19 at 20, *Braun v Custodian* (1944) 3 DLR 412 at 428, (1944) SCR 339 at 345–346, *Hunt v R* (1968) 67 DLR (2d) 373 at 378 and *Oliner v Canadian Pacific Rly Co* (1970) 34 AD 2d 310 at 313.

I conclude that an issue as to who has title to shares in a company should be decided by the law of the place where the shares are situated (lex situs). In the ordinary way, unless they are negotiable instruments by English law, and in this case, that is the law of the place where the company is incorporated. There may be cases where it is arguably the law of the place where the share register is kept, but that problem does not arise today. The reference is to the domestic law of the place in question; at one time there was an argument for renvoi, but mercifully (or sadly, as the case may be) that has been abandoned.

STAGE 3: THE SYSTEM OF LAW

Whether it be situs, place of incorporation or place of share register, the answer is the law of and prevailing in the State of New York. I therefore agree with the conclusion reached by Millett J, although I have reached it by a somewhat different route. It is unnecessary to pursue the issue as to *where* the relevant events took place, as I have not adopted the lex loci actus. It seems to me that situs and incorporation have the advantage of pointing to one system of law which is very unlikely to be transient, and cannot be manipulated by a purchaser of shares in order to gain priority. If a lender of money chooses to take as security shares in companies incorporated in a number of different jurisdictions, he may have to make different inquiries so as to satisfy himself as to his title. He does not deserve much sympathy on that account, particularly as I do not know whether lenders are particularly diligent in making any inquiries at all.

Subject to what counsel may say, I would answer the preliminary question in these appeals by saying that the issue as to whether the defendants have title to the shares as purchasers in good faith for value without notice of adverse claims should be decided by the law of New York, not including its conflict rules. That in effect involves that the appeals thus far have failed.

AULD LJ. The question between the parties to this appeal is: 'who has the better right to ownership of shares in a corporation?' The question in this part of the appeal is: 'how, in the English conflict of laws, is the applicable law for such an issue to be determined?' Is it a matter of property to be governed by the location of the shares or the incorporation of the company? Or is it to be determined by one or other of the rules governing obligations? If the latter, does it come within the existing rules governing choses in action, or does it form, as Millett J held, 'a special sub-species of chose in action with its own rules'? (See [1995] 3 All ER 749 at 761, [1995] 1 WLR 992 at 992.)

Macmillan Inc was a Delaware company controlled by the late Robert Maxwell through Maxwell Communications Corp plc. It owned about 55.6% of Berlitz International Inc, a company incorporated in New York. Mr Maxwell, contrary to Macmillan's interests, through a series of transfers and other corporate vehicles, agreed in London with Lehman Bros International Ltd (Lehman), Crédit Suisse and Swiss Volksbank to pledge Berlitz shares as security for loans made by them to his private interests. The shares were immediately or ultimately transferred to Shearson Lehman Bros Holdings plc (Shearson Lehman) as assignee of Lehman, Swiss Volksbank and Crédit Suisse in New York, in accordance with its law. New York law treats the shares in the manner in which they were transferred there as negotiable instruments.

The loan and security transactions were negotiated and concluded in London. Such notice as the banks, as I shall call them, received of Macmillan's interest in the shares, they received in London. Some of the share transfers, namely that to Lehman and part of that to Crédit Suisse, were by way of delivery of share certificates and an executed transfer form in London, followed by transfer in New York. Some, that to Swiss Volksbank and part of that to Crédit Suisse, were made directly in New York.

Mr Maxwell's private interests defaulted on the loans, and there is a dispute between Macmillan and the three banks as to who has the better claim to the Berlitz shares. Macmillan claims that it is the equitable owner. Each of the banks says that at the time of each relevant transfer in New York it was a transferee for value in good faith without notice of Macmillan's interest. Each says that it had no notice, or in Shearson Lehman's case no effective notice under New York law, which affects its entitlement.

As to the applicable law, Macmillan maintains that it is English law, because the transactions giving rise to the issue had their closest and most real connection to England. Shearson Lehman and Credit Suisse contend that New York law applies, because it is the law of the country of incorporation of Berlitz. Alternatively, they contend for New York as the lex situs, the place where the shares were. Swiss Volksbank maintains, as the judge held, that the applicable law is the lex loci actus, namely that of New York where the transfer of the shares took place, coinciding in the circumstances with the law of incorporation and the lex situs.

The parties are at odds as to whether it is the claim or the issue that has to be characterised in order to determine the connecting factor for identification of the applicable law. Macmillan says it is the claim; the banks say it is the issue. To add to the problems the parties are also not agreed as to the nature of the transaction giving rise to the claim or the issue.

As to the claim, Macmillan says it is based on obligation not property. It describes it as a restitutionary claim, albeit based on its equitable property in the shares. The banks say that it is a proprietary claim, not one arising out of an obligation, since there was no contract or equity between the parties. Millett J, while accepting Macmillan's description of the claim as restitutionary, held that it was the issue that mattered and that it was one of priority of property rights. He held that that issue is governed by the lex loci actus, which he described as 'the law of the place where the transaction took place on which the later assignee relies for priority over the claim of the original owner', namely New York, where the transfers took place (see [1995] 3 All ER 747 at 763, 779, [1995] 1 WLR 978 at 994, 1011). He also said that he saw no reason in the circumstances to distinguish the lex loci actus from the lex situs or the law of incorporation, because the shares were also in New York, Berlitz's place of incorporation.

I agree that the issue provides the starting point. It is whether each bank can resist Macmillan's equitable claim to return of the shares by showing that it was a bona fide transferee for value without notice and thus acquired an interest in them superior to that of Macmillan. More specifically, the issue is whether the banks can show that they acquired the shares without notice of Macmillan's interest.

As to the transaction, on Macmillan's approach it was the lending and security arrangements made in London, and the alleged notice there to the banks of Macmillan's prior interest, leading to the transfer of the shares in New York. For the banks, the transaction was solely the transfer of the shares in New York.

Subject to what I shall say in a moment, characterisation or classification is governed by the lex fori. But characterisation or classification of what? It follows from what I have said that the proper approach is to look beyond the formulation of the claim and to identify according to the lex fori the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the lex fori, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly, so that it attracts a particular domestic rule under the lex fori which may not be applicable under the other system: see *Cheshire and North's Private International Law* (12th edn, 1992) pp 45–46 and *Dicey and Morris on the Conflict of Laws* (12th edn, 1993) vol 1, pp 38–43, 45–48.

The dispute about the nature of the issue in this case, whether it is about restitution, stemming from the developing notion of a 'receipt-based restitutionary claim', or about property, is a good example of the danger of looking at the problem through domestic eyes. There is a long and growing line of cases, recently comprehensively reviewed by Hobhouse J in *Westdeutsche Landesbank Girizentrale v Islington London BC, Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890, indicating a right to restitution flowing from the circumstances of receipt, regardless of the knowledge of or notice to the recipient. See also *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 512 at 526–527, 532–534, [1991] 2 AC 548 at 570–572, 577–581 per Lord Goff and *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97 at 103, [1995] 2 AC 378 at 386 per Lord Nicholls, 'Recipient liability is restitution-based ...' Charles Harpum in 'Accessory liability for procuring or assisting a breach of trust' (1995) 111 LQR 545 at 546 suggested that the *Royal Brunei* case vindicates the school of thought that treats receipt-based claims as restitutionary, as against that which bases them on equitable wrongdoing.

The 'receipt-based restitutionary claim' is a notion of English domestic law that may not have a counterpart in many other legal systems, and is one that it may not be appropriate to translate into the English law of conflict. In my view, it would wrong to attempt to graft this equitable newcomer onto the class of cases where English courts will intervene to enforce an equity in respect of property abroad. Adrian Briggs made the point, albeit a little more diffidently, in an article prompted by Millett J's judgment in this case, entitled 'Restitution meets the conflict of laws' [1995] 3 RLR 94 at 97:

> 'It is a commonplace that conceptual divisions in domestic law do not necessarily translate into the conflict of laws ... To take a distinction which is struggling to define itself within the domestic law of restitution and project this into the realm of choice of law may be unwise.'

As to land, the normal rule in England is that the lex situs applies to competing claims: see r 116(3) in *Dicey and Morris* vol 2, pp 946, 952–955, *British South Africa Co v Companhia de Moçambique* [1893] AC 602, [1891–4] All ER Rep 640 and *Hesperides Hotels Ltd v Muftizade* [1978] 2 All ER 1168, [1979] AC 508. Compare the position in Canada, where the lex fori is said to determine such questions of priority (see *Canada Deposit Insurance Corp v Canadian Commercial Bank* [1993] 3 WWR 302).

One of the exceptions to r 116(3), expressed in sub-para (a), is 'where the action is based on a contract or equity between the parties': see *Dicey and Morris* vol 2,

pp 952–955, *Deschamps v Miller* [1908] 1 Ch 856 at 863 per Parker J; and eg *Penn v Lord Baltimore* (1750) 1 Ves Sen 444, [1558–1774] All ER Rep 99, *Lord Cranstown v Johnston* (1796) 3 Ves 170, 30 ER 952, *Ex p Holthausen, Re Scheibler* (1874) LR 9 Ch App 722, *Paget v Ede* (1874) LR 18 Eq 118, [1874–80] All ER Rep 902 and *Mercantile Investment Co v River Plate Co* [1892] 2 Ch 303 at 311, in which an English court ruled that it had jurisdiction to enforce a foreign charge on foreign land against its English owners. Compare *Norris v Chambres* (1861) 29 Beav 246, 54 ER 621; *affd* 3 De G F & J 583, 45 ER 1004, where the court declined jurisdiction to enforce a claimed equitable lien on foreign land sold to a third party with notice. See also *US Surgical Corp v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, reversed without consideration of the question of choice of law (see (1984) 156 CLR 41); and cf *Webb v Webb* Case C-294/92 [1994] 3 All ER 911 at 930–931, [1994] QB 696 at 716–717.

Moving from land to other forms of property, my view is that the concept of a 'receipt-based restitutionary claim' would not, in any event, provide a firm basis in the circumstances of this case for identifying the appropriate connecting factor. I say that for the following reasons.

First, the importance to Macmillan's case that the claim or issue should be regarded as restitutionary rather than proprietary is its reliance on the tentative r 201(2)(c) in *Dicey and Morris* vol 2, p 1471, that the proper law of a non-contractual obligation relating to movables arising from unjust enrichment is that of the country where the enrichment occurs. I say 'tentative' rule because, as the commentary in *Dicey and Morris* vol 2, pp 1476–1478 makes plain, the authority on which it is said to be based, *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1979] 3 All ER 1025, [1981] Ch 105, does not expressly decide it; and the other authorities applying it appear to rest on that insecure foundation. It is true that in *Jogia (a bankrupt), Re, ex p the trustee v D Pennellier & Co Ltd* [1988] 2 All ER 328 at 338, [1988] 1 WLR 484 at 495 Sir Nicolas Browne-Wilkinson expressed the view that the rule accorded with the *American Restatement of the Law, Second, Conflict of Laws* (1971) and seemed to be sound in principle, but that was a case concerning service out of the jurisdiction under the then RSC Ord 11(1)(f), and his view was obiter. In *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 736, Millett J relied, without discussion, on the rule and the *Chase Manhattan* case as authorities for the proposition that the law governing 'receipt-based restitutionary claims' is the law of the country where the defendant received the money. So also did Hwang JC in *Hongkong and Shanghai Banking Corp Ltd v United Overseas Bank Ltd* [1992] 2 SLR 495 at 500. At the highest, as Mr David Oliver QC, on behalf of Macmillan, put it, there is 'a tendency in the cases to indorse *Dicey*'s proposition'. None of them binds this court, and, as will appear, I do not consider it necessary to express a view on it. In any event, acceptance and application of the proposition would not assist Macmillan on the facts. Such enrichment or benefit as the banks received, they received in New York on the transfer to them there of the shares. I shall return to that aspect in another context in a moment.

Secondly, even if *Dicey*'s rule is valid, it is difficult to see what unjust enrichment the banks have had, since they gave full value.

Thirdly, even if the facts could support a claim for unjust enrichment, it is the issue that determines the matter. As I have said, it is essentially a proprietary one, whether the banks could defeat Macmillan's interest by establishing that they were bona fide transferees for value without notice. In my view, r 201(2)(c) has no application to such an issue. It (the issue) is more within the sphere of the rules governing priority of ownership.

Before I turn to those rules, I should consider the alternative argument of Macmillan that the lex loci actus should govern the matter, namely the law of England, because that is where the transaction took place. As I have said, on Macmillan's approach, the transaction was the lending and security arrangements made in London, part of which involved the transfer of the shares in New York, the banks deriving the benefit through the documentation in London to secure their title to the shares elsewhere. London also was where the banks received such notice as they did of Macmillan's interest. For the banks, the transaction was solely the transfer of shares immediately or ultimately in New York.

Mr Oliver cited a number of authorities in support of his submission that the court should consider the underlying transaction, including: *Rodick v Gandell* (1852) 1 De G M & G 763, 42 ER 749, *Holroyd v Marshall* (1862) 10 HL Cas 191, [1861–73] All ER Rep 414, *Re Queensland Mercantile and Agency Co ex p Australian Investment Co, ex p Union Bank of Australia* [1891] 1 Ch 536, *Simultaneous Colour Printing Syndicate v Foweraker* [1901] 1 KB 771 and *Swiss Bank Corp v Lloyds Bank Ltd* [1981] 2 All ER 449, [1982] AC 584.

Millett J was driven to reject that submission by his identification of the issue as one of priority of property rights, rather than one arising out of an obligation. He accepted as a general proposition that the governing law should be that which has 'the closest and most real connection with the transaction', but stated ([1995] 3 All ER 747 at 760, [1995] 1 WLR 978 at 991):

> 'It is in order to identify the relevant transaction and to ascertain the law which has the closest and most real connection with it that it is necessary to undertake the process of identifying and characterising the issue in question between the parties.'

He identified the transaction ([1995] 3 All ER 747 at 763, [1995] 1 WLR 978 at 994):

> '... the issues of priority in a case such as present fall to be determined by the lex loci actus, i e the law of the place where the transaction took place on which the later assignee relies for priority over the claim of the original owner. This does *not* lead to the adoption of English law in respect of every transaction in the present case, as Macmillan contends. The relevant transaction is not the contract to grant security, which affects only the parties to the contract, but the actual delivery of possession or transfer of title which created the security interest on which the particular defendant relies.'

In my view, the judge correctly identified the transaction for this purpose via his identification of the issue. The authorities relied on by Mr Oliver were all cases where there was privity of contract or some fiduciary relationship between the parties stemming from more than mere receipt of property with notice of another's claim to an interest in it. That is not so here. The negotiations and agreements in England preceding the transfer were not with Macmillan; there was no privity of contract between the parties, and, apart from the claimed equity which Macmillan relies upon to support its 'receipt-based restitutionary claim', no equitable or other fiduciary relationship between them.

The question remains whether Millett J was correct to take the lex loci actus of the transaction, the transfer, as the means of identifying the applicable law. In general, disputes about the ownership of land and of tangible and intangible movables, including negotiable instruments, are governed by the lex situs: see, in relation to land, *Norton v Florence Land and Public Works Co* (1877) 7 Ch D 332; in

relation to tangible movables, r 118 in *Dicey and Morris* vol 2, pp 965, 967, *Cammell v Sewell* (1860) 5 H & N 728 at 742–747, 157 ER 1371, and *Winkworth v Christie Manson & Woods Ltd* [1980] 1 All ER 1121 at 1125, 1134–1136, [1980] Ch 496 at 501, 512–514; in relation to intangible movables, including negotiable instruments, see eg *Alcock v Smith* [1892] 1 Ch 238, *Re Maudslay Sons & Field, Maudslay v Maudslay Sons & Field* [1900] 1 Ch 602 at 609–610 (in which Cozens-Hardy J expressed the view that the principle of *Norton v Florence Land* applies to a debt, even though it is a chose in action, because a debt has a 'quasi-locality') and *Embericos v Anglo-Austrian Bank* [1904] 2 KB 870; *affd* [1905] 1 KB 677.

Swiss Volksbank, albeit contending for the lex loci actus, maintains that the same principle applies to shares in a company when, by the law of the place where they are situated at the time of transfer, they are treated as negotiable.

Shearson Lehman and Crédit Suisse contend for the law of incorporation, relying in large part on the commentary in the current edition of *Dicey and Morris* (12th edn, 1993) to r 120(2) that the priority of competing assignments of an intangible thing is governed by the law governing the creation of the thing. Rule 120(2), which reproduces art 12.2 of the Rome Convention on the Law Applicable to Contractual Obligations, states:

> 'The law governing the right to which an assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any questions whether the debtor's obligations have been discharged.'

The commentary (vol 2, p 981), reproducing the former *Dicey and Morris* r 123, is that:

> 'Since the law governing the creation of the right assigned determines the rights and obligations of the debtor that result from the assignment, it must also decide questions of priorities between competing assignments. Thus, if the same right is assigned twice to different assignees, the law under which the right was created decides which assignment prevails.'

See also *Cheshire and North's Private International Law* (12th edn, 1992) pp 811–812, 816.

Millett J's view was that such a principle or rule does not apply to the priority of competing claims to interests in the shares of a corporation. He said that he regarded it as limited to successive assignments by the same assignor of the same debt or fund or other choses in action governed in English domestic law by the rule in *Dearle v Hall* (1828) 3 Russ 1, [1824–34] All ER Rep 28 (see [1995] 3 All ER 747 at 761, [1995] 1 WLR 978 at 992). That also appears to be the context in which the editors of *Cheshire and North* pp 811–812, 816 argue, in support of the same proposition.

As Millett J observed, none of the authorities cited in support of the old r 123 concerned shares in a corporation (see [1995] 3 All ER 747 at 761, [1995] 1 WLR 978 at 993). *Le Feuvre v Sullivan* (1855) 10 Moo PCC 1, 14 ER 389 was a dispute about the deposit of a life insurance policy as security for a loan. It contains no statement of principle and is explicable on one of several bases: lex loci actus of the deposit and grant of the security, the law of domicile of the lender, or the lex loci actus of the making of the contract of insurance. *Kelly v Selwyn* [1905] 2 Ch 117 concerned an English trust fund created by an English testator with trustees in England, in which the expressed ratio was that the English law applied because it must have been contemplated by the testator that an English court would

administer the fund. Two other authorities relied upon by Mr Charles Aldous QC, for Shearson Lehman, in this context, *Re Queensland Mercantile and Agency Co, ex p Australasian Investment Co, ex p Union Bank of Australia* [1891] 1 Ch 536; *affd* [1892] 1 Ch 219 and *Re Maudslay Sons & Field, Maudslay v Maudslay Sons & Field* [1900] 1 Ch 682, do not appear to me to throw any light on the subject where, as here, the competing claims do not result from successive assignments or dispositions by the same person. And, as Millett J also noted, the rule in *Dearle v Hall* does not apply to dealings by the owner of shares in an English company.

Accordingly, I agree with Millett J that the former r 123 in *Dicey and Morris* (11th edn, 1987) vol 2, p 964 is not a suitable route for selecting the applicable law in this case.

In my view, there is authority and much to be said for treating issues of priority of ownership of shares in a corporation according to the lex situs of those shares. That will normally be the country where the register is kept, usually but not always the country of incorporation. If the shares are negotiable the lex situs will be where the pieces of paper constituting the negotiable instruments are at the time of transfer. As to the law determining negotiability, the views of *Dicey and Morris* p 1420 and *Cheshire and North* pp 523, 823 are that it is determined by the law of the country where the alleged transfer by way of 'negotiation' takes place, namely where the instrument is at the time. The logical result is that beneficial ownership is extinguished by an act of transfer recognised in the jurisdiction in which it occurs: see *Goodwin v Robarts* [1875] LR 10 Exch 337, *affd* (1876) 1 App Cas 476, *Picker v London and County Banking Co Ltd* (1887) 18 QBD 515 and *London Joint Stock Bank v Simmons* [1892] AC 201, [1891–4] All ER Rep 415. As negotiability is just a step on the way to determining situs for this purpose, the reasoning may appear, in the abstract, to be circular. However, it should be an obvious enough exercise when applied to the facts of most cases. And, in my view, there is judicial support and good commonsense for it, and for treating the lex situs of shares at the time of the last relevant transfer as the applicable law in disputes about priority.

The judicial support is to be found in *Alcock v Smith* [1892] 1 Ch 238 at 255 per Romer J, affirmed in the Court of Appeal—see, in particular Lopes LJ (at 266); *Embericos v Anglo-Austrian Bank* [1904] 2 KB 870; *affd* [1905] 1 KB 677 and *Koechlin et cie v Kestenbaum Bros* [1927] 1 KB 889. (See also *Picker*'s case).

The common sense of determining negotiability according to the lex situs and of treating the lex situs of the last relevant transfer as the applicable law in priority disputes is, first, that it treats shares as other property, situated at and subject to the law of the place where they are at the time of the transaction in issue. Secondly, it provides certainty in cases of successive or competing assignments in different countries, also a characteristic of the law of incorporation. That is so even where, according to the lex situs, some other law, say that of the country of incorporation, applies. It may be burdensome in a single transaction involving transfers of parcels of shares in a number of countries to have to check the law of the place where each is at the time of transfer. However, that requirement, which is a matter of common commercial prudence, applies to all the tests of applicability contended for in this appeal.

I therefore conclude that the shares are in the same position as chattels and that the dispute as to priority of ownership of them should be determined by the law of New York as the lex situs.

That, in my view, is enough to dispose of this part of the appeal. However, I should not leave the matter without referring to the decision of the House of

Lords in *Colonial Bank v Cady, London Chartered Bank of Australia v Cady* (1890) 15 App Cas 267, and to some North American authorities.

Cady was a case in which the London brokers of owners of shares in a New York company dishonestly deposited the (non-negotiable) share certificates with banks in London to secure a loan. In a dispute between the share owners and the banks, the latter claiming to have no notice of the dishonesty, the House of Lords held that if it had had to decide whether the matter was governed by New York or English law it would have held that English law applied, but that as the law of New York and England on the issue appeared to be the same, there was no need to determine the matter.

The dispute was as to the validity of the transfer of the share certificates, not in the event as to priority of ownership of the shares. Lord Halsbury LC and Lord Watson, in common with Cotton, Lindley and Bowen LJJ in the court below (sub nom *Williams v Colonial Bank, Williams v London Chartered Bank of Australia* (1888) 38 Ch D 388), appear to have preferred English law because the property in issue was the share certificates in London, not the shares in New York. Lord Bramwell and Lord Morris did not consider it necessary to express a view. Both Lord Watson and Lord Herschell, however, distinguished between the formal requirements of, and contractual rights connected with, the transfer of shares, the former being governed by the law of incorporation, the latter by the place of the transaction. Lord Watson distinguished between ownership of the shares and rights deriving from ownership of the share certificates representing them. He said, as to the latter ((1890) 15 App Cas 267 at 277–278):

> '... delivery passes, not the property of the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner.'

Lord Herschell said (at 283):

> 'I agree that the question, what is necessary or effectual to transfer the shares ... or to perfect the title to them, where there is or must be held to have been an intention to transfer them, must be answered by a reference to the law of the State of New York. But I think that the rights arising out of a transaction entered into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares, must be determined by the law prevailing here.'

The case supports the proposition that where there is delivery of possession of property, in that case certificates, the law of the country where the property was at the time of delivery governs the question whether the transferee is entitled to retain them as against the true owner. As to the shares themselves, the remarks of Lord Watson and Lord Herschell were not, and had no need to be, directed at the law of incorporation as distinct from the law of situs; there, as in this appeal, they were the same. To the extent, if at all, that those remarks point to the former rather than the latter, they were obiter.

As to the North American jurisprudence, it provides support for the law of incorporation, and also, by derivation, for the lex situs where the law of incorporation provides for transfer of shares elsewhere. It also distinguishes, as did the House of Lords in *Cady*'s case, between shares and non-negotiable share certificates evidencing them. As to the latter, see for example *Direction Der Disconto-Gesellschaft v US Steel Corp* (1924) 300 F 741; *affd* (1925) 267 US 22, an expropriation case in which Justice Holmes in the United States Supreme Court

said, in a dispute as to title to share certificates: '... the question who is the owner of the paper depends upon the law of the place where the paper is.' (See 267 US 22 at 28.) As to the combined operation of the law of incorporation and lex situs, where the former makes the shares assignable in other countries; see *Pennsylvania Co for Insurance on Lives and Granting Annuities v United Rlys of Havana* (1939) 26 F Supp 379, a decision of the Maine District Court, and *Morson v Second National Bank of Boston* (1940) 29 NE 2d 19, a decision of the Supreme Court of Massachusetts. As to the primacy of the law of incorporation where it does not permit the shares to be assigned elsewhere, see, as a starting point, *Jellenik v Huron Copper Mining Co* (1900) 177 US 1. That was a decision of the Supreme Court of the United States in which the shares were situated in the state where the company was incorporated. The other cases cited to us were in the main expropriation cases, namely *United Cigarette Machine Co Inc v Canadian Pacific Rlys Co* (1926) 12 F (2d) 634, *Braun v Custodian* (1944) 3 DLR 412 at 421n per Thorson J, distinguishing between title to the property in the share and that in the share certificate (*affd* [1944] SCR 339), *Brown v Beleggings-Societeit NV* (1961) 29 DLR (2d) 67 and *Oliner v Canadian Pacific Rly Co* (1970) 34 AD 2d 310; see also *Hunt v R* (1968) 67 DLR (2d) 373, a succession duty case.

For my part, I do not derive much direct assistance from the North American jurisprudence. However, it confirms the distinction between shares and share certificates where the latter are non-negotiable and, overall, it is as consistent with selection of the lex situs as of the law of incorporation as the applicable law to disputes about the ownership of shares.

In the preliminary question for decision before us, we are concerned with the transfer of shares in New York, not the transfer of share certificates in England, the distinction made in *Cady*'s case and many of the North American cases. For the reasons I have given, my view is that the applicable law for determination of the issue of priority of ownership of those shares is the domestic law of New York, because it was the lex situs of the shares at the time of transfer. It so happens, on the facts, that it was also the law of incorporation and of the lex loci actus. Accordingly, I would reject Macmillan's submission on the preliminary issue, but for different reasons than those given by Millett J.

ALDOUS LJ. Macmillan appeal from an order of Millett J in an action in which it was the plaintiff and the relevant defendants were Shearson Lehman Bros Holdings plc, Swiss Volksbank and Crédit Suisse. The action was concerned with shares in a New York company called Berlitz International Inc. The shares in question had been owned by Macmillan, but were transferred into the name of Bishopsgate Investment Trust plc (BIT), which held those shares on trust for Macmillan under an agreement governed by New York law. In breach of that trust agreement, BIT pledged the shares to the defendant banks in consideration of loans. After default, and after the collapse of the Maxwell organisation, the action was started to recover the shares. Macmillan claimed restoration of the shares, but that was resisted by the defendants who contended that they were the owners of the shares, and that their title had priority over any claim of Macmillan because they were bona fide purchasers for value without notice of the legal estate in the shares. They also contended that the question of whether they had notice should be determined according to New York law. The reason being that under New York law the test is actual knowledge or suspicion and deliberate abstention from inquiry lest the truth be discovered; whereas under English law it is sufficient if the purchaser had reason to know or cause to suspect.

The judge concluded that the question as to whether the defendants were bona fide purchasers for value of the legal estate without notice should be decided pursuant to New York law, and applying that law he held that the defendants' right to the shares in Berlitz ranked in priority to the equitable title of Macmillan. Macmillan believe the conclusion of the judge to be wrong and appealed, but we were only concerned with the issue as to what was the appropriate law to apply to decide whether the defendants were bona fide purchasers for value of the legal estate without notice. In particular, whether the appropriate law was English or New York law.

The facts

Before the court the parties accepted, for the purposes of the hearing only, the facts as found by the judge, not all of which are relevant to the matters before this court. I will therefore only provide a summary of the facts to set the background against which the question of law can be decided.

Mr Robert Maxwell and his family controlled a large and complex web of private companies and trusts which were referred to as 'the private side'. One of those companies was BIT. Maxwell Communications Corp (MCC) was not part of the private side, but was controlled by the Maxwell family. It acquired the shares of Macmillan in 1988. Berlitz is a company incorporated under the law of New York. It was a wholly owned subsidiary of Macmillan at the time that Macmillan was taken over by MCC. Subsequently, 44.4% of Berlitz common stock was offered for sale to the public, and thereafter the shares were listed and traded on the New York Stock Exchange. The rest of the shares were held by Macmillan and were represented by a single share certificate in its name. In October 1990 the single stock certificate representing 10.6m Berlitz shares was cancelled and was replaced by nine certificates, subsequently 21, in the name of BIT. BIT held those shares upon trust for Macmillan, but there is no doubt that the purpose of obtaining the transfer of the shares to BIT was to enable money to be raised for the private side, which was contrary to the interests of Macmillan. At the beginning of 1991, 7.6m of the 10.6m of the Berlitz shares were placed in the transfer system in operation in New York called the DTC system. The letters DTC refer to the Depository Trust Co, which is a company organised as a depository for shares. It accepts securities for deposit, which are then credited to the account of the depositing participant in the scheme. When shares are deposited the certificates are returned to the company's transfer agents and cancelled. The shares are then registered in the name of CEDE & Co, which is a nominee of DTC, and a fresh certificate is issued in CEDE & Co's name. Thus in March 1991 the certificate representing 7.6m shares in Berlitz in the name of BIT was cancelled and CEDE & Co was recorded as the owner of those shares, which it held as nominee for DTC, who in turn held them on behalf of the depositing company. The remaining shares were retained and the certificates were held in London.

Shearson Lehman

Lehman Bros International Ltd is an associate company of the second defendant, Shearson Lehman. It entered into an agreement dated 3 November 1989 pursuant to which it lent treasury bills to Bishopsgate Investment Management Ltd (BIM) in return for the deposit of collateral. The Berlitz shares in question formed part of that collateral. They were deposited in three tranches on 30 November 1990, 31 December 1990, and 27 September 1991 respectively. The first tranche consisted of a certificate relating to 500,000 Berlitz shares indorsed as to 370,000 to Lehman Bros. That share certificate was delivered to,

and held by, Lehman Bros in London. The second tranche consisted of two indorsed certificates, for 500,000 shares respectively, which were also delivered and held in London. After a review of security, Lehman Bros deposited the three share certificates in the DTC system. Pursuant to that deposit 1·37m shares in Berlitz were registered in the name of CEDE & Co in July 1991 and held to the order of Bankers' Trust, the agents acting for Lehman Bros. The third tranche consisted of two indorsed certificates for 500,000 and 130,000 Berlitz shares. They were delivered in London to Lehman Bros, which forwarded them to New York for incorporation into the DTC system. That took place on 16 October 1991.

On 29 October 1991 Lehman Bros sought return of the treasury bills lent to the Maxwell organisation. On 5 November 1991 Mr Robert Maxwell was reported missing at sea, on 6 November 1991 Lehman Bros served formal notice of default, and on the same day sold to Shearson Lehman the Berlitz shares that they held. That sale was completed on 4 December 1991 and Shearson Lehman was registered as owner of the shares on the Berlitz register in place of CEDE & Co.

Swiss Volksbank

Swiss Volksbank, the second defendant, is a Swiss company which has offices in London and New York. In 1991 it held one million shares in an Israeli company as security for a loan to one of the private side Maxwell companies. On 11 October 1991 Mr Kevin Maxwell requested release of those shares so that a sale could be completed. Swiss Volksbank agreed to that upon substitution of 2·4m Berlitz shares as security. Those shares were part of the DTC holding and the relevant transfer within the DTC was completed by 13 November 1991. After demand for payment, Swiss Volksbank enforced its security by buying the shares from itself. The shares were withdrawn from the DTC system on 4 December 1991 and Swiss Volksbank was registered as the owner of the shares on 6 December 1991, and a new certificate to that effect was issued.

Crédit Suisse

Crédit Suisse is a company incorporated in Switzerland. In 1990 it approved the grant to one of the Maxwell private side companies of a £50m facility secured against a portfolio of shares. To secure that facility a single indorsed certificate in respect of 500,000 Berlitz shares was deposited with Credit Suisse in London on 27 September 1991. On 8 November 1991 a further 1m shares in the DTC system were offered as security, and the appropriate transfer was completed on 13 November. Crédit Suisse made a formal demand for repayment on 5 December 1991. Thereafter, solicitors acting for Macmillan demanded return of the shares, and Crédit Suisse was joined in this action on 13 December. On 16 December 1991 Crédit Suisse undertook not to transfer, sell, charge or otherwise dispose of or deal with the Berlitz shares that it held. As Crédit Suisse was not prepared to continue that undertaking until trial, ex parte relief was sought and granted on 25 January 1992. On 13 April 1992 Hoffmann J refused to continue the injunction. Thereafter, Credit Suisse arranged for the 1m shares held to its benefit, to be withdrawn from the DTC and registered in a nominee company owned by it. It also arranged for the nominee company to become the registered owners of the other 500,000 shares that were covered by the certificate held in London.

Since the action started all the shares in Berlitz have been sold to a Japanese company with the agreement of the parties. That is irrelevant to the issue before us, as the parties accept that the dispute is to be decided upon the pleadings.

The issue

In the amended statement of claim, Macmillan pleads that since the end of 1989 it has been entitled to 10·6m shares of Berlitz stock; that it remains the beneficial owner of the shares and is entitled to the share certificates and the dividends, and that the defendants hold their Berlitz shares on constructive trust for them. Macmillan claims a declaration that it remains and still is beneficially entitled to the shares; a declaration that the defendants hold their Berlitz shares on constructive trust for the plaintiff, and inquiries as to compensation, damages for breach of trust and conversion and ancillary relief. The defences vary, but as now amended each defendant pleads how it came into possession of its shares and claims that it is entitled to the shares as a bona fide purchaser for value of the legal estate without notice of any right of Macmillan. The defendants also allege that the relevant law to decide that issue is the law of New York.

Before us and before the judge, Macmillan submitted that the appropriate law to decide whether the defendants were bona fide purchasers of the legal estate without notice was English law. Macmillan submitted that its claim was based upon a restitutory obligation and that the law to be applied was English law as that was the law of the place where the benefit was received. It submitted that the benefit was the security which was the subject of negotiation in London and was supplied in London. Thus it was submitted that r 201[2](c) in *Dicey and Morris on the Conflict of Laws* (12th edn, 1993) vol 2, p 1471 applied:

> 'Rule 201—(1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.
>
> (2) The proper law of the obligation is (*semble*) determined as follows: (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract; (b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immoveable is situated (*lex situs*); (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.'

The defendants submitted that the dispute between the parties concerned the title to the shares, and in particular it was a dispute as to whether the plaintiffs or the defendants had the better title. That being so, New York law applied. However, the defendants did not agree as to the reason why New York law applied. Counsel for Shearson Lehman and Crédit Suisse submitted that New York law applied because the appropriate law was the law of incorporation of Berlitz, the lex situs. Swiss Volksbank, on the other hand, submitted that the appropriate law was that of lex loci actus, being the law of the place where the transaction on which the assignee relied for priority over the claim of the original owner took place. That submission was accepted by the judge, who held that the place where the transaction took place was the place where actual delivery, possession or transfer of title, which created the security interest on which the particular defendant relied occurred. Thus, as the shares claimed by Shearson Lehman and Swiss Volksbank were transferred in New York, New York law applied.

It must be remembered that Crédit Suisse was in a slightly different position from the other defendants in that at the date of the writ it still held a certificate in London, and thus at that time the lex loci actus was English law. After the injunction was lifted, the shares were registered in New York in the name of a

Crédit Suisse nominee, with the result that New York law became the lex loci actus. a

Characterisation

As appears from the second chapter of *Dicey and Morris*, the problem of characterising which judicial concept or category is appropriate is not easy, but it is a task which is essential for the court to complete before it can go on to decide which system of law is to be used to decide the question in issue. In this case, the court's task is made easier as the parties are agreed that the characterisation of the issue is to be determined according to English law. b

Macmillan submitted that its claim was in essence a claim for the performance of an obligation by the defendants to restore its property or the proceeds or the value of the property. That, it was said, was a claim in equity for restitution. That is true, but to succeed it involves establishing a number of facts, including that it owned the shares and that they were transferred to the defendants in breach of trust. The reply of the defendants is that the shares are registered in their names and they were bona fide purchases for value without notice. c

The issue between the parties concerns the title to the shares and, in particular, whether Macmillan or the defendants have the better title. The issue is one of priority. I agree with the judge when he said ([1995] 3 All ER 747 at 757, [1995] 1 WLR 978 at 988): d

> 'In order to ascertain the applicable law under English conflict of laws, it is not sufficient to characterise the nature of the *claim*: it is necessary to identify *the question in issue*.' (Millett J's emphasis.) e

Any claim, whether it be a claim that can be characterised as restitutionary or otherwise, may involve a number of issues which may have to be decided according to different systems of law. Thus, it is necessary for the court to look at each issue and to decide the appropriate law to apply to the resolution of that dispute. The judge concluded ([1995] 3 All ER 747 at 759, [1995] 1 WLR 978 at 990): 'In my judgment the defendants have correctly characterised the issue as one of priority.' I agree, but believe it right to add what is implicit in that statement, namely that the issue is one of priority of title to shares in Berlitz. Those shares are in the nature of choses in action. They give to the registered holder the rights and liabilities provided by the company's documents of incorporation, as governed by New York law. The issue between the parties concerns the right to be registered as the holder of the shares and therefore entitled to the rights and liabilities stemming from registration or the right to registration. f g

Mr David Oliver QC, who appeared for Macmillan, referred us to a number of cases concerning restitutionary claims, mainly in respect of money paid under a mistake or obtained by fraud. None of them seemed to me to be relevant, once it is appreciated that the issue in the present case concerns priority to the title of the shares, and in particular the property represented by the shares. As Browne-Wilkinson V-C pointed out in *Re Jogia (a bankrupt), ex p the trustee v D Pennellier & Co Ltd* [1988] 2 All ER 328 at 338, [1988] 1 WLR 484 at 495, different considerations apply to quasi-contractual obligations relating to money to those where the obligation relates to an immovable: h j

> 'As at present advised, I am of the view that quasi-contractual obligations of this kind arise from the receipt of the money. I find it difficult to see how such obligation can be said to be made or arise in any place other than that

of the receipt. As to the proper law, *Dicey and Morris on the Conflict of Laws* (10th edn, 1980) vol 2, p 921, r 170 expresses the view that, save in cases where the obligation to repay arises in connection with a contract or an immovable, the proper law of the quasi-contract is the law of the country where the enrichment occurs. This accords with the American Restatement and seems to me to be sound in principle.'

The applicable law

I cannot agree with the plaintiff's submission that r 201 of *Dicey and Morris* applies. That rule is concerned with what has been called unjust enrichment, not a case like the present where the defendants gave value for the shares and the dispute is whether the legal titles they obtained have priority over that of the plaintiff. Further, in so far as the defendants have obtained any benefit or enrichment, it was the legal titles to the shares which were obtained in New York. It follows, if r 201(2)(c) were to be applied, there is a strong case for concluding that New York law was the applicable law.

Macmillan went on to submit that whether or not the issue between the parties should be characterised as restitutionary, the appropriate system of law to resolve the issue was that which had the closest and most real connection with the issue. That, Macmillan submitted, was English law, because in every case the agreement under which the shares were provided as security were negotiated in London, the loans were repayable in London and the benefit, the shares, were received in London. The transaction must be considered as a whole and, if so, the bulk of the transaction took place in London. Thus, it was said, English law is the lex loci actus and should be applied to the transaction as a whole.

The judge dealt with that submission. He said ([1995] 3 All ER 747 at 760, [1995] 1 WLR 978 at 991):

'It is impossible to quarrel with the contention that the governing law should be the law which has "the closest and most real connection with the transaction". In the present case, however, the incantation of the formula is not particularly helpful. It is merely to state the question, not to solve it. It is in order to identify the relevant transaction and ascertain the law which has the closest and most real connection with it that it is necessary to undertake the process of identifying and characterising the issue in question between the parties.'

He went on to conclude that the issue which he had characterised as one of priority should be determined by the lex loci actus. He said ([1995] 3 All ER 747 at 763, [1995] 1 WLR 978 at 994):

'This does *not* lead to the adoption of English law in respect of every transaction in the present case, as Macmillan contends. A relevant transaction is not the contract to grant security, which affects only the parties to the contract, but the actual delivery of possession or transfer of title which created the security interest on which the particular defendant relies.'

I agree with the view expressed by the judge in the extracts I have just quoted. In any case, it is important to remember that none of the defendants had any dealings with Macmillan. Thus, there was no transaction between Macmillan and the defendants. The issue being one of priority, the law having the closest and most real connection must be New York law. That is the law which governs the right in dispute, namely the right to be placed on the register.

As I have said, Shearson Lehman and Crédit Suisse submitted that the issue should be decided by the law of incorporation, namely New York law. They submitted that r 120(2) of *Dicey and Morris* was determinative. It is in this form (p 979):

> 'The law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.'

That rule does not equate to the facts of this case, as the rule is directed to determination of issues between assignors and assignees and, by implication where shares are involved, the company whose shares have been assigned. In the present case the issue is one of priority in circumstances where there is no legal relationship between the parties claiming the shares. In any case I have no doubt that the transferability of shares in a corporation, the formalities necessary to transfer them, and the right of the transferee to be registered on the books of the corporation as the owner of the shares, are all governed by the law of incorporation. That was the conclusion of the judge (see [1995] 3 All ER 747 at 761, [1995] 1 WLR 978 at 992). It is also a conclusion supported by the judgments of the Court of Appeal and the speeches of the House of Lords in *Colonial Bank v Cady, London Chartered Bank of Australia v Cady* (1888) 38 Ch D 388; *affd* (1890) 15 App Cas 267. In that case English executors of a holder of shares of an American company signed blank transfers to enable them to be registered as holders of the shares. Their brokers fraudulently deposited the share certificates with the defendant bank as security for advances. The brokers subsequently became bankrupt and the executors sought the return of the share certificates. It was concluded both by the Court of Appeal and by the House of Lords that in the absence of attestation by a consul, the transfers were not in order and therefore they did not give the bank title to the shares. The pertinent conclusions to this case can be derived from two extracts from the speeches of the House of Lords. Lord Halsbury LC said (15 App Cas 267 at 272):

> 'My Lords, if it were necessary to consider what law must govern, as between these parties, the right to the certificates on the one hand, and the right to detain them as pledged for the money advanced on them on the other, though the certificates themselves were the certificates of shares in a foreign corporation, I should not doubt not doubt that it is to the law of England you must look, and not to the law of the United States.'

Lord Watson said (at 276–277):

> 'That the interest in the railway company's stock, which possession of these certificates confers upon a holder who has lawfully acquired them, must depend upon the law of the company's domicil, seems clear enough, and has not been disputed by the respondents. But the parties to the various transactions, by means of which the certificates passed from the possession of the respondents into the hands of the appellants, are all domiciled in England; and it is in my opinion equally clear that the validity of the contracts at pledge between Blakeway and the appellants, and the right of the latter to retain and use the documents as their own, must be governed by the rules of English law. In the application of these rules the appellants are, of course, entitled to the benefit of any privilege which the law of America attaches to

possession of these documents as conferring right or title to the property of the shares.'

The judge rightly concluded ([1995] 3 All ER 747 at 766, [1995] 1 WLR 978 at 997):

> 'In my judgment that case is authority for the following propositions: (i) the formal validity of a transfer of shares in a foreign corporation must be determined by the law of incorporation; (ii) the rights, if any, in the shares of a foreign corporation, conferred by the lawful possession of the share certificates, must be determined by the same law; but (iii) where the certificates are delivered into the possession of the holder in England, the prior question whether he is entitled to retain possession of them against the claim of the true owner must be determined by English law.'

However, he went on to say:

> 'In my judgment the case is clear authority in favour of the lex loci actus and against the application of the law of incorporation for the purpose of deciding questions of priority while the transfer remains unregistered.'

He also concluded that the application of the law of incorporation to the issue of priority of title in the shares was contrary to principle and authority, in particular *Cady*'s case. I believe that that latter statement was not correct. The question of priority was not before the court in *Cady*'s case, nor was the question as to what law determined the rights to the shares, as opposed to the right to the share certificates.

The judge also considered that there was persuasive authority in foreign cases to suggest that the appropriate law to apply when deciding the issue of priority was that of lex loci actus. For myself, I am of the view that the authorities indicate, rather than decide, that the appropriate law to apply when deciding whether one party has a better title to shares is the lex situs, that being the law of incorporation.

In *Braun v Custodian* (1944) 3 DLR 412 Thorson J, sitting in the Exchequer Court of Canada, gave judgment in a case where an American citizen had purchased in Germany from an enemy alien shares in the Canadian Pacific Railway Co. Those shares were registered and transferred into his name in New York. The Canadian Custodian of Enemy Property claimed the shares. It was contended on behalf of the American citizen that the order vesting the shares in the custodian was a nullity, on the grounds that the situs of the shares was in New York because the transfers were registered there and therefore the shares were not property in Canada, and consequently not subject to the jurisdiction of the Canadian legislation. After citing *Cady*, Thorson J concluded that there was a difference between the property in the share certificates and the property in the shares themselves. He said (at 428):

> 'It is, I think, a sound rule of law that the *situs* of shares of a company for the purpose of determining a dispute as to their ownership is in a territory of incorporation of the company, for that is where the court has jurisdiction over the company in accordance with the law of its domicile and power to order rectification of its register, where such rectification may be necessary, and to enforce such order by personal decree against it. It is at such place that the shares can be effectively dealt with by the court. The Canadian Pacific Railway was incorporated in Canada under the law of Canada and is governed by it and, under such law, is subject to the jurisdiction of the

Canadian courts. The *situs* of the shares in dispute for the purposes of the present case is, therefore, in Canada and they constitute property in Canada.' a

It is true that Thorson J was not dealing with a question of priority of rival claims to shares, but he was concerned with rival claims and concluded the appropriate law was the law of incorporation. If that be right, as I believe it to be, then it would be odd to apply a different system of law to resolving claims to title in which the issue was concerned with priority to title, to that applicable where the issue was whether a particular person had any title at all. b

Braun v Custodian was followed in *Hunt v R* (1968) 67 DLR (2d) 373 where the Supreme Court of Canada held that for the purpose of execution, the property in shares was situated at the place of incorporation.

In *Braun's* case, Thorson J referred to *Jellenik v Huron Copper Mining Co* (1900) 177 US 1, a case decided in the United States Supreme Court. The decision is mainly concerned with whether the suit of the plaintiffs could proceed in the absence of the defendants. The suit was brought in the Circuit Court of the United States for the Western District of Michigan by parties who were citizens of other states, against the Michigan Mining Corp and certain individuals holding shares in that corporation being citizens who resided in Massachusetts. The plaintiffs claimed that they were the real owners of certain shares of the company which were held by the Massachusetts defendants and sought a decree to that effect. Justice Harlan, who gave the judgment of the court, said (at 13): c d

'But we are of the opinion that it is within Michigan for the purposes of a suit brought there against the Company—such shareholders being made parties to the suit—to determine whether the stock is rightfully held by them. The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the Company for the benefit of the true owner. As the habitation or domicil of the Company is and must be in the State that created it, the property represented by its certificates and stock may be deemed to be held by the Company within the State whose creature it is, whenever it is sought by suit to determine who is the real owner. This principle is not affected by the fact that the defendant is authorized by the laws of Michigan to have an office in another State, at which a book showing the transfers of stock may be kept.' e f g

That judgment also indicates that shares are property which is situated in the country of incorporation and it is the law of that country which should be applied when determining questions of ownership.

A similar conclusion was reached by Judge Manton giving the judgment of the Circuit Court of Appeal, Second Circuit in *United Cigarette Machine Co Inc v Canadian Pacific Rlys Co* (1926) 12 F (2d) 634. In so doing he cited this passage from the judgment of Justice Holmes in *Direction Der Disconto-Gesellschaft v US Steel Corp* (1925) 267 US 22 at 28: h

'Therefore New Jersey having authorized this corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognizes as owner anyone to whom the person declared by the paper to be the owner has transferred it by the indorsement provided for, wherever it takes place. It allows an indorsement in blank, and by its laws as well as by the law of England an indorsement in blank authorizes anyone who is the lawful owner of the paper to write in a name, and thereby entitle the person j

a so named to demand registration as owner in his term upon the corporation's books. But the question who is the owner of the paper depends upon the law of the place where the paper is.'

That quotation was cited by the judge. However, Judge Manton in his judgment drew a distinction between owning the paper and owning the rights attaching to the shares. The latter, as he made clear, was to be governed by the b law of Canada being the law of incorporation. Thus, his judgment, like the others to which I have referred, suggests that the appropriate law to apply when deciding the ownership of the shares, as opposed to the ownership of the certificates, is the law of incorporation.

Judgments to a similar effect were given by District Judge Peters in c *Pennsylvania Co for Insurance on Lives and Granting Annuities v United Rlys of Havana* (1939) 26 F Supp 379 and the Supreme Judicial Court of Massachusetts in *Morson v Second National Bank of Boston* (1940) 29 NE 2d 19. In that case the court had to decide whether a testator had, prior to his death, made a valid gift in circumstances where the share certificates were handed over in Italy and were subsequently indorsed. It was argued that the validity of the gift had to be judged d by the law of Italy and that as certain formalities required by Italian law had not been observed, there had been no transfer of ownership of the shares. The court held that there had been a valid gift according to the law of incorporation and therefore property passed. In the judgment of the court the following was said (at 20–21):

e

> 'Doubtless it is true that whether or not there is a completed gift of an ordinary tangible chattel is to be determined by the law of the situs of the chattel ... Shares of stock, however are not ordinary tangible chattels. A distinction has to be taken between the shares and the certificate, regarded as a piece of paper which can be seen and felt, the former being said to be f subject to the jurisdiction of the state of incorporation and the latter to the jurisdiction of the state in which it is located ... The shares are part of the structure of the corporation, all of which was erected and stands by virtue of the law of the state of incorporation. The law of that state determines the nature and attributes of the shares. If by the law of that state the shares devolve upon one who obtains ownership of the certificate it may be that the g law of the state of a purported transfer of a certificate will indirectly determine ownership ... But at least when the State of incorporation has seen fit in creating the shares to insert in them the intrinsic attribute or quality of being assignable in a particular manner it would seem that that state, and other states as well, should recognize assignments made in the h specified manner wherever they are made, even though that manner involves dealing in some way with the certificate. Or the shares may be regarded for this purpose as remaining at home with the corporation, wherever the certificate may be—much as real estate remains at home when the deeds are taken abroad.'

j The English authorities to which we were referred did not involve questions of priority to shares. However they do, in my view, tend to support the proposition that the appropriate law to apply in this case is the law where the property is situated, namely the law of incorporation, or lex situs. In *Norton v Florence Land and Public Works Co* (1877) 7 Ch D 332, a company with an office in London and property in Florence raised money by the issue of 'obligations' purporting to bind the property. Subsequently, by a mortgage in Italian form, the

company mortgaged the property to an Italian bank with a London office, which had notice of the 'obligations'. The bank took proceedings in Florence to enforce the mortgage and the holders of the 'obligations' sought to restrain the sale of the property, claiming priority over the bank. The court refused to interfere. Jessel MR said (at 336–337):

> 'The answer is very simple. It depends on the law of the country where the immoveable property is situated. If the contract according to the law of that country binds the immoveable property, as it does in this country, when for value, that may be so, but if it does not bind the immoveable property, then it is not so. You cannot by reason of notice to a third person of a contract which does not bind the property thereby bind the property if the law of the country in which the immoveable property is situated does not so bind it. That would be an answer to the claim so far as regards the notion that mere notice would do.'

Clearly the facts of that case are very different from the present; but shares are property in the nature of a chose in action which is immovable in the sense that it remains at the place of the company's incorporation. Thus, the reasoning of Jessel MR would suggest that the title to the shares in this case, the title to the chose in action, should depend upon whether the defendants were bona fide purchasers for value without notice according to the law of incorporation: that being the law where the property is situated.

In *Re Maudslay Sons & Field, Maudslay v Maudslay Sons & Field* [1900] 1 Ch 602 it was held that the existence of a valid charge according to English law did not entitle a debenture holder to prevent a company who was an unsecured creditor from enforcing rights given to it by French law. The reason given by Cozens-Hardy J was that the question of whether there was an equity in favour of the debenture holders had to be answered according to the law of the debt, which was where the debt was situated. Thus, as French law allowed recovery, the debenture holders had no prior equity. Again, the facts are very different, but the decision is consistent with the view that the appropriate law to apply in deciding questions of title is the law of the place where the property in dispute is situated. In the present case that is the law of incorporation, namely New York law.

In *Kelly v Selwyn* [1905] 2 Ch 117 Mr Selwyn, who was domiciled in New York, assigned to his wife his reversionary interest under his late father's will. To be a completed assignment, a notice to the trustees was not required under New York law. Three years later he assigned the same interest by way of mortgage to the plaintiff, who gave notice to the trustees. Thereafter, Mrs Selwyn gave notice to the trustees and the question arose as to whether her claim had priority. Warrington J held that as the trust fund was an English trust fund, the question of priority was governed by English law, and therefore the plaintiff's claim had priority. Thus, the judge looked at the lex situs of the property in the same way as the United States cases, to which I have referred, looked to the law of incorporation to decide questions of title in respect of shares.

As a matter of principle I believe the appropriate law to decide questions of title to property, such as shares, is the lex situs, which is the same as the law of incorporation. No doubt contractual rights and obligations relating to such property fall to be determined by the proper law of the contract. However, it is not possible to decide whether a person is entitled to be included upon the register of the company as a shareholder without recourse to the company's documents of incorporation, as interpreted according to the law of the place of

incorporation. If that be right, then it is appropriate for the same law to govern issues as to title, including issues as to priority; thus avoiding recourse to different systems of law to answer essentially a single question. Further, it is to the courts of that place which a person is likely to have to turn to enforce his rights.

The conclusion that the appropriate law is the law of incorporation is, I believe, also consistent with the general rule relating to movables and land. In both cases the courts look to the law of the place where the movable or land is situated. Further, the conclusion that it is the law of incorporation which should be used to decide questions of title, including questions as to priority of title does, I believe, lead to certainty, as opposed to applying the lex loci actus which can raise doubt as to what is the relevant transaction to be considered and where it takes place. That is particularly so in modern times with the explosion of communications technology. The conclusion is, I also believe, consistent with the trend of authority both in this country and abroad.

Although Swiss Volksbank submitted that New York law applied, it sought to support the conclusion of the judge that the appropriate law was the lex loci actus, being the law of the place where the transfers took place. Swiss Volksbank accepted that the dispute should be characterised as one relating to priority of title to the shares. It submitted that this issue should be decided by the principle that the applicable law was that of the place where the property was situated as at the time of the transfer. If so, following cases to which I have referred, you would expect them to have submitted that the appropriate law was the law of incorporation. Not so. Counsel submitted that, under New York law, the shares were negotiable instruments and therefore the place where the property was situated was the place of transfer. That, they submitted, was in New York, where the shares passed through the DTC system.

In the present case the submissions of Swiss Volksbank arrive at the same conclusion, namely that New York law applies, but that will not necessarily be the result in every case. That is demonstrated by the facts of *Braun v Custodian* (1944) 3 DLR 412; *affd* [1944] SCR 339. For myself, I would reject the submission that the situs of the rights and liabilities which are the subject of the shares is the place where they are transferred. I believe that the property, the subject of the shares, is situated at the place of incorporation, even though that property can be validly transferred and traded in other places. That being so, I conclude that the submissions of Swiss Volksbank are based on a misconception, namely that the property, the subject of the shares, can be situated in a number of countries and that the appropriate law to determine title to that property is the law of the country where the transfer takes place.

Although I have concluded that the law applicable to the resolution of the dispute is the law of incorporation and not that of the lex loci actus, the result is the same, as New York law is the law of both places. That is the law for which the defendants contend and is the law applied by the judge. It follows that the submissions of the plaintiff should, in my view, be rejected and I would dismiss the plaintiff's appeal on the question before this court.

Appeal on preliminary issue dismissed. Leave to appeal to the House of Lords refused.

Mary Rose Plummer Barrister.

TAB 7

Johnny Mennillo *Appellant*

v.

Intramodal inc. *Respondent*

INDEXED AS: MENNILLO *v.* INTRAMODAL INC.

2016 SCC 51

File No.: 36124.

2015: December 8; 2016: November 18.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Commercial law — Corporations — Oppression — Reasonable expectations of shareholder — Shareholder resigning as officer and director of corporation — Whether resignation extended to shareholder status and shares transferred accordingly — Whether evidence supported reasonable expectation asserted by shareholder of being treated as such and, if so, whether reasonable expectation was violated — Whether shareholder unlawfully deprived of shareholder status as a result of corporation's conduct — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 241.

In 2004, M and R, two friends, discussed the possibility of creating a road transportation company. M would contribute the money to start up the business while R would bring skills to ensure its success. R had the company incorporated on July 13, 2004, and that same day, the company's board of directors passed a resolution to accept notices of subscription to securities by R and M and to issue 51 shares to R and 49 shares to M. Both the notices of subscription and the resolution were signed by R alone. Thereafter, R and M rarely complied with the requirements of the *Canada Business Corporations Act* ("*CBCA*") and almost never put anything in writing. They had neither a partnership nor a shareholders' agreement, and there was no written contract or any other legal formality relating to M's advances of substantial amounts of money to R.

Johnny Mennillo *Appelant*

c.

Intramodal inc. *Intimée*

RÉPERTORIÉ : MENNILLO *c.* INTRAMODAL INC.

2016 CSC 51

N° du greffe : 36124.

2015 : 8 décembre; 2016 : 18 novembre.

Présents : La juge en chef McLachlin et les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté et Brown.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit commercial — Sociétés par actions — Abus — Attentes raisonnables de l'actionnaire — Démission d'un actionnaire à titre de dirigeant et d'administrateur d'une société — La démission valait-elle également pour la qualité d'actionnaire et, dans l'affirmative, les actions ont-elles de ce fait été transférées? — La preuve étaye-t-elle l'allégation selon laquelle l'actionnaire s'attendait raisonnablement à être traité comme tel et, dans l'affirmative, cette attente raisonnable a-t-elle été frustrée? — Le comportement de la société a-t-il eu pour effet de dépouiller illégalement l'actionnaire de sa qualité d'actionnaire? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, c. C-44, art. 241.

En 2004, deux amis, M et R, ont envisagé la possibilité de créer une entreprise de transport routier. M devait avancer les fonds de démarrage et R, mettre à contribution ses compétences pour assurer la réussite de l'entreprise. Le 13 juillet 2004, R a constitué la société et, le même jour, le conseil d'administration de cette dernière a adopté une résolution à l'effet d'accepter les avis de souscription de valeurs mobilières de R et de M et d'émettre 51 actions à R et 49 à M. Tant les avis de souscription que la résolution n'ont été signés que par R. Subséquemment, R et M n'ont que rarement observé les exigences de la *Loi canadienne sur les sociétés par actions* (« *LCSA* ») et n'ont presque jamais rien consigné par écrit. Ils n'ont pas non plus conclu de contrat de société ou de convention d'actionnaires, et les avances de fonds substantielles consenties par M à R n'ont pas fait l'objet d'un contrat écrit ou de quelque autre formalité juridique.

On May 25, 2005, M sent a letter to the corporation in which he indicated that he was resigning as an officer and director of the company. M asserts that he never intended to stop being a shareholder, but the corporation contends that M also resigned as a shareholder and accordingly transferred his shares to R. Claiming that the corporation and R unduly and wrongfully stripped him of his status as a shareholder, M applied for an oppression remedy pursuant to s. 241 of the *CBCA*.

The trial judge dismissed M's oppression claim based on the factual finding that M had undertaken to remain a shareholder only so long as he was willing to guarantee the corporation's debts and later was no longer willing to do so. A majority of the Court of Appeal dismissed the appeal.

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

Per Abella, Cromwell, Karakatsanis, Wagner, Gascon and Brown JJ.: The trial judge's factual findings are not reviewable on appeal because no palpable and overriding error is present here. M's oppression claim must accordingly be approached on the basis of the trial judge's factual findings to the effect that from May 25, 2005 onwards, M did not want to be a shareholder, did not want to be treated as such and, as a result, transferred his shares to R.

There are two elements of an oppression claim. The claimant must first identify the expectations that he or she claims have been violated and establish that the expectations were reasonably held. Then the claimant must show that those reasonable expectations were violated by conduct falling within the statutory terms, that is, conduct that was oppressive, unfairly prejudicial to or unfairly disregarding of the interests of any security holder.

In the present case, M's oppression claim is groundless. M could have no reasonable expectation of being treated as a shareholder: he no longer was and expressly demanded not to be so treated. As against the corporation, the most that can be said is that it failed to carry out M's wishes as a result of not observing certain necessary corporate formalities. But in light of these findings, it cannot be said that the corporation acted oppressively or that it illegally stripped him of his status as a shareholder. What happened is that the corporation failed to make sure that all the legal formalities were complied with before registering the transfer of shares to R. The acts of the corporation which M claims to constitute oppression were in fact taken, albeit imperfectly, in accordance with his express wishes.

Le 25 mai 2005, M a fait parvenir à la société une lettre dans laquelle il démissionnait à titre de dirigeant et d'administrateur de l'entreprise. Il affirme n'avoir jamais eu l'intention de cesser d'être actionnaire, mais la société soutient qu'il a également démissionné à titre d'actionnaire et transféré de ce fait ses actions à R. En application de l'art. 241 de la *LCSA*, M a intenté un recours pour abus, alléguant que la société et R l'avaient dépouillé indûment et illégalement de sa qualité d'actionnaire.

Le juge de première instance a rejeté le recours pour abus après avoir conclu des faits que M ne s'était engagé à demeurer actionnaire que tant qu'il serait disposé à garantir le passif de la société et que, à un moment ultérieur, il n'avait plus été disposé à le faire. Les juges majoritaires de la Cour d'appel ont rejeté l'appel.

Arrêt (la juge Côté est dissidente) : Le pourvoi est rejeté.

Les juges Abella, Cromwell, Karakatsanis, Wagner, Gascon et Brown : Les conclusions de fait du juge de première instance ne sont pas susceptibles de révision en appel car elles ne sont entachées d'aucune erreur manifeste et dominante. Il faut donc statuer sur le recours pour abus de M à partir des conclusions de fait du juge de première instance selon lesquelles, à compter du 25 mai 2005, M n'a plus voulu être actionnaire, n'a plus voulu être traité comme tel et a de ce fait transféré ses actions à R.

Deux choses incombent à celui qui allègue l'abus. D'abord, il doit préciser quelles attentes ont censément été frustrées et en établir le caractère raisonnable. Ensuite, il doit démontrer que ces attentes raisonnables ont été frustrées par un comportement que vise le libellé de la loi, à savoir le fait d'abuser des droits d'un détenteur de valeurs mobilières ou de se montrer injuste à son égard en lui portant préjudice ou en ne tenant pas compte de ses intérêts.

Dans la présente affaire, le recours pour abus est sans fondement. M ne pouvait pas raisonnablement s'attendre à être traité comme un actionnaire : il ne l'était plus et il avait expressément demandé à ne plus être traité comme tel. On peut tout au plus reprocher à la société de ne pas avoir donné suite au vœu de M en omettant d'observer certaines formalités requises de sa part. Cependant, on ne saurait affirmer au vu de ces conclusions qu'elle a agi abusivement à l'égard de M ou qu'elle l'a dépouillé illégalement de sa qualité d'actionnaire. En fait, la société a omis de s'assurer de l'observation de toutes les formalités d'ordre juridique avant d'inscrire le transfert des actions à R. Les mesures de la société que M tient pour abusives ont en fait été prises, bien que de manière imparfaite, selon la volonté qu'il avait exprimée.

The fact that a corporation fails to comply with the requirements of the *CBCA* does not, on its own, constitute oppression. What may trigger the remedy is conduct that frustrates reasonable expectations, not simply conduct that is contrary to the *CBCA*. In the present case, the failure to observe the corporate formalities in removing M as a shareholder in accordance with his express wishes to be so removed cannot be characterized as an act unfairly prejudicial to the extent that this omission deprived him of his status as a shareholder. The corporation failed to observe the formalities of carrying out his wish not to be a shareholder. Nor can the failure to properly remove him as a shareholder in accordance with his express wishes make it just and equitable for him to regain his status as a shareholder.

Regarding the issue of whether the share transfer could have been retroactively cancelled, it is not possible to do so by way of simple oral consent. An issuance of shares can be cancelled only if (a) the corporation's articles are amended or (b) the corporation reaches an agreement to purchase the shares, which requires that the directors pass a resolution, that the shareholder in question gives his or her express consent and that the tests of solvency and liquidity be met. Meeting the requirements with respect to the maintenance of share capital cannot be optional, given that it is the share capital that is the common pledge of the creditors and is the basis for their acceptance of doing business with the corporation.

It is common ground that the shares that were transferred were not endorsed by M. Therefore it is true that the corporation proceeded to register a transfer that did not meet all of the criteria stated in the *CBCA*. Since this was an important formality required by law, it was to be observed on pain of nullity of the transfer. But there is no doubt about the fact that M knew that this formality was not complied with when the company proceeded to register the transfer in the corporate books, and that he was aware that he had not endorsed his share certificate when the shares were transferred to R as the trial judge found. As he was aware of the situation of which he now complains more than three years prior, his claim in that regard was and is still prescribed. Even if the transfer was subject to nullity, it did not mean that it was inexistent.

Finally, regarding the possibility of a conditional issuance of the shares, the condition at issue was a result of an agreement between M and R that the former would be a shareholder only if he guaranteed the corporation's debts. This agreement was reached by M and R; the corporation was not a party to this agreement. Accordingly, it does not attract the corporate formalities applicable to a conditional issuance of shares.

L'inobservation des formalités de la *LCSA* par une société ne constitue pas en soi de l'abus. Peut ouvrir droit au recours pour abus le comportement qui frustre l'attente raisonnable, mais pas celui qui est seulement contraire à la *LCSA*. En l'espèce, l'inobservation des formalités nécessaires au retrait de M à titre d'actionnaire, conformément à la volonté qu'il avait exprimée, ne saurait constituer un acte injustement préjudiciable à son égard en ce qu'elle le prive de sa qualité d'actionnaire. La société a omis d'observer les formalités requises pour donner suite à sa volonté de cesser d'être actionnaire. L'omission d'effectuer régulièrement son retrait à titre d'actionnaire, selon la volonté qu'il avait exprimée, ne saurait non plus rendre juste et équitable la réintégration de M au sein de l'actionnariat.

Quant à savoir si le transfert des actions aurait pu être annulé rétroactivement, une telle mesure n'aurait pu intervenir sur simple consentement verbal. Il ne peut y avoir annulation d'une émission d'actions que a) par modification des statuts de la société ou b) par achat de gré à gré des actions par la société, ce qui requiert une résolution des administrateurs, le consentement exprès de l'actionnaire en cause et le respect des critères de solvabilité et de liquidité. La conformité aux exigences relatives au maintien du capital-actions ne saurait être facultative puisque le capital-actions constitue le gage commun des créanciers en fonction duquel ces derniers acceptent de faire affaire avec la société.

Nul ne conteste que les actions transférées n'ont pas été endossées par M. La société a donc bel et bien inscrit un transfert qui ne respectait pas toutes les conditions prévues par la *LCSA*. S'agissant d'une formalité légale importante, son inobservation exposait l'opération à la nullité. Or, il ne fait aucun doute que M savait que cette formalité n'avait pas été accomplie lorsque la société a inscrit le transfert dans ses registres et que son certificat n'était pas endossé lors du transfert de ses actions à R, comme l'a conclu le juge de première instance. Puisque, plus de trois ans auparavant, il connaissait la situation qu'il déplore aujourd'hui, son recours était et demeure prescrit. Même s'il était susceptible d'annulation, le transfert existait tout de même.

Enfin, en ce qui concerne la possibilité que les actions aient été émises conditionnellement, la condition en cause résultait d'un accord entre M et R selon lequel le premier ne serait actionnaire que s'il se portait garant du passif de la société. L'accord est intervenu entre M et R, et la société n'y est pas partie. Il ne requérait donc pas l'observation des formalités liées à une émission conditionnelle d'actions.

Per McLachlin C.J. and Moldaver J.: It is not necessary to determine whether there was an effective transfer of M's shares to R. This appeal can be disposed of on the basis that M has failed to show a reasonable expectation that he would not be removed as a shareholder from the corporation's books given that he asked to be removed as a shareholder. This is confirmed by the fact that subsequently M ceased to conduct himself as an equity shareholder and advanced money as loans. The trial judge's finding of fact is supported by the evidence. Consequently, the trial judge did not err in denying M's oppression claim.

Per Côté J. (dissenting): Two key principles are deeply rooted in Canadian corporate law and cannot simply be disregarded or ignored: the principle that a corporation's legal personality is distinct from that of its shareholder or shareholders, and the principle or rule of the maintenance of capital. The formalities provided for in corporate legislation are imposed to give effect to these principles, and they are necessary to protect the corporation's patrimony, the common pledge of its creditors.

These principles cannot be variable. The principle that a corporation has a distinct legal personality and the maintenance of capital principle are just as important in the case of a small company as in that of a large one, if not more so. Although expectations may vary from one shareholder to another in the case of a closely held corporation, this does not diminish the importance of these principles. The same is true of the formalities provided for by law to ensure that they are adhered to.

It follows that the conclusion that shares were issued conditionally in this case or that the agreement between the two shareholders regarding M's shares was cancelled retroactively, simply by their consenting to its being cancelled, and that this cancellation had some effect on the corporation even though the necessary formalities were not observed, jeopardizes important pillars of Canadian corporate law.

Along the same lines, the fact that one shareholder claims he and his fellow shareholder entered into an agreement for the transfer of shares does not relieve the corporation of its legal duty to make the necessary inquiries before passing a resolution approving that transfer of shares and registering the transfer in its registers. The *CBCA* imposes some very strict requirements to be met before a transfer of shares is registered, including that the security be endorsed and that the transfer be rightful. The corporation's

La juge en chef McLachlin et le juge Moldaver : Point n'est besoin de décider s'il y a effectivement eu transfert des actions de M à R. On peut statuer sur le pourvoi à partir du fait que M n'a pas démontré qu'il pouvait raisonnablement s'attendre à ce que les registres de la société continuent de faire état de sa qualité d'actionnaire puisqu'il avait demandé à ne plus être actionnaire. Cela est d'ailleurs confirmé par le fait qu'il a cessé par la suite d'agir comme actionnaire participatif et a avancé des fonds sous forme de prêts. La conclusion de fait du juge de première instance trouve appui dans la preuve. Il n'a donc pas eu tort de rejeter le recours pour abus intenté par M.

La juge Côté (dissidente) : Deux grands principes sont profondément enracinés en droit canadien des sociétés par actions et ne peuvent simplement être écartés ou ignorés : il s'agit du principe de la personnalité juridique distincte de la société par rapport à celle de son ou ses actionnaires, et du principe ou de la règle du maintien du capital. Les formalités prévues par les lois relatives aux sociétés par actions sont imposées en raison de ces principes et elles sont nécessaires à la protection du patrimoine de la société, gage commun de ses créanciers.

Ces principes ne peuvent être à géométrie variable. Le principe de la personnalité juridique distincte de la société et celui du maintien du capital sont tout aussi importants — sinon plus — dans le cas d'une petite société que dans celui d'une grande. Bien que les attentes des actionnaires puissent varier de l'un à l'autre dans le cas d'une société par actions à capital fermé, l'importance de ces principes n'est pas pour autant diminuée. Il en va de même des formalités prévues par la loi pour faire respecter ces principes.

Il s'ensuit que la conclusion selon laquelle il y a eu en l'espèce émission conditionnelle d'actions ou encore celle selon laquelle il y a eu en l'espèce annulation rétroactive de l'entente entre les deux actionnaires quant aux actions de M sur simple consentement de ceux-ci et que cette annulation a eu quelque effet que ce soit sur la société, en dépit de l'absence du formalisme requis, mettent en péril des piliers importants du droit canadien des sociétés.

Dans le même sens, la prétention d'un actionnaire suivant laquelle une entente de transfert d'actions est intervenue entre lui et son coactionnaire ne libère pas la société en cause de son devoir légal de faire les vérifications requises avant d'entériner par résolution ce transfert d'actions et de l'inscrire dans ses registres. La *LCSA* soumet l'inscription d'un transfert d'actions à des conditions préalables très strictes, dont l'endossement du titre et le caractère régulier du transfert. L'omission de telles

failure to make such inquiries in this case was in itself a form of oppression.

M did not, by expressing an intention to withdraw from the corporation as a shareholder, extinguish any reasonable expectations he may have had as regards his remaining on the company's books as a shareholder. To conclude the opposite would amount to saying that the mere expression of an intention to withdraw from a corporation as a shareholder would also extinguish the reasonable expectation that the corporation in question will act in accordance with the law and with its articles and by-laws and will make the necessary inquiries before depriving a person of his or her shareholder status, and would thereby defeat the oppression remedy. However, the *CBCA* itself does not limit access to the oppression remedy in such a manner and, what is more, shareholders are entitled to expect a corporation to act in accordance with its articles and by-laws and, more generally, with the law. These are, so to speak, presumed expectations.

The question of reasonable expectations is of greater relevance to the determination of a shareholder's rights that are not specifically provided for in the legislation and in the corporation's articles and by-laws. Where, as in this case, a corporation is alleged to have acted unlawfully, the focus of the analysis is not so much on the question of reasonable expectations as on that of whether the corporation's conduct was in fact unlawful and, therefore, oppressive. Mere irregularities that are not oppressive or unfairly prejudicial will not be sufficient to justify granting the remedy to the complainant. On the other hand, a failure to comply with a mandatory legislative provision or with the requirements set out in the corporation's articles and by-laws that relate to the very recognition of shareholder status may justify granting the oppression remedy.

In this case, several aspects of the corporation's conduct are problematic. The evidence shows that the share certificate in question was not endorsed. It also shows that the corporation made no inquiries before passing the resolution to transfer M's shares, and that the resolution was passed retroactively and was signed by a single shareholder (namely the majority shareholder). The corporation's conduct in this regard, which violated express provisions of the legislation and of its own articles and by-laws, was prejudicial to M: that conduct unlawfully stripped him of his status as a shareholder. It is difficult to imagine how a business corporation could act more oppressively toward a shareholder than by depriving him or her of that status.

vérifications par la société en l'espèce constituait en soi une forme d'abus.

En exprimant l'intention de se retirer de la société à titre d'actionnaire, M ne mettait fin à toutes attentes raisonnables qu'il pouvait avoir de demeurer dans les registres de la société en tant qu'actionnaire. Conclure le contraire revient à dire que la simple expression de l'intention de se retirer d'une société en tant qu'actionnaire mettrait également fin à l'attente raisonnable que la société en question agisse en conformité avec la loi et ses statuts et règlements et qu'elle procède aux vérifications requises avant de priver une personne de son statut d'actionnaire, faisant ainsi échec au recours pour abus. Or, la *LCSA* elle-même ne limite pas ainsi l'accès au recours pour abus et, de plus, les actionnaires sont en droit de s'attendre à ce que la société agisse en conformité avec ses statuts et règlements et, plus généralement, avec la loi. Il s'agit pour ainsi dire d'attentes présumées.

La question des attentes raisonnables a une plus grande pertinence lorsqu'il s'agit de déterminer les droits d'un actionnaire au-delà de ce qui est spécifiquement prévu dans la loi et les statuts et règlements de la société. Lorsque l'illégalité de la conduite de la société est alléguée, comme c'est le cas en l'espèce, l'analyse ne porte pas tant sur la question des attentes raisonnables que sur celle visant à déterminer si la conduite de la société est effectivement illégale et, partant, abusive. De simples irrégularités, qui ne constituent pas pour autant un abus ou un acte injustement préjudiciable, ne seront pas suffisantes pour donner ouverture au recours du plaignant. À l'inverse, l'omission de se conformer à une disposition impérative de la loi ainsi qu'aux exigences prévues par les statuts et règlements de la société en ce qui concerne la reconnaissance même du statut d'actionnaire pourra donner ouverture au recours pour abus.

En l'espèce, plusieurs aspects de la conduite de la société posent problème. La preuve révèle que le certificat d'actions en cause n'a pas été endossé. Elle révèle également que la société n'a fait aucune vérification avant d'adopter la résolution de transfert des actions de M, et que c'est rétroactivement et avec la signature d'un seul actionnaire (c'est-à-dire l'actionnaire majoritaire) que la résolution a été adoptée. Cette conduite de la société, qui contrevient à des dispositions expresses de la loi, de ses statuts et de ses règlements, a été préjudiciable à M : elle l'a dépouillé illégalement de son statut d'actionnaire. Et il est difficile d'imaginer conduite plus abusive d'une société par actions à l'endroit d'un actionnaire que celle de le priver de ce statut.

The conduct of a corporation that approves a transfer of shares without making any inquiries and that confuses its interests with those of its majority shareholder, as if it were a mere puppet, is not less oppressive simply because another shareholder at some point expressed an intention to withdraw from the corporation without there being any agreement on the terms of such a withdrawal.

Furthermore, the trial judge did not find that the corporation's shareholders had agreed on a transfer of shares. The interpretation to the effect that he did so find denotes a fragmented reading of the trial judge's reasons and distorts his conclusions. The trial judge instead concluded that, given that M's shares had been issued on condition that he guarantee the corporation's debts, the intention he expressed of withdrawing from the corporation was sufficient for him to be stripped of his status as a shareholder. It is inaccurate to say that the trial judge's finding that the shares had been transferred was independent of their having been issued conditionally.

The parties characterized the agreement that was alleged to have been entered into by the corporation's shareholders in several different ways, at times as a conditional issuance of shares, at times as a retroactive cancellation and at times as a contract of sale or a contract of gift. This reflects a more fundamental problem, namely that, without some speculation, no intention in this regard can be found in the evidence. Indeed, the difficulty the courts below had in characterizing the alleged agreement resulted from the fact that there was no evidence of the juridical operation contemplated by the corporation's shareholders on May 25, 2005 that allegedly resulted in the transfer of M's shares.

Moreover, it is impossible to find, as a matter of law, that M transferred his shares on May 25, 2005. Whatever conclusion might be reached about the credibility of the witnesses in this regard, the intention expressed by M of withdrawing from the corporation had no effect on his rights as a shareholder. In this case, the intention expressed by M was at most an invitation to contract.

The analysis that is required in the circumstances cannot disregard the interplay between Quebec civil law and the *CBCA*. It is contrary to basic principles of Quebec civil law to argue that the intention expressed by M in this case resulted in an agreement of wills even though there was no agreement on the juridical operation being contemplated. To conclude that the expression of such an intention bars M's claim for oppression — thereby approving after the fact the transfer registered by the corporation in

La conduite d'une société qui avalise un transfert d'actions sans vérification aucune, et qui confond ses intérêts avec ceux de son actionnaire majoritaire comme si elle n'était qu'une simple marionnette, n'est pas moins abusive seulement parce que, à un certain moment donné, un coactionnaire a exprimé son intention de se retirer de la société, sans qu'il y ait eu entente quant aux modalités d'un tel retrait.

Par ailleurs, le premier juge n'a pas conclu que les actionnaires de la société s'étaient entendus afin de procéder à un transfert d'actions. Cette interprétation dénote une lecture parcellaire du jugement de première instance et en dénature les conclusions. Le juge de première instance a plutôt conclu que l'intention exprimée par M de se retirer de la société, dans la mesure où ses actions avaient été émises conditionnellement à ce qu'il garantisse le passif de la société, était suffisante pour le dépouiller de son statut d'actionnaire. Il n'est pas exact en l'espèce d'affirmer que le juge de première instance a conclu à la cession des actions, indépendamment du caractère conditionnel de leur émission.

Les parties ont qualifié l'entente qui serait intervenue entre les actionnaires de la société de maintes façons, y voyant tantôt une émission conditionnelle, tantôt une annulation rétroactive, tantôt un contrat de vente ou de donation. Cela traduit un problème plus fondamental : le fait que, sauf conjecture, aucune intention à cet effet ne ressort de la preuve. En fait, la difficulté éprouvée par les juridictions inférieures à qualifier la prétendue entente résulte du fait que la preuve est muette sur l'opération juridique qui aurait été envisagée par les actionnaires de la société le 25 mai 2005 et qui aurait eu comme résultat le transfert de ses actions.

Il est d'ailleurs impossible de conclure en droit que M a transféré ses actions le 25 mai 2005. En effet, peu importe la conclusion quant à la crédibilité des témoins à cet égard, l'intention manifestée par M de se retirer de la société était sans effet sur ses droits en tant qu'actionnaire. En l'espèce, l'intention exprimée par M constituait tout au plus une invitation à contracter.

L'analyse qui s'impose dans les circonstances ne peut ignorer l'interaction du droit civil québécois avec la *LCSA*. Soutenir que l'intention exprimée par M en l'espèce donnait lieu à un accord de volontés, et ce, malgré l'absence d'entente quant à l'opération juridique projetée, va à l'encontre de principes élémentaires du droit civil québécois. Conclure que l'expression d'une telle intention constitue une fin de non-recevoir au recours pour abus de M — avalisant ainsi a posteriori le transfert

its registers — is contrary to the law, to fairness and to common sense.

In addition to having no basis in law, the finding that M had expressed his intention of withdrawing as a shareholder and had transferred his shares in May 2005 is not supported by the evidence and is thus based on palpable and overriding errors. The trial judge erred in rejecting M's testimony in this regard, since he did so on the basis of an unreasonable interpretation of several pieces of evidence in the record. At most, the evidence shows that M expressed an intention to divest himself of his shares, but no agreement was reached on how he would dispose of them.

Finally, the prescription period applicable to a claim under s. 241 of the *CBCA* will depend on the basis for the claim. Where — as in this case — the complainant has been acknowledged to be a shareholder at some point and is claiming to have been unlawfully stripped of shareholder status by the corporation, the claim is therefore imprescriptible.

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Applied: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560.

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inscrit par la société dans ses registres — heurte la loi, l'équité et le sens commun.

La conclusion suivant laquelle M aurait exprimé son intention de se retirer en tant qu'actionnaire et aurait transféré ses actions en mai 2005, en plus de n'avoir aucun fondement en droit, ne trouve aucune assise dans la preuve et repose donc sur des erreurs manifestes et dominantes. Lorsque le juge de première instance rejette le témoignage de M à cet égard, il commet une erreur puisqu'il le fait en s'appuyant sur une interprétation déraisonnable de plusieurs pièces versées au dossier. Tout au plus, la preuve démontre qu'une intention de se départir de ses actions a été exprimée par M, sans toutefois qu'il n'y ait eu d'entente quant à la façon dont il disposerait de ses actions.

Enfin, le délai de prescription applicable au recours exercé en application de l'art. 241 de la *LCSA* dépendra du fondement du recours. Lorsque le statut d'actionnaire a été à un moment reconnu au plaignant — comme c'est le cas en l'espèce —, et que celui-ci prétend que la société l'en a illégalement dépouillé, le recours est alors imprescriptible.

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Claude Marseille, *Paul Martel* and *Caroline Dion*, for the appellant.

Hubert Camirand and *Marie-Geneviève Masson*, for the respondent.

The judgment of Abella, Cromwell, Karakatsanis, Wagner, Gascon and Brown JJ. was delivered by

CROMWELL J. —

I. Introduction

[1] In this oppression proceeding under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), the underlying question is whether, as the appellant, Johnny Mennillo, alleges, the business or affairs of Intramodal inc. were carried on or conducted in a manner that was oppressive or unfairly prejudicial to or unfairly disregarded Mr. Mennillo's interests: s. 241(2) *CBCA*.

[2] The informal manner in which the parties dealt with each other and their lack of attention to proper documentation gave rise to some technical points of corporate law including how a share transfer can be properly registered and how a share

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POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Vézina, Gagnon et St-Pierre), 2014 QCCA 1515, [2014] AZ-51101093, [2014] J.Q. nº 8429 (QL), 2014 CarswellQue 10625 (WL Can.), qui a confirmé une décision du juge Poirier, 2012 QCCS 1640, [2012] AZ-50849648, [2012] J.Q. nº 3574 (QL), 2012 CarswellQue 3855 (WL Can.). Pourvoi rejeté, la juge Côté est dissidente.

Claude Marseille, *Paul Martel* et *Caroline Dion*, pour l'appelant.

Hubert Camirand et *Marie-Geneviève Masson*, pour l'intimée.

Version française du jugement des juges Abella, Cromwell, Karakatsanis, Wagner, Gascon et Brown rendu par

LE JUGE CROMWELL —

I. Introduction

[1] La question qui, aux fins du présent pourvoi, sous-tend le recours pour abus intenté sur le fondement de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, c. C-44 (« *LCSA* »), est celle de savoir si, comme l'allègue l'appelant, Johnny Mennillo, Intramodal inc. a abusé des droits de ce dernier ou s'est montrée injuste à son égard en lui portant préjudice ou en ne tenant pas compte de ses intérêts, par la façon dont elle a conduit ses activités commerciales ou ses affaires internes (par. 241(2) de la *LCSA*).

[2] Le caractère informel des rapports entre les parties et le peu d'attention que ces dernières ont porté à l'établissement des documents requis soulèvent certains points techniques du droit des sociétés, notamment en ce qui concerne la manière dont

transfer may be cancelled. However, the answer to the fundamental question of whether Mr. Mennillo was oppressed in the corporate law sense turns on which of two sharply different versions of the facts — one supported by Mr. Mennillo and the other by Intramodal's controlling shareholder, Mario Rosati — ought to be accepted.

[3] Mr. Mennillo claims that he was oppressed because he was an investor in Intramodal who was frozen out of equity participation by Mr. Rosati. Intramodal denies this and says that Mr. Mennillo, far from having been frozen out of the corporation, wanted to be removed as a director and shareholder and transferred his shares to Mr. Rosati.

[4] The trial judge completely rejected Mr. Mennillo's version of events and substantially accepted Intramodal's. The judge found that Mr. Mennillo agreed that he would remain a shareholder only so long as he was willing to guarantee the corporation's debts. He ultimately decided that he did not wish to do so and transferred his shares to Mr. Rosati. The failure to observe the formalities necessary to complete the transfer of the shares, the judge found, resulted from an error or oversight on the part of Mr. Rosati's lawyer.

[5] If the trial judge's findings of fact are accepted, as in my view they ought to be, Mr. Mennillo's oppression claim is groundless. The critical finding is that Mr. Mennillo did not wish to remain a shareholder and told Mr. Rosati to have him removed as such. On those findings, all the corporation can be accused of is sloppy paperwork. But sloppy paperwork on its own does not constitute oppression. Neither does the corporation and its controlling shareholder treating Mr. Mennillo exactly as he wanted to be treated. While some errors were made in the courts below on some points of corporate law, Mr. Mennillo's oppression claim was properly dismissed and I would dismiss his appeal.

un transfert d'actions peut être inscrit régulièrement ou annulé. Toutefois, la question fondamentale de savoir si M. Mennillo a fait l'objet d'un abus au sens du droit des sociétés dépend de la version des faits que l'on retient entre les deux, nettement différentes, offertes par M. Mennillo et Mario Rosati, l'actionnaire contrôlant d'Intramodal.

[3] M. Mennillo allègue l'abus de ses droits. Investisseur dans Intramodal, il aurait été exclu de toute participation au capital par M. Rosati. Intramodal nie l'abus et affirme que, loin d'avoir été évincé de la société, M. Mennillo ne voulait plus faire partie de ses administrateurs et de ses actionnaires et a transféré ses actions à M. Rosati.

[4] Le juge de première instance rejette en bloc la version des faits de M. Mennillo et retient essentiellement celle d'Intramodal. À son avis, M. Mennillo a convenu qu'il ne demeurerait actionnaire que tant qu'il serait disposé à garantir le passif de la société. Finalement, M. Mennillo y a renoncé et a transféré ses actions à M. Rosati. De l'avis du juge, ce serait une erreur ou un oubli de la part de l'avocat de M. Rosati qui expliquerait l'inobservation des formalités nécessaires pour mener à bien le transfert des actions.

[5] Si les conclusions de fait du juge de première instance sont justes, comme j'estime qu'elles le sont, le recours pour abus de M. Mennillo est sans fondement. Selon la conclusion cruciale, M. Mennillo n'a pas souhaité demeurer actionnaire et a demandé à M. Rosati de faire en sorte qu'il ne le soit plus. Partant, la seule chose que l'on peut reprocher à la société est de ne pas avoir observé les formalités. Or, cette inobservation ne saurait en soi constituer de l'abus. La façon dont la société et son actionnaire contrôlant ont considéré M. Mennillo, c'est-à-dire exactement comme il le voulait, ne saurait non plus constituer de l'abus. Bien que les juridictions inférieures aient commis des erreurs sur des points touchant au droit des sociétés, j'estime que l'allégation d'abus a été rejetée à raison et je suis d'avis de rejeter le pourvoi.

II. Overview of the Legal Context, Parties' Positions and Issues

A. *Legal Context*

[6] To understand the facts and issues, it is important to understand the legal framework in which they must be considered.

[7] All of the relief requested by Mr. Mennillo is based solely on his claim of oppression under s. 241 of the *CBCA*. Other claims that he might have made, but did not make, are irrelevant to this appeal and cannot be considered. That section provides:

241 (1) A complainant may apply to a court for an order under this section.

(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[8] The Court set out the nature and constituent elements of an oppression claim in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at paras. 53-94. The oppression remedy is inspired by the principles of equity: it gives courts a

II. Aperçu du contexte juridique, des thèses des parties et des questions en litige

A. *Contexte juridique*

[6] Pour bien comprendre les faits et les questions en litige, il importe de préciser le contexte juridique dans lequel ils doivent être examinés.

[7] Le redressement demandé par M. Mennillo prend entièrement appui sur son allégation d'abus formulée en application de l'art. 241 de la *LCSA*. Les autres allégations qu'il aurait pu formuler, mais qu'il n'a pas formulées, sont sans pertinence et ne peuvent être prises en compte. Voici le texte de cette disposition :

241 (1) Tout plaignant peut demander au tribunal de rendre les ordonnances visées au présent article.

(2) Le tribunal saisi d'une demande visée au paragraphe (1) peut, par ordonnance, redresser la situation provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :

a) soit en raison de son comportement;

b) soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;

c) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

[8] Dans l'arrêt *BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560, par. 53-94, la Cour fait état de la nature de l'allégation d'abus et de ses composantes. Le recours pour abus s'inspire des principes d'equity : le tribunal se

broad jurisdiction to enforce "not just what is legal but what is fair" (para. 58; see also *Premier Tech ltée v. Dollo*, 2015 QCCA 1159, leave to appeal refused, 2016 CanLII 21792 (S.C.C.)). Whether there has been oppression is judged according to "business realities" not "narrow legalities": *BCE*, at para. 58. Furthermore, "[w]hat is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play": para. 59.

[9] There are two elements of an oppression claim. The claimant must first "identify the expectations that he or she claims have been violated . . . and establish that the expectations were reasonably held": *BCE*, at para. 70. Then the claimant must show that those reasonable expectations were violated by conduct falling within the statutory terms, that is, conduct that was oppressive, unfairly prejudicial to or unfairly disregarding of the interests of any security holder: para. 68; s. 241(2) *CBCA*.

[10] According to the trial judge's findings of fact, Mr. Mennillo agreed that he would remain a shareholder of the corporation on the condition that he guarantee its debts. He decided that he no longer wished to guarantee those debts and transferred his shares to Mr. Rosati. He could, therefore, have no reasonable expectation of being treated as a shareholder thereafter. He also could be thought to reasonably expect the corporation to ensure that the corporate formalities to register this arrangement would be observed. But the failure to do so (i.e. the conduct that "violated" those expectations) cannot be characterized as "oppressive, unfairly prejudicial or unfairly disregarding" of his interests. This was a two-person, private company in which the dealings between the parties were marked by extreme informality. As this Court said in *BCE*, "[c]ourts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company": para. 74. In substance, Mr. Mennillo was not oppressed but treated as he wanted the corporation to treat him. The failure of the company's lawyer to

voit conférer le vaste pouvoir d'imposer « le respect non seulement du droit, mais [aussi] de l'équité » (par. 58; voir aussi *Premier Tech ltée c. Dollo*, 2015 QCCA 1159, autorisation de pourvoi refusée (2016 CanLII 21792 (C.S.C.)). L'existence d'un abus tient à la « réalité commerciale », pas seulement aux « considérations strictement juridiques » (*BCE*, par. 58). En outre, le tribunal détermine ce qui est juste et équitable « selon les attentes raisonnables des parties intéressées en tenant compte du contexte et des rapports en jeu » (par. 59).

[9] Deux choses incombent à celui qui allègue l'abus. D'abord, il doit « préciser quelles attentes ont censément été frustrées [. . .] et en établir le caractère raisonnable » (*BCE*, par. 70). Ensuite, il doit démontrer que ces attentes raisonnables ont été frustrées par un comportement visé par le libellé de la loi, à savoir le fait d'abuser des droits d'un détenteur de valeurs mobilières ou de se montrer injuste à son égard en lui portant préjudice ou en ne tenant pas compte de ses intérêts (par. 68; par. 241(2) de la *LCSA*).

[10] Suivant les conclusions de fait du juge de première instance, M. Mennillo avait convenu qu'il demeurerait actionnaire de la société à la condition d'en garantir le passif. Il avait ensuite fait savoir qu'il ne souhaitait plus être garant de ce passif et il avait cédé ses actions à M. Rosati. Il ne pouvait donc pas raisonnablement s'attendre à être considéré comme un actionnaire par la suite. Il était par contre concevable qu'il s'attende raisonnablement à ce que la société s'assure de l'observation des formalités alors requises pour inscrire l'accord. Mais l'omission de la société de s'en assurer (soit le comportement par lequel elle a « frustré » les attentes de l'intéressé) ne saurait être assimilée au fait d'abuser des droits de M. Mennillo ou de se montrer injuste à son égard en lui portant préjudice ou en ne tenant pas compte de ses intérêts. La société en cause était une société fermée constituée de deux personnes dont les rapports entre elles se caractérisaient par une absence totale de formalisme. Comme le dit la Cour dans *BCE*, « [i]l est possible que les tribunaux accordent une plus grande latitude pour déroger à des formalités strictes aux administrateurs d'une

comply with the corporate law requirements to give effect to that intention is not oppression.

[11] Contrary to what my colleague Justice Côté concludes, the fact that a corporation fails to comply with the requirements of the *CBCA* does not, on its own, constitute oppression: paras. 166 and 195. The oppression remedy is a discretionary one that is equitable in nature: D. S. Morritt, S. L. Bjorkquist and A. D. Coleman, *The Oppression Remedy* (loose-leaf), at p. 5-10.4; D. H. Peterson and M. J. Cumming, *Shareholder Remedies in Canada* (2nd ed. (loose-leaf)), at p. 17-14. What may trigger the remedy is conduct that frustrates reasonable expectations, not simply conduct that is contrary to the *CBCA*. As I see it, my colleague's approach not only represents a significant departure from our jurisprudence, but as applied here permits Mr. Mennillo to use oppression proceedings as an instrument of oppression rather than as a remedy for it.

B. *Parties' Positions*

[12] Mr. Mennillo submits that he was unlawfully removed from the list of shareholders of the corporation through an amended declaration filed with the Registraire des entreprises of Quebec ("REQ") on July 18, 2005. He also argues that as a shareholder, he had the right to access the corporate records of the company during the usual business hours, a right which was denied to him until the fourth day of the trial in the Superior Court. Simply put, his oppression claim is that he is a shareholder and investor who was frozen out of the corporation.

[13] For its part, Intramodal says that Mr. Mennillo resigned as a director, asked not to be a shareholder and transferred his shares to Mr. Rosati. His advances of funds were fully repaid with a healthy bonus. Putting the corporation's position in its simplest terms, Mr. Mennillo did not want to be an equity shareholder and, as we shall see, he is no longer one.

petite société fermée qu'à ceux d'une société ouverte de plus grande taille » (par. 74). En somme, M. Mennillo n'a pas été victime d'abus, mais a été traité par la société comme il l'avait souhaité. Le fait que l'avocat de celle-ci n'a pas observé les formalités du droit des sociétés pour donner effet à cette volonté ne constitue pas de l'abus.

[11] Contrairement à ce que conclut ma collègue la juge Côté, l'inobservation des formalités de la *LCSA* par une société ne constitue pas en soi de l'abus (par. 166 et 195). Le recours pour abus est de nature discrétionnaire et a pour assise l'equity (D. S. Morritt, S. L. Bjorkquist et A. D. Coleman, *The Oppression Remedy* (feuilles mobiles), p. 5-10.4; D. H. Peterson et M. J. Cumming, *Shareholder Remedies in Canada* (2e éd. (feuilles mobiles)), p. 17-14). Peut ouvrir droit au recours le comportement qui frustre l'attente raisonnable, mais pas celui qui est seulement contraire à la *LCSA*. J'estime que non seulement l'approche de ma collègue rompt sensiblement avec la jurisprudence de la Cour, mais aussi que, en l'espèce, elle permet à M. Mennillo de faire du recours pour abus un instrument d'abus plutôt que de redressement.

B. *Thèses des parties*

[12] M. Mennillo soutient qu'Intramodal a illégalement rayé son nom de la liste des actionnaires dans une déclaration modificative déposée auprès du Registraire des entreprises du Québec (« REQ ») le 18 juillet 2005. Il prétend par ailleurs que, en tant qu'actionnaire, il avait le droit de consulter les registres de la société pendant les heures normales de bureau, mais qu'on lui a refusé l'exercice de ce droit jusqu'au quatrième jour du procès en Cour supérieure. Autrement dit, il s'agirait d'un actionnaire et investisseur qu'on aurait évincé de la société.

[13] Intramodal rétorque que M. Mennillo a démissionné de son poste d'administrateur, qu'il a demandé à ne plus être actionnaire et qu'il a cédé ses actions à M. Rosati. Il y a eu remboursement intégral des sommes avancées par M. Mennillo et versement d'une prime généreuse à ce dernier. L'entreprise soutient en somme que M. Mennillo ne voulait pas être un actionnaire participatif et, comme nous le verrons, qu'il ne l'est plus.

C. *Issues*

[14] Putting aside questions of prescription and remedy, Mr. Mennillo raises two legal points and one factual point on appeal.

[15] In relation to the law, he maintains:

(a) The trial judge erred in finding that he had transferred his shares to Mr. Rosati when no such transfer was validly effected in law (2012 QCCS 1640); and

(b) The majority of the Court of Appeal erred in concluding that a share subscription could be retroactively cancelled by simple verbal agreement and without complying with the required legal formalities (2014 QCCA 1515).

[16] In relation to the facts, Mr. Mennillo relies on the conclusions of the dissenting judge in the Court of Appeal and says that the trial judge erred in rejecting his claim that he is a shareholder of the corporation.

[17] I agree with Mr. Mennillo in relation to the second legal point relating to corporate law. However, this point has no impact on the result of the oppression proceedings. The trial judge found that in May 2005, Mr. Mennillo did not want to remain a shareholder because he no longer wanted to be guarantor of all Intramodal's debts. Some corporate formalities of the transfer of shares from Mr. Mennillo to Mr. Rosati were not completed as a result of an error or oversight on the part of Mr. Rosati's lawyer. From that date, Mr. Mennillo agreed to be simply a lender to his friend Mr. Rosati. As of May 25, 2005, Mr. Mennillo ceased to be a shareholder in the corporation. That is exactly how the corporation treated him. In my view, the dissenting justice in the Court of Appeal was wrong to overturn these findings of fact. There was, to be sure, some very sloppy paperwork. But in light of the key findings of fact, the corporation in substance simply treated Mr. Mennillo as he wanted to be treated and he was repaid all of the money he had loaned with a substantial bonus.

C. *Questions en litige*

[14] M. Mennillo soulève en appel deux points de droit et un point de fait sur lesquels je me penche sans égard aux questions de prescription et de redressement.

[15] S'agissant du droit, il fait valoir ce qui suit :

a) Le juge de première instance conclut à tort qu'il a cédé ses actions à M. Rosati alors qu'aucun transfert valable en droit n'a été effectué (2012 QCCS 1640);

b) Les juges majoritaires de la Cour d'appel ont tort de conclure qu'il est possible d'annuler rétroactivement une souscription d'actions par simple entente verbale, sans accomplir les formalités juridiques requises (2014 QCCA 1515).

[16] S'agissant des faits, M. Mennillo invoque les conclusions du juge dissident de la Cour d'appel et soutient que le juge de première instance rejette à tort sa prétention selon laquelle il est actionnaire de l'entreprise.

[17] Je donne raison à M. Mennillo quant au deuxième point qui touche au droit des sociétés, mais cela n'a aucune incidence sur l'issue du recours pour abus. Le juge de première instance conclut que, en mai 2005, M. Mennillo ne souhaitait plus être actionnaire, car il ne voulait plus être garant de la totalité du passif d'Intramodal. Certaines des formalités nécessaires au transfert des actions de M. Mennillo à M. Rosati n'ont pas été accomplies à cause d'une erreur ou d'un oubli de la part de l'avocat de M. Rosati. Dès ce moment, M. Mennillo a consenti à n'être qu'un simple prêteur vis-à-vis de son ami, M. Rosati. Le 25 mai 2005, M. Mennillo a cessé d'être actionnaire de la société et c'est exactement ainsi que la société l'a traité. À mon avis, le juge dissident de la Cour d'appel a tort d'infirmer ces conclusions de fait. Il y a certes eu un grand manque de formalisme, mais à la lumière de ces conclusions de fait cruciales, la société a pour l'essentiel simplement traité M. Mennillo comme il avait souhaité l'être et ce dernier a été remboursé de toutes les sommes prêtées en plus de toucher une prime substantielle.

III. Analysis

A. *The Factual Issue*

(1) Preliminary Observations

[18] The main question on which the outcome of the appeal depends is whether the trial judge made a reviewable error in finding that in May 2005, Mr. Mennillo did not wish to remain a shareholder because he no longer wanted to be the guarantor of all of Intramodal's debts and transferred his shares to Mr. Rosati. If these factual findings stand, Mr. Mennillo's oppression action is groundless: it was not oppressive, unfairly prejudicial to, or unfairly disregarding of his interests for the corporation to treat Mr. Mennillo as he himself asked to be treated. I recall that, as the Court said in *BCE*, in considering a claim in oppression, the courts should look at business realities not merely narrow legalities: para. 58.

[19] The appeal also raises some points of corporate law and of the law of prescription. These legal points, however, have no bearing on the ultimate disposition of the appeal. I will briefly address them after I set out my reasons for affirming the trial judge's fundamental conclusions.

(2) Overview of the Basic Facts

[20] In the winter of 2004, Messrs. Johnny Mennillo and Mario Rosati, two friends, discussed the possibility of creating a company. Mr. Mennillo would contribute the money to start up the business while Mr. Rosati would bring skills to ensure the success of a road transportation company. Mr. Rosati reserved the name "Intramodal" in April 2004.

[21] Mr. Rosati had the company incorporated on July 13, 2004. That same day, Intramodal's board of directors passed a resolution to accept notices of subscription to securities by Mr. Rosati and Mr. Mennillo and to issue 51 class "A" shares to Mr. Rosati and 49 shares of the same class to Mr. Mennillo. Both the

III. Analyse

A. *Le litige factuel*

(1) Remarques préliminaires

[18] L'objet principal du pourvoi est de savoir si le juge de première instance commet une erreur susceptible de contrôle lorsqu'il conclut que, en mai 2005, M. Mennillo ne souhaitait plus être actionnaire, car il ne voulait plus être garant de la totalité du passif d'Intramodal, de sorte qu'il a cédé ses actions à M. Rosati. Si ces conclusions de fait demeurent, le recours pour abus exercé par M. Mennillo est sans fondement : la société n'a pas abusé des droits de M. Mennillo et elle ne s'est pas montrée injuste à son égard en lui portant préjudice ou en ne tenant pas compte de ses intérêts puisqu'elle l'a traité comme il l'avait demandé. Rappelons que, comme le dit la Cour dans *BCE*, le tribunal saisi d'une allégation d'abus doit tenir compte de la réalité commerciale et pas seulement des considérations strictement juridiques (par. 58).

[19] Le pourvoi soulève par ailleurs quelques points en droit des sociétés ainsi qu'en droit de la prescription. Ces points de droit n'ont cependant aucune incidence sur l'issue du pourvoi. Je les examinerai brièvement une fois exposés les motifs pour lesquels je suis d'avis de confirmer les principales conclusions du juge de première instance.

(2) Aperçu des faits essentiels

[20] À l'hiver 2004, deux amis, MM. Mennillo et Rosati, ont envisagé la création d'une entreprise. M. Mennillo devait avancer les fonds de démarrage et M. Rosati, mettre ses compétences à contribution pour assurer la réussite d'une société de transport routier. En avril 2004, M. Rosati a réservé la dénomination « Intramodal ».

[21] Le 13 juillet 2004, M. Rosati constituait Intramodal en personne morale. Le même jour, le conseil d'administration d'Intramodal adoptait une résolution par laquelle les avis de souscription d'actions de MM. Rosati et Mennillo étaient acceptés et 51 actions de catégorie « A » étaient émises à M. Rosati,

notices of subscription and the resolution were signed by Mr. Rosati alone.

[22] It is worth mentioning at this point that many of the legal difficulties in this case have arisen as a result of the virtually complete lack of formality that accompanied the parties' business dealings. They rarely complied with the requirements of the *CBCA* and in fact almost never put anything in writing. They had neither a partnership nor a shareholders' agreement. They rarely or never exchanged emails or letters. Before Intramodal was incorporated, the roles that Messrs. Mennillo and Rosati respectively intended to fulfill in the company were agreed upon by a simple handshake. Once Intramodal was incorporated (on July 13, 2004), they became its directors and shareholders, but neither of them paid for their shares, contrary to the requirements of s. 25(3) *CBCA* and Mr. Mennillo's share certificate was never signed as required by s. 49(4)(a) *CBCA*.

[23] There was no written contract or indeed any other legal formality relating to Mr. Mennillo's advances of substantial amounts of money to Mr. Rosati. As evidence of the money provided for Intramodal by Mr. Mennillo, there are only two sheets of a Rolodex, marked up by Mr. Mennillo and initialed by Mr. Rosati.

[24] On May 25, 2005, Mr. Mennillo sent a letter to Intramodal in which he indicated that he was resigning as an officer and director of the company. He and Mr. Rosati give different accounts as to the reasons for and extent of his resignation. Whereas Intramodal argues that Mr. Mennillo transferred his shares to Mr. Rosati, Mr. Mennillo asserts that he never intended to stop being a shareholder of the company. On July 18, 2005, Daniel Ovadia, Intramodal's lawyer, filed an amending declaration with the REQ to indicate that Mr. Mennillo had been removed as a director and shareholder of the company.

[25] Between September 2005 and December 5, 2005, Mr. Mennillo advanced $145,000 to

49 à M. Mennillo. Tant les avis de souscription que la résolution n'ont été signés que par M. Rosati.

[22] Il convient de mentionner que, dans la présente affaire, bon nombre des problèmes d'ordre juridique tiennent à l'absence quasi totale de formalisme dans les relations d'affaires. Les parties n'ont que rarement observé les exigences de la *LCSA* et n'ont en fait presque jamais rien consigné par écrit. Elles n'ont pas non plus conclu de contrat de société ou de convention d'actionnaires. Elles ont rarement échangé des courriels ou des lettres, ou ne l'ont jamais fait. Avant la constitution d'Intramodal, MM. Mennillo et Rosati convenaient par une simple poignée de main des fonctions de l'un et de l'autre dans l'entreprise. Une fois Intramodal constituée en société (le 13 juillet 2004), ils en sont devenus les administrateurs et les actionnaires, mais aucun n'a versé la somme nécessaire pour libérer ses actions, contrairement aux exigences du par. 25(3) de la *LCSA*. En outre, le certificat d'actions de M. Mennillo n'a jamais été signé comme l'exige l'al. 49(4)a) de la *LCSA*.

[23] Les avances de fonds substantielles de M. Mennillo à M. Rosati n'ont été constatées par aucun contrat écrit et n'ont d'ailleurs fait l'objet d'aucune autre formalité juridique. La preuve des sommes ainsi versées à Intramodal se résume à deux fiches de *Rolodex* annotées par M. Mennillo et paraphées par M. Rosati.

[24] Le 25 mai 2005, M. Mennillo a fait parvenir à Intramodal sa lettre de démission à titre d'administrateur et de dirigeant de la société. Les versions de MM. Mennillo et Rosati diffèrent tant sur les motifs de ce geste que sur sa portée. Intramodal soutient que M. Mennillo a transféré ses actions à M. Rosati, tandis que M. Mennillo affirme qu'il n'a jamais eu l'intention de cesser d'être actionnaire de la société. Le 18 juillet 2005, l'avocat d'Intramodal, M^e^ Daniel Ovadia, a déposé auprès du REQ une déclaration modificative faisant état du retrait de M. Mennillo à titre d'administrateur et d'actionnaire de la société.

[25] Du mois de septembre 2005 au 5 décembre de la même année, M. Mennillo a avancé 145 000 $

Mr. Rosati. Intramodal began operating in December 2005, and Mr. Mennillo continued to advance money to Mr. Rosati. The amounts he advanced totalled $440,000, which included the $145,000 that had been paid in 2005. The two men met on two occasions in July 2007, and they do not agree about what took place at those meetings.

[26] According to Mr. Mennillo, he was with Mr. Rosati and another friend at the Rib'N Reef restaurant on July 14, 2007 when he noted that Intramodal was thriving and Mr. Rosati was now living very well. Upset about this, Mr. Mennillo complained that he was not sharing in the company's success. At a second meeting, on July 21, 2007, Mr. Mennillo asked that the amounts of his loans be repaid and that he receive his share of the profits generated by Intramodal. He rejected at that time an offer to transfer his shares to Mr. Rosati.

[27] According to Mr. Rosati, following the July 14 meeting, Mr. Mennillo was quite unhappy about having received no return on his $440,000 investment that had resulted in the start-up of a lucrative business. Mr. Rosati suggested that they meet a week later to resolve their differences. At that meeting, Mr. Rosati asked Mr. Mennillo what amount might satisfy him in order to put an end to their dispute. Mr. Mennillo fixed the amount at $150,000, which meant that the total debt amounted to $690,000, including interest at the annual rate of 10 percent and a bonus of $100,000.

[28] In October 2007, Mr. Rosati and Mr. Mennillo met several times together with Antoine Papadimitriou, Mr. Mennillo's accountant. According to Mr. Mennillo, the purpose of these meetings was to fix a price for the redemption of his shares. He claimed that it was at these meetings that his advisers had suggested that his advances ($440,000) be repaid using false invoices. Mr. Papadimitriou had also suggested that the $440,000 principal amount be increased by approximately 35 percent because the tax owing on it would be paid by Mr. Mennillo's management company, 147488 Canada Inc. This would raise the amount of the repayment to $690,000.

à M. Rosati. Les activités d'Intramodal ont débuté en décembre 2005, et M. Mennillo a continué de verser des sommes à M. Rosati. Au total, il aura avancé 440 000 $, ce qui comprend les 145 000 $ déjà versés en 2005. En juillet 2007, les deux hommes se sont rencontrés deux fois, mais conservent chacun un souvenir différent de ces rencontres.

[26] Selon la version de M. Mennillo, c'est lors d'un repas avec M. Rosati et un autre ami, le 14 juillet 2007, au restaurant Rib'N Reef, qu'il aurait constaté qu'Intramodal était devenue prospère et que M. Rosati menait un grand train de vie. Contrarié par la situation, il se serait plaint de ne bénéficier aucunement de la réussite de l'entreprise. Lors de la seconde rencontre, le 21 juillet 2007, il aurait demandé le remboursement des sommes prêtées et le versement de sa part des profits d'Intramodal. Il aurait alors rejeté l'offre de transférer ses actions à M. Rosati.

[27] Selon la version de M. Rosati, après la rencontre du 14 juillet, M. Mennillo se serait montré assez mécontent de l'absence de rendement de son investissement de 440 000 $, qui avait permis le démarrage d'une entreprise lucrative. M. Rosati aurait proposé une rencontre une semaine plus tard pour régler le différend puis, lors de cette rencontre, il aurait demandé à M. Mennillo de lui indiquer quel montant pourrait le satisfaire et mettre fin à la mésentente. M. Mennillo aurait alors fixé ce montant à 150 000 $ de sorte que la créance totale s'élève à 690 000 $, y compris l'intérêt au taux annuel de 10 p. 100 et une prime de 100 000 $.

[28] En octobre 2007, de nombreuses rencontres ont eu lieu entre MM. Rosati et Mennillo et le comptable de ce dernier, Antoine Papadimitriou. Selon M. Mennillo, ces rencontres avaient pour but de fixer le prix de rachat de ses actions. Il prétend que c'est à l'occasion de ces rencontres que ses conseillers lui ont proposé d'obtenir le remboursement de ses avances (440 000 $) au moyen de fausses factures. M. Papadimitriou aurait en outre proposé de majorer d'environ 35 p. 100 le capital de 440 000 $ puisque cette somme serait imposée entre les mains de la société de gestion de M. Mennillo, 147488 Canada inc. Suivant ce scénario, le montant du remboursement se serait élevé à 690 000 $.

[29] As for Mr. Rosati, he claims to have attended these meetings alone. He also claims that the purpose of the negotiations was instead to increase the amount of the repayment that had previously been agreed upon in July 2007. He maintains that Paolo Carzoli, a tax specialist, suggested that, to enable Mr. Mennillo to claim the capital gains exemption, the company's books be corrected such that Mr. Mennillo would receive 49 common shares, which he would then sell to Mr. Rosati. Mr. Rosati rejected this.

[30] The money Mr. Mennillo had advanced to Mr. Rosati was repaid in its entirety between July 2006 and December 7, 2009. This was done by means of cheques issued by Intramodal for the payment of false invoices issued by 147488 Canada Inc. for "consultation fees" or "management fees". The total amount paid by Intramodal to Mr. Mennillo's management company was $690,000.

[31] On December 7, 2009, at a meeting in a restaurant, Mr. Rosati gave Mr. Mennillo a cheque for $40,000 marked "Full and Final Payment". A few days later, Mr. Mennillo consulted his lawyer, Israel Kaufman, about this note. According to Mr. Mennillo, that was when he first understood that he was no longer a shareholder of Intramodal.

[32] On February 25, 2010, Mr. Kaufman sent Intramodal a demand letter. Claiming that Intramodal and Mr. Rosati had unduly and wrongfully stripped him of his status as a shareholder, Mr. Mennillo applied for an oppression remedy against Intramodal on September 7, 2010.

(3) Findings of Fact at First Instance

[33] Poirier J. began by stating that the case before him essentially turned on the credibility of the witnesses. He then rejected Mr. Mennillo's version of the facts in its entirety. He concluded that as of May 25, 2005, Mr. Mennillo

[29] M. Rosati dit pour sa part s'être présenté seul à ces rencontres et que les négociations visaient plutôt à augmenter le montant du remboursement déjà convenu en juillet 2007. Afin que M. Mennillo puisse profiter de la déduction pour gains en capital, un avocat fiscaliste, M^e^ Paolo Carzoli, lui aurait conseillé de rectifier les registres de la société de façon qu'il reçoive 49 actions ordinaires et les vende à M. Rosati, ce que ce dernier aurait refusé.

[30] Les avances de fonds de M. Mennillo à M. Rosati ont été entièrement remboursées entre le mois de juillet 2006 et le 7 décembre 2009. Le remboursement s'est fait par chèques d'Intramodal sur présentation de fausses factures établies par 147488 Canada inc. pour des « consultations » (« *consultations fees* ») ou de la « gestion » (« *management fees* »). La somme totale versée par Intramodal à la société de gestion de M. Mennillo se monte à 690 000 $.

[31] Le 7 décembre 2009, lors d'une rencontre dans un restaurant, M. Rosati a remis à M. Mennillo un chèque de 40 000 $ portant la mention « *Full and Final Payment* » (règlement total et définitif). Quelques jours plus tard, M. Mennillo a consulté son avocat, M^e^ Israel Kaufman, au sujet de cette mention. C'est alors qu'il aurait compris qu'il n'était plus actionnaire d'Intramodal.

[32] Le 25 février 2010, M^e^ Kaufman a fait parvenir une mise en demeure à Intramodal. Le 7 septembre 2010, M. Mennillo a intenté contre Intramodal un recours pour abus dans le cadre duquel il alléguait qu'Intramodal et M. Rosati l'avaient dépouillé indûment et illégalement de sa qualité d'actionnaire.

(3) Conclusions de fait tirées en première instance

[33] Le juge Poirier affirme d'abord que l'issue de l'affaire dont il est saisi repose essentiellement sur la crédibilité des témoins, puis il rejette en bloc la version de M. Mennillo. Il conclut que, à compter du 25 mai 2005, M. Mennillo

[TRANSLATION] refused to participate in this venture [that is, to be an equity shareholder in Intramodal] and asked to be removed from the company as a shareholder and a director effective May 25, 2005. As of that date, Mennillo agreed only to be a lender of $440,000 to his friend Rosati. The failure to complete the transfer of Mennillo's shares to Rosati resulted from an error or oversight on the part of Rosati's lawyer.

Since May 25, 2005, Mennillo has no longer been a shareholder or director of Intramodal. [paras. 74-75 (CanLII)]

[34] It is clear from a careful reading of the trial judge's reasons that he understood that Mr. Mennillo would cease to be a shareholder as a result of transferring his shares to Mr. Rosati. In the judge's view, Mr. Mennillo had more than a mere intention of being removed from the company; he found that Mr. Mennillo transferred his shares to Mr. Rosati and ceased to hold any shares in Intramodal. There was a basis for this conclusion in the evidence notwithstanding that the evidence was admittedly confused and confusing. However, the critical finding for the purposes of the substance of the oppression claim was that as of May 25, 2005, Mr. Mennillo did not wish to be a shareholder and asked to be removed. On that point, Mr. Rosati's evidence was unshaken and accepted by the trial judge.

[35] The judge's conclusions and his rejection of Mr. Menillo's version of events were based on the following findings of fact:

(i) The reason given by Mr. Mennillo for his resignation as a director of Intramodal (i.e. that Mr. Rosati didn't want a potential client, namely Labatt Breweries ("Labatt"), to know that Mr. Mennillo was involved in the corporation) was false.

(ii) The funds advanced by Mr. Mennillo, starting before Intramodal had been incorporated, were loans and were not advanced as investments in the corporation.

(iii) The figure 250,000 appearing on the "Rolodex record", which also showed all the amounts

a refusé cette aventure [soit le fait d'être actionnaire participatif d'Intramodal] et a demandé son retrait de la compagnie à titre d'actionnaire et d'administrateur à compter du 25 mai 2005. À compter de cette date, [M.] Mennillo a accepté de n'être que le prêteur d'une somme de 440 000 $ à son ami [M.] Rosati. Le fait que la cession des actions de [M.] Mennillo à [M.] Rosati n'ait pas été complétée résulte de l'erreur ou l'oubli de la part de l'avocat de [M.] Rosati.

Depuis le 25 mai 2005, [M.] Mennillo n'est plus détenteur d'aucune action ni administrateur de Intramodal. [par. 74-75 (CanLII)]

[34] Il ressort de la lecture attentive de ses motifs que, pour le juge, M. Mennillo cessait d'être actionnaire dès le transfert de ses actions à M. Rosati. À son avis, M. Mennillo n'a pas seulement eu l'intention de se retirer de la société, mais a cédé ses actions à M. Rosati et cessé d'être actionnaire d'Intramodal. Cette conclusion a une assise dans la preuve même si, de l'avis de tous, cette dernière est confuse et source de confusion. Toutefois, selon la conclusion cruciale sur le bien-fondé de l'allégation d'abus, en date du 25 mai 2005, M. Mennillo ne souhaitait plus être actionnaire et a demandé son retrait. Sur ce point, le témoignage de M. Rosati demeure constant, et le juge y ajoute foi.

[35] Les conclusions du juge et le rejet par ce dernier de la version de M. Mennillo reposent sur le constat des faits suivants :

(i) Le motif invoqué par M. Mennillo pour démissionner à titre d'administrateur d'Intramodal (à savoir que M. Rosati ne voulait pas que La Brasserie Labatt (« Labatt »), un client éventuel, sache que M. Mennillo avait des intérêts dans la société) était faux.

(ii) Les sommes avancées par M. Mennillo avant la constitution en société d'Intramodal étaient des prêts, non des investissements dans la société.

(iii) Le montant de 250 000 $ qui figure sur le *Rolodex*, lequel fait état de toutes les sommes

advanced by Mr. Mennillo, corresponded to the amount that Mr. Mennillo and Mr. Rosati had agreed on in July 2007 and that had served to establish the amount of the final payment ($440,000 + $250,000 = $690,000).

(iv) Two documents relating to an insurance policy taken out on the lives of Mr. Mennillo and Mr. Rosati, the beneficiary of which was Intramodal, proved, first, that Mr. Rosati believed as of August 15, 2006 that he was the sole shareholder and director of Intramodal and, second, that Mr. Mennillo was only a creditor of the company.

(v) In a letter from Mr. Kaufman, Mr. Mennillo's lawyer, dated October 31, 2007, no mention was made of financing for the purchase of shares, as what was referred to was instead the acknowledgment of a debt.

(vi) In a memorandum dated November 26, 2007, Mr. Carzoli, a tax adviser retained by Mr. Papadimitriou (Mr. Mennillo's accountant), described the ownership of shares in Intramodal as of the fall of 2007 and concluded from it that Mr. Mennillo was no longer a shareholder of the company at that time.

(vii) The demand letter sent to Intramodal by Mr. Kaufman on February 25, 2010 showed that Mr. Mennillo knew he was no longer a shareholder and that this had been the case since May 2005, when he had resigned as a director and transferred his shares.

(viii) As could be seen in Intramodal's books, there was a common shares certificate in Mr. Mennillo's name. However, it was not signed, and the same was true on the share transfer form on the back, which contained only the nominative information. These books also contained a resolution dated May 25, 2005 concerning the transfer of the shares from Mr. Mennillo to Mr. Rosati. If the transfer was not completed, this was the result of an error or oversight on the part of Mr. Rosati's lawyer.

avancées par M. Mennillo, correspond à la somme dont ont convenu MM. Mennillo et Rosati en juillet 2007 et qui a servi à établir le montant du remboursement total (440 000 $ + 250 000 $ = 690 000 $).

(iv) Les deux documents relatifs à l'assurance contractée sur la vie de M. Mennillo et celle de M. Rosati et dont le bénéficiaire était Intramodal établissent, d'une part, que M. Rosati se croyait, depuis le 15 août 2006, seul actionnaire et administrateur d'Intramodal et, d'autre part, que M. Mennillo n'était que créancier de la société.

(v) Dans une lettre de l'avocat de M. Mennillo, M[e] Kaufman, datée du 31 octobre 2007, il n'est nullement fait mention du financement d'un éventuel achat d'actions, mais plutôt d'une reconnaissance de dette.

(vi) Dans un mémorandum en date du 26 novembre 2007, M[e] Carzoli, un avocat fiscaliste dont M. Papadimitriou (le comptable de M. Mennillo) retenait les services, décrit l'actionnariat d'Intramodal à l'automne 2007 et conclut que M. Mennillo n'est plus, à ce moment, actionnaire de la société.

(vii) La mise en demeure transmise par M[e] Kaufman à Intramodal le 25 février 2010 montre que M. Mennillo savait qu'il n'était plus actionnaire, et ce, depuis mai 2005, lorsqu'il avait démissionné à titre d'administrateur et transféré ses actions.

(viii) Les registres d'Intramodal révèlent l'existence d'un certificat d'actions ordinaires au nom de M. Mennillo. Or, celui-ci n'est pas signé, non plus que le formulaire de transfert d'actions figurant à l'endos, qui ne contient que des renseignements nominatifs. Par ailleurs, ces registres contiennent une résolution datée du 25 mai 2005 portant sur le transfert des actions de M. Mennillo à M. Rosati. Si le transfert des actions de M. Mennillo à M. Rosati n'a pas été effectué, c'est à cause d'une erreur ou d'un oubli de la part de l'avocat de M. Rosati.

(ix) An out-of-court examination of Mr. Mennillo on October 28, 2010 supported the view that he had acknowledged that he no longer wanted to be a shareholder of Intramodal as of May 2005. He mentioned several times in the course of that examination that he had removed himself as a shareholder of Intramodal, but then corrected himself to say that he had only resigned as a director. Moreover, the date he gave as the one at which he had learned he was no longer a shareholder was not the one specified in his motion to institute proceedings and also differed from the one specified in his affidavit of July 29, 2010. The trial judge found that a revelation as important as that should have made an impression on Mr. Mennillo.

(4) Mr. Mennillo's Position With Respect to These Findings

[36] Mr. Mennillo relies on the conclusions of the dissenting judge who found a number of errors in the reasoning of the trial judge which justified setting aside his findings of fact. I will consider each in turn.

(a) *The Reason Mr. Mennillo Gave for Resigning as a Director*

[37] The trial judge found that Mr. Mennillo's explanation of why he had resigned as a director in May 2005 was false.

[38] Mr. Mennillo's version was that Labatt wished to review Intramodal's books and to visit its premises. He said that his involvement with the company would not be favourable in Labatt's eyes because of his activities in hydroponic greenhouses and the sale of tobacco products. Mr. Mennillo placed this visit by Labatt at a time when Intramodal was acquiring important transportation equipment and he referred repeatedly in his testimony to the fact that Labatt would come to visit the premises.

[39] The trial judge found, however, that Mr. Mennillo's resignation could not have been linked to

(ix) L'interrogatoire préalable de M. Mennillo le 28 octobre 2010 confirme l'opinion selon laquelle ce dernier a reconnu avoir souhaité ne plus être actionnaire d'Intramodal à partir du mois de mai 2005. Lors de cet interrogatoire, il a mentionné à quelques reprises qu'il avait démissionné comme actionnaire d'Intramodal, pour se reprendre ensuite et affirmer que cette démission n'était qu'à titre d'administrateur. De plus, la date à laquelle il dit avoir appris qu'il n'était plus actionnaire ne correspond pas à celle indiquée dans sa requête introductive d'instance et diffère également de celle qui figure dans son affidavit du 29 juillet 2010. Selon le juge de première instance, le moment de cette révélation si importante aurait dû imprégner la mémoire de M. Mennillo.

(4) Thèse de M. Mennillo sur ces conclusions

[36] M. Mennillo invoque les conclusions du juge dissident de la Cour d'appel, à savoir que, dans ses motifs, le juge de première instance commet un certain nombre d'erreurs qui justifient l'infirmation de ses conclusions de fait. Je les examine tour à tour.

a) *Le motif invoqué par M. Mennillo pour démissionner à titre d'administrateur*

[37] Le juge de première instance conclut que le motif invoqué par M. Mennillo pour démissionner à titre d'administrateur en mai 2005 était faux.

[38] Selon M. Mennillo, Labatt voulait examiner les registres d'Intramodal et visiter ses locaux. Il dit que Labatt aurait vu d'un mauvais œil sa participation dans l'entreprise à cause de ses activités dans le domaine des serres hydroponiques et celui de la vente de produits du tabac. Il fait coïncider la visite des représentants de Labatt avec l'acquisition d'équipements de transport importants par Intramodal et il mentionne plusieurs fois dans son témoignage la visite des locaux d'Intramodal par Labatt.

[39] Le juge de première instance conclut cependant que la démission de M. Mennillo ne peut avoir

the examination of Intramodal's books by representatives of Labatt because at the time, Intramodal had no equipment or premises. In any case, Mr. Mennillo's explanation made no sense because his resignation as a director would not make him disappear from the corporation's books if, as he claimed, he was a shareholder. The judge also referred to the inconsistencies in Mr. Mennillo's evidence in relation to this resignation.

[40] The dissenting judge in the Court of Appeal found that the trial judge had erred by setting aside Mr. Mennillo's version of events. He reasoned that although Intramodal did not have any equipment, it was engaging in some public relations activities at the time of the proposed visit. He also thought that Mr. Mennillo's explanation made sense in light of the fact that Labatt would not likely be concerned if Mr. Mennillo's involvement was only as a minority shareholder and, in any event, the problem could have been resolved by Mr. Mennillo transferring his shares to his management company.

[41] Respectfully, there was no basis for the dissenting judge to set aside the trial judge's rejection of Mr. Mennillo's explanation of why he had resigned as a director. As the majority of the Court of Appeal pointed out, Mr. Mennillo linked Labatt's visit to a time when Intramodal was acquiring transportation equipment. But it was clear that Intramodal was not doing so in the time leading up to Mr. Mennillo's resignation in May 2005. I would add that Mr. Mennillo also linked the visit to a time when Labatt could visit the premises. But this made no sense because Intramodal had no premises as of the date of Mr. Mennillo's resignation as a director. Moreover, the trial judge made no error in concluding that if Mr. Mennillo stayed on as a shareholder, his involvement would be obvious not only from the books of the corporation but also from the public register.

[42] There was no clear and determinative error on the part of the trial judge with respect to this point.

été liée à l'examen des registres d'Intramodal par les représentants de Labatt, car Intramodal ne possédait alors ni équipements ni locaux. Quoi qu'il en soit, l'explication de M. Mennillo ne se tient pas, car sa démission à titre d'administrateur n'aurait pas fait disparaître son nom des registres de la société si, comme il le prétend, il était demeuré actionnaire. Le juge invoque également les incohérences de son témoignage sur sa démission.

[40] Le juge dissident de la Cour d'appel conclut que le juge de première instance écarte à tort la version des faits de M. Mennillo. Il explique que même si Intramodal n'avait pas d'équipement, elle se livrait à certaines activités de relations publiques au moment où devait avoir lieu la visite. De plus, l'explication de M. Mennillo se tient puisque Labatt ne se serait pas vraisemblablement inquiétée de la participation de M. Mennillo au seul titre d'actionnaire minoritaire et que, de toute façon, le problème aurait pu être résolu par le simple transfert de ses actions à sa société de gestion.

[41] En tout respect, aucun fondement ne permettait au juge dissident d'écarter la décision du juge de première instance de ne pas ajouter foi à l'explication de sa démission à titre d'administrateur offerte par M. Mennillo. Comme le soulignent les juges majoritaires de la Cour d'appel, M. Mennillo fait coïncider la visite des représentants de Labatt avec l'acquisition d'équipements de transport par Intramodal. Or, il appert clairement que ce n'est pas ce que faisait Intramodal au cours de la période qui a précédé la démission de M. Mennillo en mai 2005. J'ajoute que M. Mennillo fait également coïncider la visite avec une période où Labatt aurait pu visiter les locaux, ce qui était invraisemblable, car Intramodal n'en disposait pas le jour de la démission de M. Mennillo à titre d'administrateur. Qui plus est, le juge de première instance n'a pas tort de conclure que si M. Mennillo était demeuré actionnaire, sa participation dans la société aurait été évidente à la lecture non seulement des registres de l'entreprise, mais aussi du registre public.

[42] Le juge de première instance ne commet aucune erreur manifeste et déterminante sur ce point.

(b) *The Life Insurance Documents*

[43] The dissenting judge took issue with the trial judge's reliance on documents relating to a life insurance in which Mr. Rosati indicated that he was the sole shareholder of the corporation. The dissenting judge thought that these statements needed to be treated with caution as they originated with Mr. Rosati and, in addition, it was hard to understand why, if Mr. Mennillo was simply a creditor, Intramodal would insure his life. However, as the majority of the Court of Appeal pointed out, Mr. Rosati was dealing with a broker who had done business with Mr. Mennillo for more than 20 years. The trial judge was entitled to take into account that in September 2006, Mr. Rosati was openly claiming, in dealings with Mr. Mennillo's insurance broker, that Mr. Mennillo was not a shareholder in the corporation. The trial judge could well conclude that such behaviour on Mr. Rosati's part enhanced the credibility of his theory. There was certainly no basis to interfere with the trial judge's findings in this regard.

(c) *The Carzoli Memorandum*

[44] The dissenting judge was also of the view that the trial judge had misinterpreted a memo prepared by Mr. Carzoli, a tax specialist retained by Mr. Mennillo's accountant, Mr. Papadimitriou.

[45] The trial judge noted that, in a memo prepared after a meeting with Mr. Mennillo's accountant, Mr. Carzoli wrote that "[t]he minute book of the company indicates that the shares are owned by only one shareholder . . . . The other shareholder . . . was only an investor in the company": para. 50. The judge took this as some evidence that Mr. Mennillo did not believe himself to be a shareholder as of the date of the memorandum (i.e. November 26, 2007).

[46] The dissenting judge thought that this was an erroneous inference because Mr. Carzoli explained in the rest of the memorandum that the register needed correction in order to reflect the reality that Mr. Mennillo was in fact a shareholder.

b) *Les documents relatifs à l'assurance-vie*

[43] Le juge dissident reproche au juge de première instance de se fonder sur des documents d'assurance-vie dans lesquels M. Rosati dit être l'unique actionnaire de la société. Il estime que cette affirmation doit être considérée avec circonspection dans la mesure où M. Rosati en est l'auteur. De plus, on comprend mal pourquoi Intramodal aurait assuré la vie de M. Mennillo s'il n'avait été qu'un simple créancier. Toutefois, comme le font observer les juges majoritaires de la Cour d'appel, M. Rosati retenait les services d'un courtier qui faisait affaire avec M. Mennillo depuis plus de 20 ans. Le juge de première instance pouvait donc tenir compte du fait que, en septembre 2006, M. Rosati affirmait ouvertement, lorsqu'il avait affaire au courtier d'assurance de M. Mennillo, que ce dernier n'était pas actionnaire de la société. Il pouvait très bien conclure que le comportement de M. Rosati ajoutait à la véracité de sa thèse. Il n'y avait assurément aucune raison valable d'intervenir à l'égard des conclusions du juge sur ce point.

c) *Le mémorandum de M^e^ Carzoli*

[44] Le juge dissident est également d'avis que le juge de première instance interprète mal le mémorandum de M^e^ Carzoli, un avocat fiscaliste dont le comptable de M. Mennillo, M. Papadimitriou, retenait les services.

[45] Le juge de première instance indique que, dans un mémorandum rédigé après sa rencontre avec le comptable de M. Mennillo, M^e^ Carzoli écrit : [TRADUCTION] « [l]e registre des procès-verbaux de la société indique que les actions n'appartiennent qu'à un seul actionnaire [. . .] L'autre actionnaire [. . .] n'est qu'un investisseur de l'entreprise » (par. 50). Cet élément prouve selon lui que M. Mennillo ne se croyait pas actionnaire à la date du mémorandum (soit le 26 novembre 2007).

[46] Le juge dissident estime qu'il s'agit d'une inférence erronée, car dans le reste de son mémo, M^e^ Carzoli explique que le registre doit être rectifié afin de constater que M. Mennillo est en fait actionnaire. Il conclut également du mémorandum que

The dissenting judge was also of the view that the memorandum showed that Mr. Carzoli's strategy was based on the premise that Mr. Mennillo was a shareholder.

[47] However, as the majority in the Court of Appeal pointed out, the statement that there was only one shareholder was made to Mr. Mennillo's accountant and yet passed in silence. Moreover, as the trial judge and the majority further noted, the memorandum was inconsistent with Mr. Mennillo's testimony that he had only learned that he was not a shareholder in winter of 2009 given that the memorandum was dated roughly two years before.

[48] Once again, the trial judge's reliance on the Carzoli memorandum did not provide an appropriate basis for appellate intervention in relation to the trial judge's rejection of Mr. Mennillo's evidence.

(d) *The October 31, 2007 Letter*

[49] The dissenting judge also took issue with the trial judge's reliance on an October 31, 2007 letter from Mr. Mennillo's lawyer, Mr. Kaufman. In the dissenting judge's view, a careful reading of that letter showed that it was not contrary to Mr. Mennillo's position.

[50] The trial judge noted that while Messrs. Kaufman and Mennillo took the position that this letter was directed at putting in place financing to permit Mr. Rosati to buy Mr. Mennillo's shares, the letter itself said nothing about a share purchase but rather was drafted in terms of an acknowledgment of debt. The majority of the Court of Appeal saw nothing wrong with the trial judge's treatment of this letter and nor do I. It was open to the judge to infer from the letter, and particularly the absence of any mention of share purchase in it, that it would be unlikely to omit mention of that element in light of Mr. Mennillo's contention that he had never withdrawn as a shareholder.

la stratégie proposée par M[e] Carzoli supposait que M. Mennillo soit actionnaire.

[47] Toutefois, comme le signalent les juges majoritaires de la Cour d'appel, la déclaration selon laquelle il n'y a qu'un seul actionnaire a été faite au comptable de M. Mennillo, mais elle a pourtant été passée sous silence. Qui plus est, comme le font observer le juge de première instance et les juges majoritaires de la Cour d'appel, le témoignage de M. Mennillo selon lequel il n'aurait appris qu'à l'hiver 2009 qu'il n'était pas actionnaire ne concorde pas avec le fait que le mémorandum a été rédigé environ deux ans auparavant.

[48] Encore une fois, ce n'est pas parce que le juge de première instance s'appuie sur le mémorandum de M[e] Carzoli que la Cour d'appel est admise à intervenir quant à sa décision d'écarter le témoignage de M. Mennillo.

d) *La lettre du 31 octobre 2007*

[49] Le juge dissident déplore aussi le fait que le juge de première instance se fonde sur une lettre de l'avocat de M. Mennillo, M[e] Kaufman, datée du 31 octobre 2007. Selon lui, une lecture attentive révèle que cette lettre ne va pas à l'encontre de la thèse de M. Mennillo.

[50] Le juge de première instance fait remarquer que même si M[e] Kaufman et M. Mennillo ont fait valoir que cette lettre visait un montage financier qui aurait permis à M. Rosati d'acheter les actions de M. Mennillo, la lettre comme telle ne fait pas mention d'un achat d'actions et revêt plutôt la forme d'une reconnaissance de dette. Les juges majoritaires de la Cour d'appel n'ont rien à redire, et moi non plus, sur ce que le juge de première instance conclut de la lettre. Il lui était loisible d'en inférer, surtout en l'absence de toute mention d'un achat d'actions, que l'omission d'une telle mention était invraisemblable au vu de la prétention de M. Mennillo selon laquelle il n'avait jamais renoncé à sa qualité d'actionnaire.

(e) *The February 25, 2010 Letter*

[51] Finally, the dissenting judge was of the view that the trial judge had drawn erroneous inferences from the demand letter dated February 25, 2010 sent to Intramodal by Mr. Mennillo's lawyer, Mr. Kaufman. This letter referred to the alleged request that Mr. Mennillo "resign from the company" because of the interest on the part of Labatt and alleged that his share of the company had not been remitted to him following his resignation as promised.

[52] The trial judge used this letter to support the inference that, as of May 2005 when he submitted his resignation as a director, Mr. Mennillo knew that he was no longer a shareholder and, as well, to infer the date at which Mr. Mennillo stopped being a shareholder.

[53] The dissenting judge in the Court of Appeal was of the view that this letter did not support these inferences. In his opinion, the use by a lawyer (Mr. Kaufman) of the phrase "resign from the company" could not refer to anything but Mr. Mennillo's resignation as a director; it could not be understood to encompass Mr. Mennillo's shareholder status. Moreover, the letter insisted that Mr. Mennillo was a 50 percent partner in the corporation. The dissenting judge saw in this letter a clear expression that [TRANSLATION] "Mennillo still considered himself a shareholder of (partner in) Intramodal, holding almost 50% of the shares, and as such he was entitled to a share of the profits in the same proportion": para. 110 (CanLII).

[54] Once again, however, there was no basis for appellate intervention with respect to the trial judge's reliance on this letter. I agree with the reasons of the majority of the Court of Appeal for rejecting the dissenting judge's contention:

> [TRANSLATION] It may be possible to disagree about how to interpret this letter, but the Judge's interpretation does not seem to me to be "clearly wrong"; indeed, it is easy to defend. Mennillo is claiming $1M, *inter alia*,

e) *La mise en demeure du 25 février 2010*

[51] Enfin, le juge dissident estime que le juge de première instance tire des conclusions erronées de la mise en demeure du 25 février 2010 que l'avocat de M. Mennillo, M^e^ Kaufman, a fait parvenir à Intramodal. Le document fait mention de la demande qui aurait été faite à M. Mennillo de [TRADUCTION] « démissionner de la société » à cause de l'intérêt manifesté par Labatt et ajoute que la participation de M. Mennillo dans l'entreprise ne lui a pas été rendue après sa démission comme on le lui avait promis.

[52] Le juge de première instance s'appuie sur ce document non seulement pour conclure qu'en mai 2005, lorsqu'il a présenté sa démission à titre d'administrateur, M. Mennillo savait qu'il n'était plus actionnaire, mais aussi pour inférer la date à laquelle M. Mennillo a cessé de l'être.

[53] Le juge dissident de la Cour d'appel estime que la mise en demeure n'étaye pas ces conclusions. À son avis, employée par un avocat (M^e^ Kaufman), la formule [TRADUCTION] « démissionner de la société » ne pouvait viser que la qualité d'administrateur de M. Mennillo, à l'exclusion de sa qualité d'actionnaire. De surcroît, la mise en demeure souligne que M. Mennillo est associé à raison de 50 p. 100 dans l'entreprise. Le juge dissident y voit la manifestation claire du fait que « [M.] Mennillo se considérait toujours actionnaire (*partner*) d'Intramodal à près de 50 % et, à ce titre, [qu']il avait le droit au partage des profits (*share of the profits*) dans la même proportion » (par. 110 (CanLII)).

[54] Mais, encore une fois, le fait que le juge de première instance s'appuie sur cette mise en demeure ne justifie pas une intervention en appel. Je souscris aux motifs pour lesquels les juges majoritaires de la Cour d'appel rejettent l'affirmation de leur collègue dissident :

> On peut différer d'opinion sur l'interprétation à donner au texte de cette [mise en demeure], mais celle du Juge ne me paraît pas « manifestement erronée », elle se défend même aisément. [M.] Mennillo réclame 1 M$,

"for failing to remit to him his share of the company". One cannot claim something one already owns. His claim implies that he is not a shareholder of Intramodal, given that he wants to become one. [para. 184]

(f) *Conclusion Concerning the Trial Judge's Findings of Fact*

[55] The trial judge's factual findings are only reviewable on appeal if they constitute an error that is both palpable and overriding: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, [2000] 1 S.C.R. 298, at para. 42. I agree with the majority of the Court of Appeal that no such error is present here. While the dissenting judge preferred a different interpretation of some of the evidence than that adopted by the trial judge, he was not entitled to substitute his view absent a palpable and overriding error. When we examine the trial judge's conclusions in light of the record, we find that there was no such error.

[56] We must, therefore, approach the case on the basis that, from May 25, 2005 onwards, Mr. Menillo did not want to be a shareholder, did not want to be treated as such and, as a result, transferred his shares to Mr. Rosati.

[57] On these findings of fact, Mr. Mennillo's oppression claim is groundless. He could have no reasonable expectation of being treated as a shareholder: he no longer was and expressly demanded not to be so treated. As against Intramodal, the most that can be said is that the corporation failed to carry out his wishes as a result of not observing certain necessary corporate formalities. But in light of these findings, it cannot be said that the corporation acted oppressively or that it illegally stripped him of his status as a shareholder as Justice Côté concludes: para. 198. What happened is that the corporation failed to make sure that all the legal formalities were complied with before registering the transfer. The acts of the corporation which Mr. Mennillo claims to constitute oppression were in fact taken, albeit imperfectly,

entre autres, « *for failing to remit to him his share of the company* » [[TRADUCTION] « pour omission de lui rendre sa participation dans l'entreprise »]. On ne saurait réclamer quelque chose que l'on détient déjà. Sa réclamation implique qu'il n'est pas actionnaire d'Intramodal puisqu'il veut le devenir. [par. 184]

f) *Conclusion sur les conclusions de fait du juge de première instance*

[55] Les conclusions de fait du juge de première instance ne sont susceptibles de révision en appel que si elles sont entachées d'une erreur manifeste et dominante (*Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 10; *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802, p. 808; *Ingles c. Tutkaluk Construction Ltd.*, 2000 CSC 12, [2000] 1 R.C.S. 298, par. 42). Je conviens avec les juges majoritaires de la Cour d'appel qu'il n'y a aucune erreur de la sorte en l'espèce. Le juge dissident voit certes dans certains éléments de preuve autre chose que le juge de première instance, mais il ne peut pour autant faire primer son opinion, sauf erreur manifeste et dominante. Au vu du dossier, nous estimons que les conclusions du juge ne sont pas entachées d'une telle erreur.

[56] Nous devons donc considérer que, dès le 25 mai 2005, M. Mennillo ne voulait plus être actionnaire et qu'il ne souhaitait pas être tenu pour tel, d'où le transfert de ses actions à M. Rosati.

[57] Eu égard à ces conclusions de fait, le recours pour abus est sans fondement. M. Mennillo ne pouvait pas raisonnablement s'attendre à être traité comme un actionnaire : il ne l'était plus et avait expressément demandé à ne plus être considéré comme un actionnaire. Tout au plus peut-on dire d'Intramodal qu'elle n'a pas donné suite à son vœu du fait qu'elle a omis d'observer certaines formalités requises de sa part. Cependant, on ne saurait affirmer au vu de ces conclusions que la société a agi abusivement à l'égard de M. Mennillo ou qu'elle l'a dépouillé illégalement de son statut d'actionnaire, comme le conclut la juge Côté (par. 198). En fait, la société a omis de s'assurer de l'observation de toutes les formalités d'ordre juridique avant d'inscrire le transfert. Les mesures de la société que M. Mennillo

in accordance with his express wishes. But it cannot be unfairly prejudicial to Mr. Mennillo for the corporation to register a transfer of shares that he wished to happen, and that, as I will discuss later, he can no longer attack. As a consequence, all of Mr. Mennillo's claims must fail.

[58] The failure to observe the corporate formalities in removing Mr. Mennillo as a shareholder in accordance with his express wishes to be so removed cannot, in my respectful view, be characterized as an act unfairly prejudicial to the extent that this omission deprived him of his status as a shareholder: Côté J., at para. 207. The corporation failed to observe the formalities of carrying out his wish *not* to be a shareholder. Nor can the failure to properly remove him as a shareholder in accordance with his express wishes make it just and equitable for him to regain his status as a shareholder: para. 204.

B. *Corporate Law Points*

[59] Although it is not strictly speaking necessary to do so, I will address three points of corporate law because some clarification of them will be useful: whether the share transfer could have been retroactively cancelled as the majority of the Court of Appeal thought; the consequence of the failure to observe the formalities prescribed by the *CBCA*; and whether the shares could have been issued conditionally.

(1) The Possible Retroactive Cancellation of the Share Transfer

[60] Before the trial judge and the Court of Appeal, Mr. Mennillo argued that he has been a shareholder of Intramodal from its incorporation and remained as such. Before the trial judge, Intramodal presented two different theories in response to Mr. Mennillo's argument. The first one is that Mr. Mennillo would have become a shareholder had he accepted to financially support the corporation and to be the guarantor of the entirety of its debts, but he declined or neglected to do so and

tient pour abusives ont en fait été prises, bien que de manière imparfaite, selon la volonté qu'il avait exprimée. La société ne peut donc pas s'être montrée injuste à son égard en lui portant préjudice du fait qu'elle a inscrit le transfert d'actions qu'il avait lui-même voulu et, comme je l'explique plus loin, qu'il ne peut plus contester. En conséquence, les allégations de M. Mennillo doivent toutes être rejetées.

[58] Soit dit en tout respect, l'inobservation des formalités nécessaires au retrait de M. Mennillo à titre d'actionnaire, conformément à la volonté qu'il avait exprimée, ne saurait constituer un acte injustement préjudiciable [à son égard] dans la mesure où elle le prive de son statut d'actionnaire (la juge Côté, par. 207). La société a omis d'observer les formalités requises pour donner suite à sa volonté de *cesser* d'être actionnaire. L'omission d'effectuer régulièrement le retrait à titre d'actionnaire, selon la volonté exprimée par M. Mennillo, ne saurait non plus rendre juste et équitable sa réintégration en qualité d'actionnaire (par. 204).

B. *Points relevant du droit des sociétés*

[59] Même si, à strictement parler, ce n'est pas nécessaire, je me penche sur trois points du droit des sociétés, car certains éclaircissements à leur sujet seront utiles : le transfert d'actions aurait-il pu être annulé rétroactivement comme le prétendent les juges majoritaires de la Cour d'appel, quelles sont les conséquences de l'omission d'observer les formalités prescrites par la *LCSA* et les actions auraient-elles pu être émises conditionnellement?

(1) La possibilité d'annuler rétroactivement le transfert d'actions

[60] En première instance et en Cour d'appel, M. Mennillo a soutenu qu'il était devenu actionnaire d'Intramodal dès sa constitution en société et qu'il l'était toujours. En première instance, Intramodal a fait valoir deux théories différentes pour réfuter la thèse de M. Mennillo. Elle a d'abord prétendu que M. Mennillo serait devenu actionnaire s'il avait accepté d'appuyer financièrement l'entreprise et de se porter garant de la totalité de son passif, mais qu'il avait refusé ou négligé de le faire, de sorte qu'il

consequently never became a shareholder. The second one is that Mr. Mennillo resigned as a director of Intramodal and transferred his shares to Mr. Rosati. Intramodal focused on its second theory before the Court of Appeal and argued that the shares were transferred from Mr. Mennillo to Mr. Rosati on May 25, 2005.

[61] The trial judge concluded that Mr. Mennillo agreed that he would remain a shareholder only so long as he was willing to guarantee the corporation's debts and that Mr. Mennillo ultimately decided that he did not wish to do so and transferred his shares to Mr. Rosati. In the Court of Appeal, the majority concluded as follows on this issue:

> [TRANSLATION] . . . Can it be concluded that there was a genuine transfer of the shares from Mennillo to Rosati? It seems to me, rather, that they quite simply agreed on May 25, 2005 to retroactively cancel their agreement to associate with one another that they had originally entered into in 2004. The agreement had been reached informally, as was the cancellation thereof. [para. 225]

[62] It is worth highlighting that this theory of the retroactive cancellation of the agreement was neither adopted by the trial judge nor pleaded by the parties.

[63] Contrary to what the majority of the Court of Appeal suggested, I am of the opinion that it is not possible to retroactively cancel an issuance of shares by way of simple oral consent. As Mr. Mennillo points out, an issuance of shares can be cancelled only if (a) the corporation's articles are amended or (b) the corporation reaches an agreement to purchase the shares, which requires that the directors pass a resolution, that the shareholder in question gives his or her express consent and that the tests of solvency and liquidity be met. Can such an act by the corporation be valid even though these requirements of the *CBCA* have not been met? I do not think so.

[64] The commentators agree that meeting the requirements with respect to the maintenance of share capital cannot be optional, given that it is the share capital that is the common pledge of the creditors and is the basis for their acceptance of doing

n'était jamais devenu actionnaire. Elle a ensuite soutenu que M. Mennillo avait démissionné de son poste d'administrateur et qu'il avait transféré ses actions à M. Rosati. En Cour d'appel, Intramodal a mis l'accent sur sa deuxième théorie et soutenu que M. Mennillo avait cédé ses actions à M. Rosati le 25 mai 2005.

[61] Selon le juge de première instance, M. Mennillo a convenu qu'il ne demeurerait actionnaire que tant qu'il serait disposé à garantir le passif de la société. M. Mennillo a finalement décidé de ne pas se porter ainsi garant et a transféré ses actions à M. Rosati. Voici ce qu'opinent les juges majoritaires de la Cour d'appel sur ce point :

> . . . peut-on conclure qu'il y a eu véritablement cession des actions de [M.] Mennillo à [M.] Rosati? Il me semble plutôt que, tout simplement, ils conviennent le 25 mai 2005 d'annuler rétroactivement leur entente d'association convenue au départ en 2004. L'entente avait été conclue sans aucun formalisme, de même son annulation. [par. 225]

[62] Il convient de souligner que cette thèse de l'annulation rétroactive de l'entente n'est pas retenue par le juge de première instance, ni défendue par l'une ou l'autre des parties.

[63] Contrairement à ce que laissent entendre les juges majoritaires de la Cour d'appel, on ne peut selon moi annuler rétroactivement une émission d'actions sur simple consentement verbal. Comme le souligne M. Mennillo, il ne peut y avoir annulation d'une émission d'actions que a) par modification des statuts de la société ou b) par achat de gré à gré des actions par la société, ce qui requiert une résolution des administrateurs, le consentement exprès de l'actionnaire en cause et le respect des critères de solvabilité et de liquidité. Un tel acte de la société peut-il être valide malgré le non-respect de ces conditions de la *LCSA*? J'estime que non.

[64] Les auteurs reconnaissent que le respect des exigences relatives au maintien du capital-actions ne saurait être facultatif puisque le capital-actions constitue le gage commun des créanciers en fonction duquel ces derniers acceptent de faire affaire

business with the corporation: P. Martel, *Business Corporations in Canada: Legal and Practical Aspects* (loose-leaf), at pp. 12-17, 12-18 and 14-31; R. Crête and S. Rousseau, *Droit des sociétés par actions* (3rd ed. 2011), at pp. 550-52; F. W. Wegenast, *The Law of Canadian Companies* (1979 (reissue of 1931 ed.)), at p. 313.

[65] Furthermore, certain American commentators point out that strict protection of a corporation's capital stock is necessary in a context in which the liability of shareholders is, for its part, limited:

> Strong entity shielding and limited liability are highly complementary; the presence of one generally calls for the other. . . .
>
> . . . limited liability generally requires strong entity shielding, largely because limited liability increases the incentive for owners to withdraw from the firm when its prospects are doubtful. That incentive, in turn, creates the threat of a run on the firm's assets, which would destroy going-concern value to the detriment of both the firm's creditors and its owners. By denying owners the power to withdraw unilaterally, strong entity shielding prevents such runs. [Footnote omitted.]

(H. Hansmann, R. Kraakman and R. Squire, "The New Business Entities in Evolutionary Perspective", [2005] *U. Ill. L. Rev.* 5, at pp. 11-12)

[66] More concretely, why would the law establish strict requirements primarily to protect creditors' interests if such requirements could validly be ignored? I am unable to find a satisfactory answer to this question, and it is my opinion that the respondent has also failed to provide one.

(2) The Consequence of Non-Compliance With the Formalities of the *CBCA*

[67] The trial judge held that Mr. Mennillo was no longer a shareholder of Intramodal as of May 25, 2005 and that [TRANSLATION] "[t]he failure to complete the transfer of Mennillo's shares to Rosati resulted from an error or oversight on the part of Rosati's lawyer": para. 74.

avec la société (P. Martel, *La société par actions au Québec*, vol. I, *Les aspects juridiques* (feuilles mobiles), par. 12-79 à 12-82, 14-107 et 14-108; R. Crête et S. Rousseau, *Droit des sociétés par actions* (3e éd. 2011), p. 550-552; F. W. Wegenast, *The Law of Canadian Companies* (1979 (réédition de l'éd. de 1931)), p. 313).

[65] Qui plus est, certains auteurs américains relèvent que la protection stricte du capital-actions d'une société est nécessaire dans la mesure où la responsabilité de l'actionnaire est pour sa part limitée :

> [TRADUCTION] La protection stricte de l'entité et la responsabilité limitée sont très complémentaires; l'une appelle généralement l'autre . . .
>
> . . . la responsabilité limitée exige généralement la protection stricte de l'entité, surtout parce qu'elle est de nature à inciter des propriétaires à quitter l'entreprise lorsque son avenir est incertain. À son tour, cette incitation expose le capital-actions à des retraits massifs, lesquels sont susceptibles de réduire à néant la valeur de l'entreprise au détriment de ses créanciers et de ses propriétaires. En refusant aux propriétaires le droit de se retirer unilatéralement, la protection stricte de l'entité empêche de tels retraits. [Note en bas de page omise.]

(H. Hansmann, R. Kraakman et R. Squire, « The New Business Entities in Evolutionary Perspective », [2005] *U. Ill. L. Rev.* 5, p. 11-12)

[66] De manière plus concrète, pourquoi la loi établirait-elle des exigences strictes visant principalement la protection des intérêts des créanciers si de telles exigences pouvaient être ignorées en toute impunité? Je ne puis trouver de réponse satisfaisante à cette question et, à mon avis, l'intimée n'est pas non plus en mesure d'en avancer une.

(2) Les conséquences de l'inobservation des formalités prescrites par la *LCSA*

[67] Le juge de première instance conclut que M. Mennillo a cessé d'être actionnaire d'Intramodal le 25 mai 2005 et que « [l]e fait que la cession des actions de [M.] Mennillo à [M.] Rosati n'ait pas été complétée résulte de l'erreur ou l'oubli de la part de l'avocat de [M.] Rosati » (par. 74).

[68] Needless to say, there is no evidence in writing of such transfer between Mr. Mennillo and Mr. Rosati. But for the reasons I set out at length above, the trial judge made no palpable and overriding error when he rejected Mr. Mennillo's version of events and substantially accepted Intramodal's. For this reason, I accept his finding that Mr. Mennillo refused to take on the role of Intramodal's guarantor and transferred his shares to Mr. Rosati. The evidence on the transfer point is conflicting and inconsistent. The judge adopted a view of the evidence that was open to him given the extreme informality of the parties' dealings and their virtually complete inattention to corporate formalities. As I read his reasons, there was an onerous contract between Mr. Mennillo and Mr. Rosati for the transfer of the shares, a view supported by the evidence: *Martin v. Dupont*, 2016 QCCA 475; art. 1381 *Civil Code of Québec* ("*C.C.Q*").

[68] Il va sans dire qu'aucun écrit n'atteste cette cession. Mais pour les motifs détaillés qui précèdent, le juge de première instance ne commet aucune erreur manifeste et dominante lorsqu'il rejette la version des faits de M. Mennillo et qu'il retient essentiellement celle d'Intramodal. C'est pourquoi je fais mienne sa conclusion voulant que M. Mennillo ait refusé de se porter garant du passif d'Intramodal et transféré ses actions à M. Rosati. La preuve relative au transfert des actions est contradictoire et incohérente. Son interprétation par le juge Poirier est légitime compte tenu du caractère extrêmement informel des rapports entre les parties et de l'inobservation par ces dernières de la quasi-totalité des formalités requises d'une société. Suivant mon interprétation de ses motifs, un contrat à titre onéreux liait MM. Mennillo et Rosati concernant le transfert des actions, ce qui est étayé par la preuve (*Martin c. Dupont*, 2016 QCCA 475; art. 1381 du *Code civil du Québec* (« *C.c.Q.* »)).

[69] It is uncontested that Intramodal did not ascertain whether some of the corporate formalities of the *CBCA* were complied with by Mr. Mennillo and Mr. Rosati when it registered the transfer of shares, but that cannot in and of itself invalidate any transfer between them: *Inspecteur général des institutions financières v. Assurances funéraires Rousseau et frère Ltée*, [1990] R.R.A. 473 (C.A.); Martel, at pp. 16-28 to 16-30.

[69] Nul ne conteste qu'Intramodal a omis de s'assurer que MM. Mennillo et Rosati s'étaient acquittés de certaines de leurs obligations suivant la *LCSA* lorsqu'elle a inscrit le transfert d'actions. Or, pareille omission ne peut en soi invalider un transfert intervenu entre les deux hommes (*Inspecteur général des institutions financières c. Assurances funéraires Rousseau et frère Ltée*, [1990] R.R.A. 473 (C.A.); Martel, par. 16-103 à 16-108).

[70] On this point, s. 76 *CBCA* states:

[70] À cet égard, l'art. 76 de la *LCSA* dispose ce qui suit :

76 (1) Where a security in registered form is presented for transfer, the issuer shall register the transfer if

(a) the security is endorsed by an appropriate person as defined in section 65;

(b) reasonable assurance is given that that endorsement is genuine and effective;

(c) the issuer has no duty to inquire into adverse claims or has discharged any such duty;

(d) any applicable law relating to the collection of taxes has been complied with;

76 (1) L'émetteur doit procéder à l'inscription du transfert d'une valeur mobilière nominative lorsque les conditions suivantes sont réunies :

a) la valeur mobilière est endossée par une personne compétente au sens de l'article 65;

b) des assurances suffisantes sur l'authenticité et la validité de cet endossement sont données;

c) il n'est pas tenu de s'enquérir de l'existence d'oppositions ou il s'est acquitté de cette obligation;

d) les lois relatives à la perception de droits ont été respectées;

(e) the transfer is rightful or is to a *bona fide* purchaser; and

(f) any fee referred to in subsection 49(2) has been paid.

(2) Where an issuer has a duty to register a transfer of a security, the issuer is liable to the person presenting it for registration for loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer.

[71] In this case, the requirements of s. 76(1)(a) *CBCA* are not fulfilled. It is common ground that the shares that were transferred were not endorsed by Mr. Mennillo. Therefore it is true that Intramodal proceeded to register a transfer that did not meet all of the criteria stated in the *CBCA*. But this is of no assistance to Mr. Mennillo under the circumstances. It is not as a result of an improper registration of this share transfer that Mr. Mennillo is no longer the holder of any shares in Intramodal. It is rather as a result of his transfer of these shares to Mr. Rosati, as found by the trial judge.

[72] In that regard, the endorsement of the shares was required to complete the transfer itself between Mr. Mennillo and Mr. Rosati. It was required for the shares to be delivered, which, in turn, was necessary to complete the share transfer: ss. 60(1) and 65(3) *CBCA*. Since this was an important formality required by law, it was to be observed on pain of nullity of the transfer: arts. 1414 and 1416 *C.C.Q.*; Martel, at pp. 16-26 et seq.

[73] With that being said, there is no doubt about the fact that Mr. Mennillo knew that this formality was not complied with when the company proceeded to register the transfer in the corporate books, some time in 2007. There is also no doubt that he was aware that he had not endorsed his share certificate when the shares were transferred to Mr. Rosati as the trial judge found.

[74] While it might have been possible for Mr. Mennillo to attack the transfer on the basis of the non-compliance with this required formality of the *CBCA*, no such claim was or could have been advanced when he instituted his proceedings in

e) le transfert est régulier ou est effectué au profit d'un acheteur de bonne foi;

f) les droits prévus au paragraphe 49(2) ont été acquittés.

(2) L'émetteur tenu de procéder à l'inscription du transfert d'une valeur mobilière est responsable, envers la personne qui la présente à cet effet, du préjudice causé par tout retard indu ou par tout défaut ou refus.

[71] En l'espèce, la condition prévue à l'al. 76(1)a) de la *LCSA* n'est pas remplie. Nul ne conteste que les actions transférées n'ont pas été endossées par M. Mennillo. Il est donc exact de prétendre qu'Intramodal a inscrit un transfert qui ne respectait pas toutes les conditions prévues par la *LCSA*. Or, cette irrégularité n'appuie pas la thèse de M. Mennillo. Ce n'est pas à cause d'une inscription irrégulière du transfert d'actions qu'il n'est plus actionnaire d'Intramodal, mais parce qu'il a transféré ses actions à M. Rosati, comme le conclut le juge de première instance.

[72] L'endossement des actions était nécessaire pour mener à bien le transfert de M. Mennillo à M. Rosati. Il était requis pour la livraison des actions, laquelle s'imposait à son tour pour qu'il y ait transfert (par. 60(1) et 65(3) de la *LCSA*). S'agissant d'une formalité légale importante, son inobservation exposait l'opération à la nullité (art. 1414 et 1416 *C.c.Q.*; Martel, par. 16-91 et suiv.).

[73] Cela dit, il ne fait aucun doute que M. Mennillo savait que cette formalité n'avait pas été accomplie lorsque, en 2007, la société a inscrit le transfert dans ses registres. Nul ne peut non plus douter qu'il savait que son certificat n'était pas endossé lors du transfert des actions à M. Rosati, comme le conclut le juge de première instance.

[74] M. Mennillo aurait pu contester le transfert en invoquant l'inobservation de cette formalité exigée par la *LCSA*, mais il ne l'a pas fait et n'aurait pas pu le faire au moment d'intenter son recours en septembre 2010. Puisque, plus de trois ans auparavant,

September 2010. As he was aware of the situation of which he now complains more than three years prior, his claim in that regard was and is still prescribed: art. 2925 *C.C.Q.* Even if the transfer was subject to nullity, it did not mean that it was inexistent. In Quebec civil law, the sanction of nullity needs to be pronounced by a tribunal: S. Gaudet, "Inexistence, nullité et annulabilité du contrat: essai de synthèse" (1995), 40 *McGill L.J.* 291, at pp. 331-35; J.-L. Baudoin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at para. 386; D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at para. 1101. Only once nullity is judicially pronounced is a purported contract "deemed never to have existed": art. 1422 *C.C.Q.* Indeed, a "contract which does not meet the necessary conditions of its formation may be [as opposed to is] annulled": art. 1416 *C.C.Q.* This judicial intervention must be sought within three years of becoming aware of the cause of nullity: arts. 2925 and 2927 *C.C.Q.*

il connaissait la situation qu'il déplore aujourd'hui, son recours était et demeure prescrit (art. 2925 *C.c.Q.*). Même s'il était susceptible d'annulation, le transfert existait tout de même. En droit civil québécois, la sanction qu'est la nullité doit être prononcée par le tribunal (S. Gaudet, « Inexistence, nullité et annulabilité du contrat : essai de synthèse » (1995), 40 *R.D. McGill* 291, p. 331-335; J.-L. Baudoin et P.-G. Jobin, *Les obligations* (7e éd. 2013), par P.-G. Jobin et N. Vézina, par. 386; D. Lluelles et B. Moore, *Droit des obligations* (2e éd. 2012), par. 1101). Ce n'est qu'une fois la nullité prononcée par une cour de justice que le contrat « est réputé n'avoir jamais existé » (art. 1422 *C.c.Q.*). En effet, le « contrat qui n'est pas conforme aux conditions nécessaires à sa formation peut [et non pas doit] être frappé de nullité » (art. 1416 *C.c.Q.*). La mesure judiciaire doit être demandée au plus tard trois ans après que l'intéressé a eu connaissance de la cause de nullité (art. 2925 et 2927 *C.c.Q.*).

(3) The Conditional Issuance of the Shares

[75] In the Court of Appeal, the dissenting judge read the trial judge's reasons as holding that the issuance of the shares to Mr. Mennillo had been conditional on his remaining a guarantor. The dissenting judge went on to say that this conditional status is not set out in the *CBCA* and in any event, even if it were, such status would also have needed to be specified in the books of the company. The dissenting judge also expressed the view that this sort of conditional shareholder status could not depend on an informal agreement between two individuals.

[76] I am in substantial agreement with the dissenting judge about the law on this point. Conditions attaching to the shares need to be specified in the articles of the corporation and in the securities register. Also, the resolution authorizing the issuance of the shares to Mr. Mennillo would have needed to specify their conditional status: ss. 24(4), 49(13) and 50(1)(c) *CBCA*. These formalities were not fulfilled.

(3) L'émission conditionnelle des actions

[75] Le juge dissident de la Cour d'appel conclut des motifs du juge de première instance que les actions ont été émises à M. Mennillo à la condition qu'il demeure garant du passif. Il ajoute que la *LCSA* ne prévoit pas un tel actionnariat conditionnel et que, de toute manière, s'il avait été possible, il aurait fallu qu'il soit indiqué dans les registres de la société. Toujours selon lui, un tel actionnariat conditionnel ne saurait tenir à un accord informel entre deux personnes.

[76] Je suis d'accord pour l'essentiel avec le juge dissident quant au droit applicable sur ce point. La condition dont une action est assortie doit être précisée dans les statuts de la société et dans son registre des valeurs mobilières. De même, la résolution autorisant l'émission des actions à M. Mennillo aurait dû préciser qu'elles étaient assorties d'une condition (par. 24(4) et 49(13) et al. 50(1)c) de la *LCSA*). Ces formalités n'ont pas été accomplies.

[77] But in my respectful view, the dissenting judge misread the trial judge's reasons. None of the parties argued that they intended the shares to be issued conditionally and in my view the trial judge did not intend to and did not say that any condition was attached to the shares themselves. Rather, when we read his reasons in light of the evidence, we see that he was of the view that the condition to which the trial judge referred was a result of an agreement between Messrs. Mennillo and Rosati that the former would be a shareholder only if he guaranteed Intramodal's debts. This agreement was reached by Messrs. Mennillo and Rosati; Intramodal was not a party to this agreement. Accordingly, it does not attract the corporate formalities applicable to a conditional issuance of shares. Understood in this way, there is no legal error in the trial judge's approach to this issue.

C. *Prescription and Remedy*

[78] The trial judge found that Mr. Mennillo's oppression claim was prescribed. He reasoned that the three-year period in art. 2925 *C.C.Q.* applied and that time began to run in May 2005 when, in his view, Mr. Mennillo knew that he would not be treated as a shareholder. The majority of the Court of Appeal did not deal with this issue. But the dissenting judge found that time had not started to run until December 2009 and in any event that the acts of oppression were continuing. Before this Court, Mr. Mennillo adopts, in a single paragraph of his factum, the reasoning of the dissenting judge on this point. Intramodal adopts the position of the trial judge.

[79] Given the limited judicial consideration of these points in the reasons of the Superior Court and the Court of Appeal, and the conclusion that Mr. Mennillo's oppression claim is groundless on its merits, I prefer not to venture a final opinion on this precise point in the context of this appeal.

[80] As a result of my proposed disposition of the appeal in relation to the dismissal of the oppression claim, it is not necessary for me to address what

[77] Toutefois, à mon humble avis, le juge dissident interprète erronément les motifs du juge de première instance. Aucune des parties ne prétend avoir voulu que les actions soient émises à quelque condition et, à mon sens, le juge de première instance n'entend pas dire et ne dit pas que les actions sont assorties comme telles d'une condition. Au vu de la preuve, il appert plutôt de ses motifs que la condition dont il fait mention résulte d'un accord entre MM. Mennillo et Rosati selon lequel le premier ne serait actionnaire que s'il se portait garant du passif d'Intramodal. L'accord en question est intervenu entre MM. Mennillo et Rosati, et Intramodal n'y est pas partie. Il ne requérait donc pas l'observation des formalités applicables à une émission conditionnelle d'actions. Dans cette optique, la démarche du juge de première instance n'est entachée d'aucune erreur de droit.

C. *Prescription et mesure de redressement*

[78] Le juge de première instance arrive à la conclusion que le recours pour abus de M. Mennillo est prescrit. Il explique que le délai de trois ans imparti à l'art. 2925 du *C.c.Q.* s'applique et qu'il a commencé à courir en mai 2005, soit au moment où, selon lui, M. Mennillo a appris qu'il ne serait plus traité comme un actionnaire. Les juges majoritaires de la Cour d'appel ne se prononcent pas sur la question. Le juge dissident estime cependant que le délai n'a commencé à courir qu'en décembre 2009 et que, de toute façon, l'abus s'était poursuivi. Devant notre Cour, M. Mennillo reprend à son compte, dans un même paragraphe de son mémoire, le raisonnement du juge dissident sur ce point. Quant à Intramodal, elle se range à l'avis du juge de première instance.

[79] Étant donné le peu d'attention que la Cour supérieure et la Cour d'appel accordent à ces questions, et la conclusion selon laquelle le recours pour abus intenté par M. Mennillo doit être rejeté sur le fond, je préfère ne pas me prononcer sur ce point précis de manière définitive dans le cadre du pourvoi.

[80] Vu la manière dont je propose de statuer en l'espèce sur le rejet du recours pour abus, point n'est besoin de me prononcer sur les mesures de

remedies would be appropriate in the event oppression had been established.

IV. Disposition

[81] I would dismiss the appeal with costs and affirm the costs orders made by the Superior Court and the Court of Appeal.

The reasons of McLachlin C.J. and Moldaver J. were delivered by

[82] THE CHIEF JUSTICE — I would dismiss the appeal for the following reasons.

[83] This is an action for oppression. Mr. Mennillo complains that Intramodal inc. acted oppressively in removing him as shareholder from the books of the company.

[84] To establish oppression, the shareholder must show: (1) a reasonable expectation that the corporation would treat him in a certain way; and (2) that the corporation breached that reasonable expectation (*BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 68). The action is an equitable action to protect reasonable and legitimate shareholder expectations — the "cornerstone of the oppression remedy" (*BCE*, at para. 61). Evidence of shareholder expectations is essential to whether conduct has been oppressive in a particular case (*BCE*, at para. 59; P. Martel, *Business Corporations in Canada: Legal and Practical Aspects* (loose-leaf), at p. 31-67; D. H. Peterson and M. J. Cumming, *Shareholder Remedies in Canada* (2nd ed. (loose-leaf)), at §§ 17.41 to 17.43; D. S. Morritt, S. L. Bjorkquist and A. D. Coleman, *The Oppression Remedy* (loose-leaf), at p. 3-2).

[85] I do not find it necessary to determine whether there was an effective transfer of Mr. Mennillo's shares in Intramodal inc. to Mr. Rosati. Suffice it to say that among other things, assessing the nature of the prestations that the parties decided to provide each other under an "onerous contract" — Mr. Rosati gets Mr. Mennillo's shares in exchange

redressement qui auraient été indiquées si l'abus avait été établi.

IV. Dispositif

[81] Je suis d'avis de rejeter le pourvoi avec dépens et de confirmer les ordonnances de la Cour supérieure et de la Cour d'appel sur les dépens.

Version française des motifs de la juge en chef McLachlin et du juge Moldaver rendus par

[82] LA JUGE EN CHEF — Je suis d'avis de rejeter le pourvoi pour les motifs suivants.

[83] M. Mennillo a intenté un recours pour abus. Il reproche à Intramodal inc. d'avoir agi de façon abusive en le dépouillant de sa qualité d'actionnaire dans les registres de la société.

[84] Pour établir l'abus, l'actionnaire doit prouver (1) qu'il s'attendait raisonnablement à ce que la société le traite d'une certaine manière et (2) que la société a frustré cette attente raisonnable (*BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560, par. 68). Issu de l'equity, le recours vise à protéger les attentes raisonnables et légitimes de l'actionnaire, lesquelles constituent la « pierre angulaire [du recours] pour abus » (*BCE*, par. 61). La preuve des attentes de l'actionnaire est essentielle pour qualifier un comportement d'abusif dans une situation donnée (*BCE*, par. 59; P. Martel, *La société par actions au Québec*, vol. I, *Les aspects juridiques* (feuilles mobiles), par. 31-197 et 31-198; D. H. Peterson et M. J. Cumming, *Shareholder Remedies in Canada* (2e éd. (feuilles mobiles)), § 17.41 à 17.43; D. S. Morritt, S. L. Bjorkquist et A. D. Coleman, *The Oppression Remedy* (feuilles mobiles), p. 3-2).

[85] Je n'estime pas nécessaire de décider s'il y a effectivement eu transfert à M. Rosati des actions de M. Mennillo dans Intramodal inc. Je me contente de dire que, entre autres choses, la question de la nature des prestations que les parties se sont consenties l'une à l'autre par voie de « contrat à titre onéreux » — M. Rosati obtenant les actions de M. Mennillo

of Intramodal inc. relieving Mr. Mennillo of his obligation to guarantee Intramodal inc.'s debts — is an issue that leaves me somewhat perplexed (a point made by Côté J. at para. 229 of her dissenting reasons).

[86] Be that as it may, in my view, this appeal can be disposed of on the basis that Mr. Mennillo has failed to show a reasonable expectation that he would not be removed as a shareholder from Intramodal inc.'s books. The trial judge found that Mr. Mennillo agreed that his shares should be transferred to Mr. Rosati: [TRANSLATION] "Mennillo refused to participate in this venture [that is, to be an equity shareholder in Intramodal] and asked to be removed from the company as a shareholder and director as of May 25, 2005" (2012 QCCS 1640, at para. 74 (CanLII)).

[87] Having asked to be removed as a shareholder, Mr. Mennillo had no reasonable expectation that he would remain on the books as a shareholder. This is confirmed by the fact that subsequently Mr. Mennillo ceased to conduct himself as an equity shareholder and advanced money as loans. The trial judge's finding of fact is supported by the evidence.

[88] Mr. Mennillo has failed to establish a reasonable expectation that he would remain a shareholder in Intramodal inc. It follows that his action for oppression must fail. Consequently, the trial judge did not err in denying Mr. Mennillo's claim.

[89] I would dismiss the appeal.

English version of the reasons delivered by

CÔTÉ J. (dissenting) —

I. Introduction

[90] It is sometimes essential to go back to the basics of the law to render the decision that is appropriate in the circumstances. It is just as essential to recall some of those basics.

en contrepartie de la libération de ce dernier par Intramodal inc. de son obligation de garantir le passif de la société — me laisse quelque peu perplexe (le point est soulevé par la juge Côté au par. 229 de ses motifs dissidents).

[86] Quoi qu'il en soit, le fait que M. Mennillo n'a pas démontré qu'il pouvait raisonnablement s'attendre à continuer de figurer à titre d'actionnaire dans les registres d'Intramodal inc. permet de statuer sur le pourvoi. Le juge de première instance conclut que M. Mennillo a accepté que ses actions devaient être cédées à M. Rosati : « [M.] Mennillo a refusé cette aventure [c'est-à-dire être actionnaire participatif d'Intramodal] et a demandé son retrait de la compagnie à titre d'actionnaire et d'administrateur à compter du 25 mai 2005 » (2012 QCCS 1640, par. 74 (CanLII)).

[87] Ayant demandé à ne plus être actionnaire, M. Mennillo ne pouvait pas raisonnablement s'attendre à ce que les registres de la société continuent de faire état de sa qualité d'actionnaire. Cela est d'ailleurs confirmé par le fait qu'il a cessé par la suite d'agir comme actionnaire participatif et a avancé des fonds sous forme de prêts. Cette conclusion de fait du juge de première instance trouve appui dans la preuve.

[88] M. Mennillo n'a pas prouvé qu'il pouvait raisonnablement s'attendre à demeurer actionnaire d'Intramodal inc. Son recours pour abus doit donc échouer. Par conséquent, le juge de première instance n'a pas eu tort de le débouter.

[89] Je suis d'avis de rejeter le pourvoi.

Les motifs suivants ont été rendus par

LA JUGE CÔTÉ (dissidente) —

I. Introduction

[90] Il est parfois essentiel de revenir aux fondements du droit afin de rendre la décision qui s'impose dans certaines circonstances. Il est tout aussi essentiel de rappeler certains de ces fondements.

[91] Two key principles are deeply rooted in Canadian corporate law and cannot simply be disregarded or ignored: the principle that a corporation's legal personality is distinct from that of its shareholder or shareholders, and the principle or rule of the maintenance of capital.

[92] In my view, both the trial judge and the majority of the Court of Appeal completely disregarded these two principles in their analysis.

[93] With respect, the analysis that is required in the circumstances cannot disregard the interplay between Quebec civil law and the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), and must neither weaken the strict formal requirements of corporate law — in this area, *forma dat esse rei* — nor confuse the business corporation with the partnership. Care must be taken not to assume that the registration of a transfer of shares means that there was a contract for the transfer of shares. Like the trial judge's assertion that shares can be issued conditionally without the corporation approving the issuance and that of the majority of the Court of Appeal that a share issuance may be cancelled retroactively without any formalities, the solution proposed by the majority cannot, in my view, be reconciled with the basic principles of corporate law and the civil law.

[94] I therefore cannot agree with the majority's opinion.

[95] The appellant, Johnny Mennillo, objects to a resolution passed by the respondent corporation, Intramodal Inc., and to its registration in its registers of a transfer of his shares to its majority shareholder, Mario Rosati. Although Intramodal initially argued, with a supporting affidavit, that the appellant had never been one of its shareholders, it now acknowledges that he was indeed a shareholder, but it refuses, contrary to the law and to its own articles and by-laws, to recognize that he now has that

[91] Deux grands principes sont profondément enracinés en droit canadien des sociétés par actions et ne peuvent simplement être écartés ou ignorés : il s'agit du principe de la personnalité juridique distincte de la société par rapport à celle de son ou ses actionnaires, et du principe ou de la règle du maintien du capital.

[92] À mon avis, tant le juge de première instance que les juges majoritaires de la Cour d'appel ont totalement fait abstraction de ces deux principes dans leurs analyses respectives.

[93] Avec égards, l'analyse qui s'impose dans les circonstances ne peut ignorer l'interaction du droit civil québécois avec la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, c. C-44 (« *LCSA* »), et ne doit pas fragiliser les exigences strictes du droit des sociétés sur le plan du formalisme — en ce domaine « *forma dat esse rei* » — et ne doit pas non plus confondre la société par actions avec la société de personnes. Il faut se garder de tenir pour acquis que l'inscription d'un transfert d'actions signifie qu'il y a eu contrat de transfert d'actions. Au même titre que l'affirmation du juge de première instance selon laquelle il peut y avoir émission conditionnelle d'actions sans que celle-ci ne soit entérinée par la société, et celle des juges majoritaires de la Cour d'appel selon laquelle une émission d'actions peut être annulée rétroactivement sans aucune formalité, la solution préconisée par la majorité est, à mon avis, irréconciliable avec les principes élémentaires du droit des sociétés et du droit civil.

[94] Je ne puis donc me résoudre à souscrire à l'opinion de la majorité.

[95] L'appelant, Johnny Mennillo, reproche à la société intimée, Intramodal inc., l'adoption d'une résolution et l'inscription dans ses registres d'un transfert de ses actions au bénéfice de son actionnaire majoritaire, Mario Rosati. Bien qu'Intramodal ait d'abord prétendu, déclaration sous serment à l'appui, que l'appelant n'avait jamais été actionnaire d'Intramodal, elle reconnaît aujourd'hui qu'il a effectivement été actionnaire, mais refuse de lui reconnaître ce statut et les avantages qui s'y rattachent, et

status and is entitled to the advantages associated therewith.

[96] It is also important to be clear that this is a proceeding brought by the appellant against Intramodal under s. 241 *CBCA*. Contrary to what my colleague seems to be suggesting, this is not a case in which one shareholder sues another over the ownership of his or her shares in a company. Mr. Rosati is not a party to this litigation.

[97] In his claim, the appellant asked that the resolution passed by the respondent company be revoked and that its registers be rectified. This means that, although he brought this claim under s. 241 *CBCA*, he could also have done so under s. 243 *CBCA* (rectification of registers) or s. 247 *CBCA* (failure by a corporation to comply with the legislation or with its articles or by-laws). The appellant submitted that Intramodal had breached its legal duties by passing the resolution in question and registering the transfer of his shares although none of the formalities required by law had been observed. He argued that the respondent company's conduct in refusing to recognize his status as a shareholder was oppressive and that a remedy was appropriate under s. 241 *CBCA*. In addition to a declaration that he had always remained a shareholder of the company, the appellant asked, as a consequence, that the resolution approving the transfer of his shares be revoked and that the company's registers be rectified accordingly.

[98] The trial judge and the majority of the Court of Appeal found that the appellant's claim was without merit on the ground that he had, in their view, expressed an intention in May 2005 to withdraw from the respondent company both as a director and officer and as a shareholder. It was therefore open to Intramodal to register the transfer of the appellant's shares to Mr. Rosati despite the fact that there had been no exchange of wills with regard to the terms of the appellant's withdrawal and even though the principal formalities required by law for the transfer of shares had not been observed. The dissenting judge found that his colleagues were disregarding the formal requirements of corporate law.

ce, en contravention à la loi et à ses propres statuts et règlements.

[96] Il importe de plus de préciser qu'il s'agit d'un recours entrepris par l'appelant à l'encontre d'Intramodal en vertu de l'art. 241 *LCSA*. Contrairement à ce que semble laisser entendre mon collègue, il ne s'agit pas d'un litige où un coactionnaire en poursuit un autre relativement à la propriété de ses actions dans la société. M. Rosati n'est pas partie au présent litige.

[97] Dans le cadre de son recours, l'appelant demande l'annulation de la résolution adoptée par la société intimée et la rectification de ses registres. En ce sens, son recours, bien que tombant sous le coup de l'art. 241 *LCSA*, aurait également pu être entrepris en vertu des art. 243 *LCSA* (rectification des registres) ou 247 *LCSA* (inobservation par la société de la loi ou de ses statuts ou règlements). L'appelant soutient qu'Intramodal a manqué à ses obligations légales en adoptant ladite résolution et en procédant à l'inscription du transfert de ses actions, alors qu'aucune des formalités requises par la loi n'avait été accomplie. La conduite de la société intimée, par son refus de reconnaître son statut d'actionnaire, est selon lui abusive et un redressement s'impose en vertu de l'art. 241 *LCSA*. En sus d'une déclaration selon laquelle il est toujours demeuré actionnaire de la société, l'appelant demande donc l'annulation de la résolution avalisant le transfert de ses actions de même que la rectification des registres de la société en conséquence.

[98] Le juge de première instance et les juges majoritaires de la Cour d'appel ont estimé que le recours de l'appelant n'était pas fondé au motif qu'il avait, selon eux, en mai 2005, exprimé son intention de se retirer de la société intimée, tant à titre d'administrateur et de dirigeant que d'actionnaire. Intramodal pouvait donc procéder à l'inscription du transfert des actions de l'appelant à M. Rosati, et ce, malgré l'absence d'échange de volontés quant aux modalités du retrait de l'appelant et même si les principales formalités prescrites par la loi en matière de transfert d'actions n'avaient pas été respectées. Le juge dissident a pour sa part conclu que l'opinion de ses collègues faisait fi du formalisme requis en droit des sociétés.

[99] According to the trial judge, the majority of the Court of Appeal and my colleagues, the fact that a shareholder expresses an intention to withdraw from a business corporation bars the shareholder from bringing any oppression proceeding for the express purpose of seeking recognition of his or her status as a shareholder. My colleague Cromwell J. finds that, in the civil law of Quebec, the expression of such an intention is equivalent to a transfer of shares. In other words, it is sufficient to cause a person to lose his or her status as a shareholder.

[100] With respect, I am of the view that the fact that one shareholder claims he and his fellow shareholder entered into an agreement for the transfer of shares does not relieve the corporation of its legal duty to make the necessary inquiries before passing a resolution approving that transfer of shares and registering the transfer in its registers. It is clear from the evidence that Intramodal did not discharge any of its legal duties in this regard. If the respondent company had made the proper inquiries, it would have discovered that the appellant's share certificate (Intramodal share certificate No. 2) had not been endorsed, contrary to the requirements of the *CBCA* and to the transfer restrictions set out on the share certificate itself and in the company's articles. It should then have refrained from registering the transfer in its registers. As well, the impugned resolution should not have been passed.

[101] In my opinion, Intramodal instead confused its interests with those of its majority shareholder, took a disturbingly lax approach in preparing its corporate documents and displayed wilful blindness as regards its legal duties. That confusion was particularly obvious — to say the least — in each of the courts below, and in this Court, where Intramodal vigorously defended the interests of its majority shareholder, who did not even see fit to intervene in the case but instead used Intramodal as his puppet. Intramodal could of course have defended itself on the allegations made against it, but it chose instead to expend its energy on defending an alleged agreement to which it was not even a party without even

[99] Suivant le raisonnement du juge de première instance, de la majorité de la Cour d'appel et de mes collègues, l'intention manifestée par un actionnaire de se retirer d'une société par actions constitue une fin de non-recevoir à tout recours pour abus visant précisément à faire reconnaître ce statut d'actionnaire. Selon mon collègue le juge Cromwell, l'expression d'une telle volonté équivaut en droit civil québécois à un transfert d'actions. En d'autres mots, elle suffit pour faire perdre à une personne son statut d'actionnaire.

[100] Avec égards, je suis d'avis que la prétention d'un actionnaire suivant laquelle une entente de transfert d'actions est intervenue entre lui et son coactionnaire ne libère pas la société en cause de son devoir légal de faire les vérifications requises avant d'entériner par résolution ce transfert d'actions et de l'inscrire dans ses registres. Or, il est manifeste, à la lumière de la preuve, qu'Intramodal n'a respecté aucune de ses obligations légales à cet égard. Si la société intimée avait procédé aux vérifications qui s'imposaient, elle aurait alors constaté que le certificat d'actions de l'appelant (certificat d'actions nº 2 d'Intramodal) n'avait pas été endossé, contrairement aux exigences de la *LCSA* et aux restrictions de transfert figurant sur le certificat d'actions lui-même ainsi que dans les statuts d'Intramodal. Cette dernière aurait dès lors dû s'abstenir d'inscrire le transfert dans ses registres. Également, la résolution contestée n'aurait pas dû être adoptée.

[101] À mon avis, Intramodal a plutôt confondu ses intérêts avec ceux de son actionnaire majoritaire et fait preuve d'un laxisme troublant dans la préparation de sa documentation corporative, ainsi que d'aveuglement volontaire quant au respect de ses obligations légales. Cette confusion a été plus qu'apparente — pour dire le moins — devant chacune des juridictions inférieures, et devant notre Cour, où Intramodal s'est employée à défendre vigoureusement les intérêts de son actionnaire majoritaire, lequel n'a même pas jugé bon d'intervenir au litige, utilisant plutôt Intramodal comme sa marionnette. Intramodal pouvait certainement se défendre des reproches formulés à son endroit,

bothering to determine its scope or verify that it was genuine.

[102] By focusing solely on the scope of the alleged agreement between the appellant and Mr. Rosati without considering the respondent company's conduct, its failure to discharge its legal duties and the consequences of that failure, the trial judge and the majority of the Court of Appeal disregarded the company's distinct legal personality as well as the basic requirements of corporate law. Rather than punishing the respondent company's unlawful conduct, they chose to endorse its actions.

[103] In addition, the trial judge made palpable and overriding errors and disregarded key evidence in arriving at the conclusion that Mr. Mennillo had transferred his shares to Mr. Rosati in May 2005.

[104] Finally, I find that the trial judge and the majority of the Court of Appeal also erred in concluding that the appellant's claim was prescribed. In this Court, the parties agreed that the appellant was, at least at some point, a shareholder of Intramodal. By challenging the respondent company's decision for unlawfully depriving him of his status, the appellant is exercising a remedy that, by its very nature, relates to his right of ownership in his shares. Neither the *CBCA* nor the *Civil Code of Québec* ("*C.C.Q.*") provides that extinctive prescription applies in such a case. As I will explain below, the ownership of shares, as opposed to the rights conferred by them, is not subject to extinctive prescription in Quebec. As a result, the three-year prescription period provided for in art. 2925 *C.C.Q.* cannot be set up against the appellant's claim for oppression.

[105] For these reasons, I am of the opinion that the appeal should be allowed.

mais elle a plutôt choisi de consacrer ses énergies à la défense d'une prétendue entente à laquelle elle n'était même pas partie et dont elle ne s'était même pas donné la peine de déterminer l'étendue et de vérifier l'authenticité.

[102] Le juge de première instance et les juges majoritaires de la Cour d'appel, en s'attachant uniquement à la portée de la prétendue entente conclue entre l'appelant et M. Rosati, sans égard à la conduite de la société intimée, au non-respect de ses obligations légales et aux conséquences de ce non-respect, ont fait fi de la personnalité juridique distincte de celle-ci ainsi que des prescriptions élémentaires du droit des sociétés. Plutôt que de sanctionner la conduite illégale de la société intimée, ils ont choisi de cautionner ses agissements.

[103] De plus, le juge de première instance a commis des erreurs manifestes et dominantes et a fait abstraction d'éléments clés de la preuve en arrivant à la conclusion que M. Mennillo aurait transféré ses actions à M. Rosati en mai 2005.

[104] Enfin, le juge de première instance et les juges majoritaires de la Cour d'appel ont également, à mon avis, eu tort de conclure que le recours de l'appelant était prescrit. Les parties s'entendent devant notre Cour pour dire que l'appelant était, à un certain moment du moins, actionnaire d'Intramodal. L'appelant, en attaquant la décision de la société intimée de le priver illégalement de son statut, exerce un recours qui, de par sa nature, se rattache à son droit de propriété sur ses actions. Ni la *LCSA* ni le *Code civil du Québec* (« *C.c.Q.* ») ne prévoient de prescription extinctive dans un tel cas. Tel que nous le verrons, la propriété des actions, par opposition aux droits qu'elles confèrent, ne fait pas l'objet d'une prescription extinctive au Québec. Partant, l'appelant ne peut se voir opposer, à l'encontre de son recours pour abus, le délai de prescription de trois ans de l'art. 2925 *C.c.Q.*

[105] Pour ces motifs, je suis d'avis qu'il y a lieu d'accueillir le pourvoi.

II. Facts

[106] In 2004, the appellant and his long-time friend, Mr. Rosati — who worked for Canvec Logistics at the time — discussed the possibility of forming a road transportation company. They agreed that the appellant would provide the start-up financing and that Mr. Rosati would contribute his skills and contacts.

[107] In April 2004, the name "Intramodal" was reserved with Quebec's Enterprise Registrar ("REQ"). The respondent company was incorporated on July 13, 2004. Its certificate of incorporation and its registers confirm that Mr. Rosati and Mr. Mennillo were appointed directors and officers and that Mr. Rosati held 51 and Mr. Mennillo 49 (share certificates No. 1 and No. 2) of the 100 Class "A" common shares that were issued for $1 each.

[108] On May 25, 2005, Mr. Mennillo resigned as a director and officer of Intramodal. A notice of resignation prepared by Daniel Ovadia, acting as Intramodal's lawyer, was sent to Mr. Mennillo, who signed it and faxed it back to Mr. Ovadia. The notice in question did not mention Mr. Mennillo's status as a shareholder but referred only to his removal as a director and officer. The reasons for the resignation were in dispute at trial, as Mr. Mennillo and Mr. Rosati offered conflicting interpretations of the events.

[109] Intramodal remained inactive for several months. The evidence shows that on July 18, 2005, Mr. Ovadia filed an amending declaration with the REQ that specified that the appellant had been removed as a director and officer, and as a shareholder. The declaration in question was signed by Mr. Ovadia, but not by the appellant.

[110] On August 5, 2005, Mr. Rosati ceased working for Canvec Logistics. He then dedicated himself full time to getting Intramodal off the ground. In the

II. Les faits

[106] Au cours de l'année 2004, l'appelant et son ami de longue date, M. Rosati — qui travaille alors chez Canvec Logistique —, discutent de la possibilité de créer une société œuvrant dans le domaine du transport routier. Ils conviennent que l'appelant en financera le démarrage et que M. Rosati y contribuera par le biais de ses compétences et de ses contacts.

[107] En avril 2004, le nom d'Intramodal est réservé auprès du Registraire des entreprises du Québec (« REQ »). La société intimée est constituée le 13 juillet 2004. Le certificat de constitution et les registres de la société confirment que MM. Rosati et Mennillo en sont nommés administrateurs et dirigeants et qu'ils détiennent respectivement 51 pour M. Rosati et 49 pour M. Mennillo (certificats d'actions nº 1 et nº 2) des 100 actions ordinaires de catégorie « A » émises au prix d'un dollar chacune.

[108] Le 25 mai 2005, M. Mennillo démissionne à titre d'administrateur et de dirigeant d'Intramodal. Un avis de démission, rédigé par Me Daniel Ovadia, agissant comme avocat d'Intramodal, lui est transmis, avis que M. Mennillo signe avant de le retourner à Me Ovadia par télécopieur. L'avis en question ne fait aucunement mention du statut d'actionnaire de M. Mennillo, mais seulement de son retrait à titre d'administrateur et de dirigeant. Les raisons expliquant cette démission ont fait l'objet d'un débat en première instance, MM. Mennillo et Rosati proposant des interprétations divergentes des événements.

[109] Intramodal demeurera inactive pendant plusieurs mois. La preuve révèle que le 18 juillet 2005, Me Ovadia a déposé auprès du REQ une déclaration modificative prévoyant le retrait de l'appelant à titre d'administrateur et de dirigeant, ainsi que d'actionnaire. La déclaration en question porte la signature de Me Ovadia. Nulle part toutefois n'y apparaît celle de l'appelant.

[110] Le 5 août 2005, M. Rosati cesse de travailler pour Canvec Logistique. Il s'investit alors à temps plein dans le démarrage d'Intramodal. À

fall of 2005, money was advanced by Mr. Mennillo. Intramodal officially began operating in December. Mr. Mennillo continued advancing money, which was used to finance the company's operations. As advances were made by Mr. Mennillo, the loaned amounts were recorded on cards of a Rolodex initialled by Mr. Rosati. A total of $440,000 was advanced in that way between June 2004 and October 2006.

[111] That amount was repaid in full by Intramodal between July 3, 2006 and December 7, 2009 by means of cheques marked "consultation fees" or "management fees". During that period, Mr. Mennillo was thus paid $690,000, which included interest and a premium, plus the applicable taxes.

[112] By 2006, the company founded by Mr. Mennillo and Mr. Rosati had become very successful.

[113] On March 24, 2006, Mr. Rosati filed with the REQ an annual declaration dated February 8, 2006 in which Mr. Mennillo was still listed as a shareholder of the company.

[114] In July 2007, at a dinner among friends, an argument broke out when Mr. Mennillo learned of the company's success. That same year (the exact date is not in evidence), Intramodal passed a retroactive resolution acknowledging Mr. Mennillo's resignation as a director and officer and approving the transfer of his shares to Mr. Rosati. That resolution, which is at the heart of this litigation and which shows that Mr. Mennillo was a shareholder of the company, at least before the transfer, was not signed by Mr. Mennillo. Nor did he ever endorse his share certificate, which remained in Intramodal's possession at all times and was never delivered to the purported transferee.

[115] In the fall of 2007, there were discussions involving the following persons: Antoine

l'automne 2005, des sommes d'argent sont avancées par M. Mennillo. En décembre, les activités d'Intramodal débutent officiellement. M. Mennillo continue d'avancer des sommes d'argent qui sont utilisées pour financer les activités de la société. Au fur et à mesure que M. Mennillo fait ces avances, les sommes prêtées sont consignées sur les fiches d'un *Rolodex* avec les initiales de M. Rosati. Au total, 440 000 $ seront ainsi avancés entre juin 2004 et octobre 2006.

[111] Ce montant sera remboursé en totalité par Intramodal au cours de la période du 3 juillet 2006 au 7 décembre 2009, et ce, au moyen de chèques portant la mention [TRADUCTION] « frais de consultation » ou « frais de gestion » (« *consultation fees* » ou « *management fees* »). Une somme de 690 000 $, incluant les intérêts et une prime à laquelle s'ajoutent les taxes applicables, est donc versée à M. Mennillo durant cette période.

[112] Dès 2006, l'entreprise fondée par MM. Mennillo et Rosati connaît un vif succès.

[113] Le 24 mars 2006, M. Rosati dépose au REQ une déclaration annuelle portant la date du 8 février 2006 dans laquelle M. Mennillo apparaît toujours comme actionnaire de la société.

[114] En juillet 2007, lors d'un souper entre amis, la discorde éclate alors que M. Mennillo prend conscience du succès de l'entreprise. En 2007 (la date exacte n'est pas établie par la preuve), Intramodal adopte une résolution avec effet rétroactif qui reconnaît la démission de M. Mennillo à titre d'administrateur et de dirigeant et qui entérine le transfert de ses actions à M. Rosati. Cette résolution, qui est au cœur du présent litige et qui atteste que, à tout le moins avant le transfert, M. Mennillo était actionnaire de la société, n'est pas signée par lui. Par ailleurs, le certificat d'actions de M. Mennillo ne sera jamais endossé par lui non plus. Il demeurera en tout temps entre les mains d'Intramodal et ne sera jamais délivré à son prétendu cessionnaire.

[115] Dès l'automne 2007, sont entreprises des discussions auxquelles prennent part les personnes

Papadimitriou, an accountant who was retained by several of the appellant's businesses, Paolo Carzoli, a tax lawyer who had been consulted by Mr. Papadimitriou for the occasion, and Israel Kaufman, a commercial lawyer consulted by the appellant to structure the proposed transaction. The appellant and Mr. Rosati also gave different accounts of the purpose of those discussions: according to the appellant, the purpose of the discussions was to determine a price for the redemption of his shares, while Mr. Rosati claimed that their purpose was to increase the amount of the repayment to be made to the appellant. The appellant's version was corroborated in this regard by Mr. Papadimitriou, Mr. Carzoli and Mr. Kaufman.

[116] On December 22, 2008, Intramodal amended its articles by removing any rights and privileges associated with the Class "A" to "G" shares of its capital stock and replacing them with new rights and privileges associated with Class "A" to "I" shares. New shares were issued to Fiducie Intra 4 (a trust created by Mr. Rosati) and to Mr. Rosati himself.

[117] On December 7, 2009, the appellant met Mr. Rosati at a restaurant and Mr. Rosati gave him a $40,000 cheque from Intramodal marked "Full and Final Payment". A few days after that payment, the appellant consulted his lawyer, who then checked the "CIDREQ" reports available online and obtained copies of the declarations filed with the REQ by Intramodal. Noting that the appellant was no longer listed as a shareholder, the lawyer told him about this discovery.

[118] On February 25, 2010, Mr. Kaufman sent Intramodal a formal notice. The appellant filed a claim for oppression against the respondent company on September 7, 2010.

[119] The appellant's version of the events that led to the dispute differs from Mr. Rosati's.

[120] Mr. Rosati maintains that in the initial agreement, the appellant undertook to finance the

suivantes : Antoine Papadimitriou, comptable dont les services sont retenus par plusieurs entreprises de l'appelant, M^e^ Paolo Carzoli, avocat fiscaliste consulté par M. Papadimitriou pour l'occasion et M^e^ Israel Kaufman, avocat commercialiste consulté par l'appelant pour le montage de l'opération projetée. L'appelant et M. Rosati offrent également des versions différentes quant à l'objet de ces discussions : selon l'appelant, ces discussions ont pour but de fixer le prix pour le rachat de ses actions, alors que selon M. Rosati, elles visent à augmenter le montant du remboursement à verser à l'appelant. La version de l'appelant est toutefois corroborée sous ce rapport par M. Papadimitriou, M^e^ Carzoli et M^e^ Kaufman.

[116] Le 22 décembre 2008, Intramodal modifie ses statuts en supprimant tous les droits et privilèges afférents aux actions de catégories « A » à « G » de son capital pour les remplacer par de nouveaux droits et privilèges afférents aux actions de catégories « A » à « I ». De nouvelles actions sont émises à Fiducie Intra 4 (une fiducie créée par M. Rosati) et à M. Rosati lui-même.

[117] Le 7 décembre 2009, l'appelant rencontre M. Rosati dans un restaurant et ce dernier lui remet un chèque de 40 000 $ tiré par Intramodal, sur lequel apparaît la mention [TRADUCTION] « règlement total et définitif » (« *Full and Final Payment* »). Quelques jours après ce paiement, l'appelant consulte son avocat, qui examine alors les rapports « CIDREQ » disponibles en ligne et obtient copie des déclarations déposées par Intramodal auprès du REQ. Il constate que l'appelant n'apparaît plus comme actionnaire et l'informe de sa découverte.

[118] Le 25 février 2010, M^e^ Kaufman envoie une mise en demeure à Intramodal. L'appelant intente un recours pour abus contre la société intimée le 7 septembre 2010.

[119] La version de l'appelant et celle de M. Rosati diffèrent quant aux événements ayant mené au différend en cause.

[120] M. Rosati soutient que dans le cadre de l'entente initiale, l'appelant s'est engagé à assumer

respondent company and guarantee its debts. At trial, he testified that his relationship with the appellant had begun to deteriorate in July 2004. According to Mr. Rosati, the appellant expressed serious doubts at that time about his ability to successfully implement their plan. Mr. Mennillo discussed this with Mr. Rosati and told him that he intended to withdraw from the company. Mr. Rosati acknowledges that he and Mr. Mennillo at no time formally established the terms of such a withdrawal. According to Mr. Rosati, the company had not yet started operating at the time of their discussion on this subject. Mr. Rosati insisted that the appellant continue financing him, and the appellant agreed to provide him with $300,000.

[121] The appellant categorically denies that he ever expressed an intention to withdraw from the company as a shareholder. He also denies that there was an agreement on his withdrawal as a shareholder. He admits withdrawing solely as a director and an officer, as is confirmed by his notice of resignation, and says that he did so at his friend's request. According to the appellant, a few weeks before May 25, 2005, Mr. Rosati told him that people from the Labatt Brewing Company Ltd. — a potential client — wanted to look at Intramodal's registers. Mr. Mennillo testified that Mr. Rosati told him at that time that it would be better that he withdraw while the necessary verifications were being carried out. According to Mr. Mennillo's own testimony, he resigned as a director and officer only after being promised that he would be reinstated. It was Mr. Rosati, through his lawyer, who sent the appellant a letter of resignation, which the appellant signed immediately.

[122] More specifically, the appellant's and Mr. Rosati's versions of the following events are diametrically opposed:

- With regard to a meeting at a restaurant on July 14, 2007, Mr. Rosati maintains that the appellant told him he was dissatisfied with the return on his loan. The two of them then decided to schedule a meeting to determine the amount to which the appellant was entitled in order to settle their dispute. According to Mr. Rosati,

le financement de la société intimée et à garantir son passif. Au procès, il a témoigné que sa relation avec l'appelant avait commencé à se détériorer à partir de juillet 2004. Toujours selon M. Rosati, l'appelant aurait alors exprimé de sérieux doutes quant à sa capacité à mener à bien leur projet. M. Mennillo en a discuté avec M. Rosati et lui a fait part de son intention de se retirer de la société. M. Rosati reconnaît que lui et M. Mennillo n'ont jamais formellement établi les modalités d'un tel retrait. Leur discussion à cet égard survient, toujours selon M. Rosati, alors que les activités de la société n'ont pas encore débuté. M. Rosati insiste pour que l'appelant continue de le financer, ce qu'il convient de faire à hauteur de 300 000 $.

[121] L'appelant, pour sa part, nie catégoriquement avoir manifesté, à quelque moment que ce soit, son intention de se retirer de la société comme actionnaire. Il nie de plus qu'il y ait eu entente visant son retrait comme actionnaire. Il admet s'être retiré uniquement à titre d'administrateur et de dirigeant, comme le confirme son avis de démission, et ce, à la demande de son ami. L'appelant affirme que quelques semaines avant le 25 mai 2005, ce dernier lui aurait indiqué que des gens de La Brasserie Labatt Ltée — un client potentiel — souhaitaient consulter les registres d'Intramodal. M. Mennillo témoigne que M. Rosati lui a alors indiqué qu'il valait mieux qu'il se retire le temps que les vérifications nécessaires soient faites. Selon son propre témoignage, M. Mennillo n'aurait démissionné comme administrateur et dirigeant que sous promesse d'être rétabli dans ses fonctions. C'est M. Rosati qui, par l'entremise de son avocat, lui fait parvenir une lettre de démission que l'appelant signe immédiatement.

[122] Plus particulièrement, l'appelant et M. Rosati offrent des versions diamétralement opposées des événements suivants :

- Concernant une rencontre au restaurant le 14 juillet 2007, M. Rosati soutient que l'appelant lui a indiqué qu'il était insatisfait du rendement de son prêt. Tous les deux ont alors décidé de fixer une rencontre afin de déterminer le montant auquel l'appelant a droit et mettre fin à leur différend. Les rencontres subséquentes

the purpose of the subsequent meetings in 2007 was to increase the amount on which they had already agreed.

- The appellant maintains that it was on July 14, 2007 that he realized Intramodal was doing very well. A meeting was scheduled not only to agree on the repayment of the loans, but also to determine a price for the redemption of his shares. Discussions on this subject took place on several occasions in 2007, but they were unsuccessful. It was not until December 2009, as a result of Mr. Kaufman's inquiries, that the appellant learned he was no longer a shareholder of Intramodal.

[123] However, Mr. Rosati and Mr. Mennillo agree on one point. There was no mention whatsoever on May 25, 2005 of the sale, exchange or gift of shares. At most, according to Mr. Rosati, because the appellant expressed an intention to withdraw from Intramodal whereas his shares had been issued to him on condition that he finance the company and guarantee its debts, he lost his status as a shareholder at that time. This is the version of the facts that was accepted by the trial judge.

III. Decisions of the Courts Below

A. *Quebec Superior Court, 2012 QCCS 1640 (Poirier J.)*

[124] The trial judge was of the view that the outcome of this case depended entirely on the credibility of the witnesses. He stated that the appellant's testimony and that of Mr. Rosati were contradictory with respect to three events in particular, namely:

- the appellant's resignation as a director and an officer of Intramodal on May 25, 2005;

- the meeting of July 14, 2007 at the restaurant and the meeting between the appellant and Mr. Rosati on July 21, 2007; and

ayant eu lieu en 2007 visaient, toujours selon M. Rosati, à augmenter le montant déjà convenu.

- L'appelant soutient que c'est le 14 juillet 2007 qu'il a réalisé qu'Intramodal avait le vent dans les voiles. Une rencontre est fixée, non seulement pour convenir du remboursement des prêts, mais également pour déterminer le prix de rachat de ses actions. Des discussions à ce sujet auront lieu à plusieurs reprises en 2007, mais avorteront. Ce n'est qu'en décembre 2009, suite aux vérifications de M^e^ Kaufman, qu'il apprendra qu'il n'est plus actionnaire d'Intramodal.

[123] MM. Rosati et Mennillo s'entendent toutefois sur un point. Le 25 mai 2005, il n'a jamais été question de vente, d'échange ou de donation d'actions. Tout au plus, selon M. Rosati, l'appelant ayant manifesté son intention de se retirer d'Intramodal alors que ses actions lui avaient été émises conditionnellement à ce qu'il finance la société et en garantisse le passif, il a alors perdu son statut d'actionnaire. C'est cette version des faits qui a été retenue par le juge de première instance.

III. Décisions antérieures

A. *Cour supérieure du Québec, 2012 QCCS 1640 (le juge Poirier)*

[124] Le juge de première instance estime que l'issue de la présente affaire repose entièrement sur la crédibilité des témoins. Il indique que le témoignage de l'appelant et celui dc M. Rosati sont contradictoires quant à trois événements en particulier, à savoir :

- la démission de l'appelant à titre d'administrateur et de dirigeant d'Intramodal en date du 25 mai 2005;

- la rencontre du 14 juillet 2007 au restaurant ainsi que celle entre l'appelant et M. Rosati le 21 juillet 2007;

– the series of meetings with the appellant's accountant between October and December 2007.

[125] On the first of those events, the trial judge found that the reason for the appellant's withdrawal as a director and an officer [TRANSLATION] "cannot be linked to the visit to Intramodal's premises and the examination of the company's books by representatives of Labatt", thus rejecting the appellant's claim that Mr. Rosati had asked him to resign to reassure that potential client (para. 29 (CanLII)). The trial judge rejected the appellant's version with respect to the other events as well.

[126] The trial judge also analyzed the exhibits filed by the parties in detail. In his opinion, several of them directly contradicted the appellant's version.

[127] He concluded from the evidence as a whole that the appellant had held 49 common shares *on condition that he finance Intramodal's operations and guarantee all of its debts once it began operating as a business*. He also found that the shares had been distributed as follows when the respondent company was incorporated: 51 percent to Mr. Rosati and 49 percent to the appellant.

[128] More importantly, the trial judge found that it was the appellant who had asked to be removed from the company (both as a director and officer and as a shareholder) effective May 25, 2005. As of that date, in the trial judge's view, the appellant became merely a lender of $440,000 to Intramodal's sole shareholder, namely Mr. Rosati. In other words, because the appellant's shares had been issued on condition that he finance Intramodal's operations and guarantee its debts, those shares were transferred to Mr. Rosati when the appellant expressed a wish to be relieved of his obligations to Intramodal. The appellant nevertheless continued financing Intramodal's operations after May 25, 2005. The trial judge added that [TRANSLATION] "[t]he failure to complete the transfer of [the appellant's] shares to Rosati resulted from an error or oversight on the part of Rosati's lawyer" (para. 74).

– la série de rencontres avec le comptable de l'appelant, d'octobre à décembre 2007.

[125] En ce qui concerne le premier de ces événements, le juge de première instance estime que le motif du retrait de l'appelant à titre d'administrateur et de dirigeant « ne peut être lié à la visite du local de Intramodal et l'examen des livres de la compagnie par les représentants de Labatt », rejetant ainsi la prétention de l'appelant suivant laquelle M. Rosati lui aurait demandé de démissionner afin de rassurer ce client potentiel (par. 29 (CanLII)). Quant aux autres événements, il rejette également la version de l'appelant.

[126] Le juge de première instance procède en outre à une analyse détaillée des pièces produites par les parties. Il est d'avis que plusieurs d'entre elles contredisent directement la version de l'appelant.

[127] Il retient de l'ensemble de la preuve que l'appelant a détenu 49 actions ordinaires *conditionnellement à ce qu'il finance les activités d'Intramodal et garantisse l'ensemble de son passif dès que débuteraient les activités de l'entreprise*. Il retient également que, lors de la constitution de la société intimée, les actions ont été réparties de la façon suivante : 51 p. 100 pour M. Rosati et 49 p. 100 pour l'appelant.

[128] Plus important encore, le juge de première instance retient que c'est l'appelant qui a demandé son retrait de la société (tant à titre d'administrateur et de dirigeant que d'actionnaire) à compter du 25 mai 2005. Selon lui, à partir de ce jour, l'appelant devenait simple prêteur d'une somme de 440 000 $ au seul actionnaire d'Intramodal, à savoir M. Rosati. En d'autres termes, dans la mesure où l'émission des actions de l'appelant était conditionnelle à ce que celui-ci finance les activités d'Intramodal et garantisse son passif, les actions ont été cédées à M. Rosati lorsque l'appelant a exprimé le souhait d'être libéré de ses obligations à l'égard d'Intramodal. L'appelant a pourtant continué à financer les activités d'Intramodal après le 25 mai 2005. Le juge de première instance ajoute que « [l]e fait que la cession des actions de [l'appelant] à Rosati n'ait pas été complétée résulte de l'erreur ou l'oubli de la part de

In short, in his opinion, the appellant was no longer a shareholder, director or officer of Intramodal, which meant that his claim had to be dismissed.

B. *Quebec Court of Appeal, 2014 QCCA 1515*

(1) Reasons of the Majority (Vézina and St-Pierre JJ.A.)

[129] The majority of the Court of Appeal, per Vézina J.A., agreed with the trial judge that the outcome of this case depended on the credibility of the witnesses. In the majority's view, the trial judge had not made any palpable and overriding error that warranted the intervention of the Court of Appeal. Moreover, his assessment of the facts, including the finding that the appellant had been excluded from Intramodal as a shareholder at his own request, necessarily led to the conclusion that the claim had to be dismissed.

[130] Furthermore, the majority found that little weight should be given to the business records in this case, because the relevant documents had been prepared in a sloppy manner. They gave some examples of this, noting that, [TRANSLATION] "[c]learly, neither the parties nor their professional advisers were concerned about paperwork and formalities" and that it was therefore not surprising that the appellant's removal as a shareholder had not been properly registered (para. 216 (CanLII)). The majority added that [TRANSLATION] "[t]his lack of duly completed and reliable documents means that it will be necessary to look to the evidence as a whole, including the depositions, in order to determine what really happened in this case and what the parties actually agreed to" (para. 219).

[131] After considering the evidence relating to the three events analyzed by the trial judge, the majority of the Court of Appeal concluded as follows:

[TRANSLATION] Counsel for Mennillo argues that Mennillo cannot have both been a shareholder and not been a shareholder. Rosati admits that he was one, so it is up to him to prove that he ceased to be one. Hence the issue of the $49 discussed above.

l'avocat de Rosati » (par. 74). Bref, selon lui, l'appelant n'est plus détenteur d'aucune action ni administrateur ou dirigeant d'Intramodal. Son recours doit par conséquent être rejeté.

B. *Cour d'appel du Québec, 2014 QCCA 1515*

(1) Motifs des juges majoritaires (les juges Vézina et St-Pierre)

[129] La majorité de la Cour d'appel, sous la plume du juge Vézina, partage l'avis du juge de première instance selon lequel l'issue de la présente affaire repose sur la crédibilité des témoins. Selon elle, le juge de première instance n'a commis aucune erreur manifeste et dominante justifiant l'intervention de la Cour d'appel. Qui plus est, son appréciation des faits, notamment la conclusion selon laquelle c'est à sa propre demande que l'appelant a été exclu d'Intramodal comme actionnaire, menait nécessairement à la conclusion que le recours devait être rejeté.

[130] Par ailleurs, les juges majoritaires estiment que peu de poids doit être accordé aux documents de l'entreprise dans la présente affaire dans la mesure où les documents pertinents ont été rédigés sans aucune rigueur. Ils donnent quelques exemples qui les amènent à affirmer que, « [m]anifestement, ni les parties ni leurs professionnels ne se souciaient des papiers et des formalités », et qu'il n'est alors pas surprenant que le retrait de l'appelant comme actionnaire n'ait pas été dûment inscrit (par. 216 (CanLII)). Ils ajoutent que « [c]ette absence de documents dûment complétés et fiables oblige à chercher dans l'ensemble de la preuve, dont les dépositions, ce qui s'est réellement passé dans cette affaire, ce dont les parties ont vraiment convenu » (par. 219).

[131] Après avoir examiné la preuve relative aux trois événements analysés par le juge de première instance, les juges majoritaires de la Cour d'appel concluent ce qui suit :

Selon son avocat, Mennillo ne peut avoir été actionnaire et ne pas l'avoir été. Or, Rosati admet qu'il l'a été, donc c'est à lui de prouver qu'il a cessé de l'être. D'où la question des 49 $, ci-dessus traitée.

movable property must be made by notarial act *en minute*, with one exception: where consent to a gift of such property is accompanied by delivery and immediate possession of the property. Gagnon J.A. noted that, in the instant case, Intramodal had not received any notarial contract in which Mr. Mennillo transferred his shares to Mr. Rosati. He added that the evidence did not show a manual gift from the appellant to Mr. Rosati accompanied by delivery of the instrument.

[139] Gagnon J.A. ended his reasons on this point by noting that, to have the claim dismissed, the respondent company had to show that Mr. Rosati was the actual transferee of the shares in question, which required that his share certificate be endorsed in accordance with s. 64 *CBCA*. Moreover, Intramodal's articles provided that no share could be transferred unless the board of directors passed a resolution consenting to the transfer. In the circumstances, it was quite simply not open to Intramodal to disregard these requirements and approve a transfer of shares to Mr. Rosati.

[140] Gagnon J.A. was also of the view that the trial judge should not have rejected the appellant's version of the facts and that there were palpable and overriding errors in his analysis in this regard.

[141] Finally, Gagnon J.A. also rejected the argument that the claim was prescribed.

IV. Issues

[142] The main issues are as follows:

- Did the respondent company, by passing the resolution approving the transfer of the appellant's shares to its majority shareholder and registering that transfer in its registers, contrary to the applicable legislation and to its own articles and by-laws, create an oppressive situation that satisfies the conditions for making a claim for oppression under s. 241 *CBCA*?

qui prévoit que la donation d'un bien meuble s'effectue par acte notarié en minute, sauf dans le seul cas où le consentement à la donation d'un tel bien s'accompagne de la délivrance et de la possession immédiate du bien. Le juge Gagnon souligne que, en l'espèce, Intramodal ne s'est vu remettre aucun contrat notarié dans lequel M. Mennillo transférait ses actions à M. Rosati. Il ajoute que la preuve ne révèle pas un don manuel de l'appelant à M. Rosati accompagné de la délivrance du titre.

[139] Le juge Gagnon termine ses motifs sur ce point en soulignant que, pour obtenir le rejet du recours, la société intimée devait démontrer que M. Rosati était le véritable cessionnaire des actions en cause, ce qui nécessitait l'endossement de son certificat d'actions, le tout conformément à l'art. 64 *LCSA*. De plus, les statuts d'Intramodal prévoient qu'aucune action ne peut être transférée sans le consentement du conseil d'administration exprimé par voie de résolution. Dans ces circonstances, Intramodal ne pouvait tout simplement pas faire fi de ces exigences et ratifier un transfert d'actions à M. Rosati.

[140] Le juge Gagnon est par ailleurs d'avis que le juge de première instance n'aurait pas dû écarter la version des faits de l'appelant et que son analyse, sur ce point, est entachée d'erreurs manifestes et dominantes.

[141] Enfin, le juge Gagnon rejette également l'argument selon lequel le recours est prescrit.

IV. Questions en litige

[142] Les principales questions en litige sont les suivantes :

- La société intimée, en adoptant la résolution entérinant le transfert des actions de l'appelant au bénéfice de son actionnaire majoritaire et en inscrivant ce transfert dans ses registres, en contravention de la législation applicable et de ses propres statuts et règlements, a-t-elle provoqué une situation d'abus qui satisfait aux conditions d'ouverture du recours pour abus prévu à l'art. 241 *LCSA*?

- Can the fact that the appellant expressed an intention to withdraw from the respondent company be raised against him as a bar to such a claim?
- Did the trial judge make palpable and overriding errors in assessing the evidence?
- Is the appellant's claim prescribed?

V. Analysis

A. *Importance of Formalism in Corporate Law*

[143] As I mentioned above, the analysis of the issues requires a review of some basic principles. While it is true that the appellant and Mr. Rosati did not make the effort to prepare complete documents setting out the exact terms of their business relationship and that they took a rather lax approach in preparing their corporate documents, there is no question that a corporation was indeed formed under the *CBCA* on July 13, 2004 and that the appellant was a shareholder from that date until at least May 25, 2005.

[144] A number of arguments have been advanced in this case with respect to the appellant's shares and, more specifically, to his status as a shareholder, including that the appellant was never a shareholder of the respondent company, that he agreed to transfer the shares to Mr. Rosati, that his ownership of the shares was conditional, and that the shares in question were cancelled retroactively.

[145] With regard to the cancellation of the shares, counsel for the appellant correctly noted at the hearing, in response to the reasons of the majority of the Court of Appeal, that such a cancellation can be effected only in accordance with the law, that is, by amending the corporation's articles or, if the shares have already been paid for, by redeeming them.

[146] The *CBCA* regulates the cancellation of a corporation's shares in order to ensure the integrity of the corporation's share capital and to preserve the common pledge of its creditors. It does so in

- L'appelant peut-il se voir opposer l'expression de son intention de se retirer de la société intimée comme fin de non-recevoir à un tel recours?
- Le juge de première instance a-t-il commis des erreurs manifestes et dominantes dans son appréciation de la preuve?
- Le recours de l'appelant est-il prescrit?

V. Analyse

A. *Importance du formalisme en droit des sociétés*

[143] Tel que mentionné plus avant, l'analyse des questions en litige exige un rappel de certains principes de base. S'il est vrai que l'appelant et M. Rosati se sont peu souciés de transposer dans des écrits complets les modalités exactes de leurs relations d'affaires et qu'ils ont fait preuve d'un certain laxisme dans la préparation des documents relatifs à la société, il est incontestable qu'une société a bel et bien été formée en vertu de la *LCSA* le 13 juillet 2004 et que l'appelant a été actionnaire du 13 juillet 2004 jusqu'au moins le 25 mai 2005.

[144] Le sort réservé aux actions de l'appelant en l'espèce et, en l'occurrence, à sa qualité d'actionnaire, a donné lieu à plusieurs thèses, entre autres celles suivant lesquelles l'appelant n'aurait jamais été actionnaire de la société intimée, il aurait convenu de les transférer à M. Rosati, il aurait été un actionnaire conditionnel, ou encore les actions en cause auraient été annulées rétroactivement.

[145] En ce qui concerne l'annulation des actions, l'avocat de l'appelant, à l'audience, et en réponse au jugement majoritaire de la Cour d'appel, a souligné à juste titre qu'une telle annulation ne pouvait se faire que conformément à la loi, soit par voie de modification des statuts, soit, si les actions ont déjà été payées, par voie d'achat ou de rachat.

[146] La *LCSA* encadre l'annulation des actions de la société dans le but de garantir l'intégrité du capital-actions et de préserver le gage commun des créanciers, le tout conformément à la règle du

accordance with the maintenance of capital rule, which is of particular importance in corporate law:

> Although the trust fund doctrine does not completely apply to our corporate law, it nonetheless constitutes the basis of a rule which appears in the law today: the maintenance of capital rule.
>
> This rule is inferred from statutory provisions prohibiting or submitting to solvency (federally) or accounting tests various transactions directly or indirectly having an effect on the paid-up capital of a corporation, such as the reduction of issued capital, declaration of dividends, acquisition by a corporation of its shares, issue of shares at a discount, transfer of shares not fully paid, etc. In the Quebec *Business Corporations Act*, it is telling that most of these provisions are found in a section entitled "Maintenance of share capital".
>
> The paid-up capital of a corporation must be maintained and safeguarded in the interest of the creditors: to this extent we can say that the trust fund doctrine is present, especially when we consider that all the above-mentioned transactions can lead to the personal liability of the directors.
>
> The principle, which essentially comes from doctrine and case law respecting paid-up capital, is the following: a corporation is not allowed to "traffic in" its capital. The statutory provisions we have referred to merely define the limits of this principle by creating certain exceptions to the prohibition against a corporation drawing on its paid-up capital. Any action which does not fall within the scope of these exceptions infringes the maintenance of capital rule and is therefore unlawful. [Emphasis added; footnotes omitted.]

(P. Martel, *Business Corporations in Canada: Legal and Practical Aspects* (loose-leaf), at pp. 12-17 and 12-18)

[147] It should be borne in mind that, although a business corporation is similar to a partnership in some respects, as is true, for example, of relationships between the shareholders of a closely held corporation, it differs from a partnership in several ways, including the fact that it requires a stricter adherence to formalities to ensure its independent existence.

maintien du capital, laquelle est au cœur du droit des sociétés :

> Même si la doctrine du *Trust fund* ne s'applique pas intégralement dans notre droit des sociétés, elle n'en constitue pas moins un fondement d'une règle qui, elle, se manifeste dans les lois actuelles : la règle du maintien du capital.
>
> Cette règle se déduit des dispositions statutaires interdisant ou soumettant à des tests de solvabilité, au fédéral, ou comptables, diverses opérations ayant pour conséquence directe ou indirecte d'affecter le capital souscrit de la société, comme par exemple la réduction du capital émis, la déclaration de dividendes, l'acquisition de ses propres actions par la société, l'émission d'actions à escompte, le transfert d'actions impayées, etc. Dans la *Loi sur les sociétés par actions*, il est significatif que la plupart de ces dispositions soient regroupées dans une section, intitulée « Maintien du capital ».
>
> Le capital souscrit de la société doit être maintenu, sauvegardé, et ce dans l'intérêt des créanciers : dans cette mesure, on peut parler d'une manifestation de la doctrine du *Trust fund*, surtout quand on constate que toutes les opérations mentionnées plus haut engagent la responsabilité personnelle des administrateurs.
>
> À la base, le principe dégagé par la doctrine et la jurisprudence en matière de capital souscrit est le suivant : la société n'a pas le droit de « trafiquer » dans son capital. Les dispositions statutaires auxquelles nous avons fait allusion ne viennent que préciser les limites de ce principe, en créant certaines exceptions à cette défense pour la société de toucher à son capital souscrit. Tout geste qui n'entre pas dans le cadre de ces exceptions contrevient à la règle du maintien du capital et est de ce fait illégal. [Je souligne; notes en bas de page omises.]

(P. Martel, *La société par actions au Québec*, vol. I, *Les aspects juridiques* (feuilles mobiles), par. 12-79 à 12-82)

[147] Rappelons que la société par actions, malgré qu'elle comporte certaines similitudes avec la société de personnes, notamment en ce qui concerne les rapports entre les actionnaires dans le cas d'une société par actions à capital fermé, s'en distingue à plusieurs égards, notamment par le fait qu'elle requiert un formalisme plus grand visant à assurer son existence autonome.

[148] A business corporation is not merely the product of an agreement between associates. As Martel notes, "[a] corporation is a 'joint stock corporation' incorporated through the intervention of the State, not by contract, and as such it is not subject to the partnership rules in the *Civil Code*" (p. 27-32 (footnote omitted)).

[149] By choosing a business corporation as their legal vehicle for carrying on business, a company's founders and shareholders voluntarily decide to be subject to a scheme that, although it does involve numerous formalities, also has a number of advantages, including the limited liability of directors for the corporation's debts, which is an advantage that flows directly from the corporation's distinct legal personality.

[150] In the case at bar, if Mr. Mennillo and Mr. Rosati had wanted consensualism to take precedence over formalism in the conduct of their affairs, they could easily have opted for a partnership, but they did not do so. Since they instead chose to create a business corporation, they cannot enjoy the advantages of such a corporation without complying with the stricter rules that apply to it.

[151] A business corporation is a legal person established for a private interest that has a distinct legal personality and patrimony: R. Crête and S. Rousseau, *Droit des sociétés par actions* (3rd ed. 2011), at para. 51. In principle, it expresses itself through the resolutions of its board of directors. Decisions of the board of directors must be made at meetings that are lawfully called, although it is also possible for all the directors to sign a given resolution in writing, in which case the resolution is as valid as if it had been passed at a meeting: s. 117(1) *CBCA*.

[152] The shareholders may exercise the management powers of the board of directors only if they enter into a unanimous shareholder agreement pursuant to s. 146 *CBCA*. Moreover, several of the many powers conferred on the board of directors may not be delegated and require authorization from the board itself: ss. 121(a) and 115(3) *CBCA*. In the

[148] Une société par actions n'est pas que le produit d'une entente entre les associés. Comme le souligne Martel : « La société est une "société par actions", constituée par l'intervention de l'État et non pas par contrat et comme telle elle n'est pas assujettie au régime général des sociétés du Code civil » (par. 27-122 (note en bas de page omise)).

[149] En choisissant le véhicule juridique qu'est la société par actions pour exercer leurs activités, les fondateurs et actionnaires d'une telle société décident volontairement de s'assujettir à un régime qui est certes soumis à de nombreuses formalités, mais qui comporte aussi plusieurs avantages, notamment la responsabilité limitée des administrateurs quant au passif de la société, soit un avantage qui découle directement de sa personnalité juridique distincte.

[150] Dans le cas qui nous occupe, si MM. Mennillo et Rosati avaient voulu que le consensualisme prime le formalisme dans la conduite de leurs affaires, ils auraient facilement pu opter pour une société de personnes, mais ils ne l'ont pas fait. Dans la mesure où ils ont plutôt choisi de créer une société par actions, ils ne peuvent bénéficier des avantages de ce type de société sans se soumettre aux règles plus strictes qui s'y rattachent.

[151] La société par actions est une personne morale de droit privé dotée d'une personnalité juridique et d'un patrimoine distincts : R. Crête et S. Rousseau, *Droit des sociétés par actions* (3e éd. 2011), par. 51. Elle s'exprime en principe au moyen des résolutions adoptées par son conseil d'administration. Les décisions du conseil d'administration doivent se prendre lors de réunions régulièrement convoquées, à moins que tous les administrateurs ne signent une résolution écrite, auquel cas cette dernière a la même valeur qui si elle avait été adoptée au cours d'une réunion : par. 117(1) *LCSA*.

[152] Les pouvoirs de gestion du conseil d'administration ne peuvent être exercés par les actionnaires que lorsque ceux-ci adoptent une convention unanime des actionnaires en vertu de l'art. 146 *LCSA*. De plus, parmi les nombreux pouvoirs conférés au conseil d'administration, plusieurs ne peuvent être délégués et doivent faire l'objet d'une

instant case, no unanimous shareholder agreement was entered into.

[153] Once the shareholders have in fact subscribed for shares, the invested amounts belong to the corporation. That capital is locked in in such a way that shareholders cannot recover their investments unilaterally or liquidate some or all of the corporation's assets at the expense of its creditors. This is the maintenance of capital principle.

[154] This principle also implies that the shareholders cannot agree among themselves to authorize one of them to require the corporation to redeem his or her shares and thus to withdraw from the corporation without its intervening.

[155] Various statutes place considerable value on corporate documents as a way to protect third parties (including creditors) that rely on them to assess the corporation's situation. One such statute is Quebec's *Act respecting the legal publicity of enterprises*, CQLR, c. P-44.1.

[156] The formalities provided for in corporate legislation are not merely a matter of "form" as suggested by the trial judge, the majority of the Court of Appeal and my colleague Cromwell J. Rather, the observance of such formalities must be viewed as conditions for the validity of the acts of the corporation, its directors and its shareholders. They are imposed to give effect to the principle that a corporation has a distinct legal personality and to the maintenance of capital principle, and they are necessary to protect the corporation's patrimony, the common pledge of its creditors.

[157] Furthermore, these principles cannot be variable. The principle that a corporation has a distinct legal personality and the maintenance of capital principle are just as important in the case of a small company as in that of a large one, if not more so. Although expectations may vary from one shareholder to another in the case of a closely held

autorisation du conseil lui-même : al. 121a) et par. 115(3) *LCSA*. On notera que, en l'espèce, aucune convention unanime des actionnaires n'a été signée.

[153] Dès que les actionnaires ont bel et bien procédé à la souscription des actions, les montants investis appartiennent à la société. Ce capital est immobilisé de manière que les actionnaires ne puissent récupérer unilatéralement leur investissement et liquider partiellement ou totalement les actifs de la société au détriment des créanciers de cette dernière. Il s'agit du principe du maintien du capital.

[154] Ce principe implique en outre que l'accord des actionnaires entre eux ne peut permettre à l'un d'eux de forcer le rachat par la société des actions qu'il détient et d'ainsi se retirer de la société sans l'intervention de cette dernière.

[155] Différentes lois accordent une valeur considérable à la documentation corporative d'une société, et ce, afin de protéger les tiers (dont les créanciers) qui s'y fient pour connaître la situation de la société, dont, au Québec, la *Loi sur la publicité légale des entreprises*, RLRQ, c. P-44.1.

[156] Les formalités prévues par les lois relatives aux sociétés par actions ne relèvent pas que de la « forme » comme le laissent entendre le juge de première instance, les juges majoritaires de la Cour d'appel, de même que mon collègue le juge Cromwell. Il faut plutôt voir dans leur respect la condition de la validité des actes de la société, de ses administrateurs et de ses actionnaires. Elles sont imposées en raison du principe de la personnalité juridique distincte de la société et du principe du maintien du capital et elles sont nécessaires à la protection du patrimoine de la société, gage commun de ses créanciers.

[157] Ces principes ne peuvent d'ailleurs être à géométrie variable. Le principe de la personnalité juridique distincte de la société et celui du maintien du capital sont tout aussi importants — sinon plus — dans le cas d'une petite société que dans celui d'une grande. Bien que les attentes des actionnaires puissent varier de l'un à l'autre dans le

corporation, this does not diminish the importance of these principles. The same is true of the formalities provided for by law to ensure that they are adhered to.

[158] In light of the above, the conclusion of the majority of the Court of Appeal that the agreement between the two shareholders regarding the appellant's shares was cancelled retroactively, simply by their consenting to its being cancelled, and that this cancellation had some effect on the company even though the necessary formalities were not observed, jeopardizes important pillars of Canadian corporate law.

[159] Assuming that Mr. Mennillo and Mr. Rosati did in fact enter into an agreement concerning a specific juridical operation in order to terminate or change the terms of their business association — which the evidence in no way shows — that agreement could not be set up against the respondent company in respect of the shares in question unless the necessary formalities were performed.

[160] The appellant argues, as did the dissenting Court of Appeal judge, that the majority of the Court of Appeal erred in completely disregarding the *CBCA*'s mandatory formalities for redeeming and transferring shares. In my view, the appellant is right. The reasoning of the majority of the Court of Appeal amounts to equating a business corporation with a partnership and seriously undermines the principle that a corporation has a distinct legal personality and the maintenance of capital principle, thereby creating uncertainty with respect to transactions involving the share capital of corporations.

[161] With respect, the fact that the appellant and Mr. Rosati themselves disregarded the necessary formalities in the way they conducted their affairs did not authorize the Superior Court and the majority of the Court of Appeal to do the same.

[162] As Idington J. of this Court noted in *Smith v. Gow-Ganda Mines, Ltd.* (1911), 44 S.C.R. 621, at p. 624, it is true that shareholders can enter into

cas d'une société par actions à capital fermé, l'importance de ces principes n'est pas pour autant diminuée. Il en va de même des formalités prévues par la loi pour faire respecter ces principes.

[158] À la lumière de ce qui précède, la conclusion des juges majoritaires de la Cour d'appel selon laquelle il y a eu annulation rétroactive de l'entente entre les deux actionnaires quant aux actions de l'appelant sur simple consentement de ceux-ci et que cette annulation a eu quelque effet que ce soit sur la société, en dépit de l'absence du formalisme requis, met en péril des piliers importants du droit canadien des sociétés.

[159] À supposer qu'une entente sur une opération juridique précise soit effectivement intervenue entre MM. Mennillo et Rosati afin de mettre fin à leur association d'affaires ou d'en changer les modalités — ce que la preuve ne révèle d'aucune façon —, pour que cette entente puisse être opposable à la société intimée eu égard aux actions en cause, les formalités requises devaient être accomplies.

[160] À l'instar du juge dissident de la Cour d'appel, l'appelant reproche aux juges majoritaires de la Cour d'appel d'avoir complètement fait abstraction des formalités impératives de la *LCSA* en matière de rachat et de transfert d'actions. À mon avis, l'appelant a raison. Le raisonnement des juges majoritaires de la Cour d'appel revient à assimiler la société par actions à une société de personnes et porte sérieusement atteinte au principe de la personnalité juridique distincte de la société par actions et à celui du maintien du capital et, ce faisant, il sème l'incertitude quant à la sécurité des opérations relatives au capital-actions des sociétés.

[161] Avec égards, le fait que l'appelant et M. Rosati eux-mêmes ont fait abstraction du formalisme requis dans leur façon de mener leurs affaires n'autorisait pas la Cour supérieure et les juges majoritaires de la Cour d'appel à faire de même.

[162] Comme le souligne le juge Idington de notre Cour dans l'arrêt *Smith c. Gow-Ganda Mines, Ltd.* (1911), 44 R.C.S. 621, p. 624, les actionnaires

various agreements as part of their business relationship, but for such agreements to be binding on the corporation, it is imperative that the statutory formalities be observed.

B. *Significance of Formalism in Corporate Law*

[163] In their respective reasons, the trial judge and the majority of the Court of Appeal relied heavily, to justify dismissing the appellant's claim for oppression, on his having expressed an intention to withdraw from the respondent company as a director, officer and shareholder. They were of the view that the only issue in this case was one of credibility.

[164] With respect, this conclusion completely disregards the formalism that is required in corporate law. It also completely disregards the respondent company's distinct legal personality. By focusing solely on whether the appellant had expressed an intention to withdraw from the respondent company, the trial judge and the majority of the Court of Appeal sidestepped the main issue: whether the respondent company's conduct was oppressive.

[165] Section 76 *CBCA* could not be any clearer. A corporation may not register a transfer of shares in its registers without first making certain inquiries. The legislation imposes some very strict requirements to be met before a transfer of shares is registered, including that the security be endorsed and that the transfer be rightful:

76 (1) Where a security in registered form is presented for transfer, the issuer shall register the transfer if

(a) the security is endorsed by an appropriate person as defined in section 65;

(b) reasonable assurance is given that that endorsement is genuine and effective;

(c) the issuer has no duty to inquire into adverse claims or has discharged any such duty;

peuvent certes, dans le cadre de leur relation d'affaires, conclure différentes ententes, mais pour que ces ententes engagent la société, les formalités prévues par la loi doivent impérativement être respectées.

B. *Portée du formalisme en droit des sociétés*

[163] Dans leurs motifs respectifs, le juge de première instance et les juges majoritaires de la Cour d'appel insistent abondamment sur l'intention exprimée par l'appelant de se retirer de la société intimée à titre d'administrateur, de dirigeant et d'actionnaire pour justifier le rejet de son recours pour abus. Ils sont d'avis que la présente affaire ne soulève qu'une simple question de crédibilité.

[164] Avec égards, une telle conclusion ne tient aucunement compte de la portée du formalisme qui s'impose en droit des sociétés. De plus, cette conclusion fait totalement abstraction de la personnalité juridique distincte de la société intimée. Le juge de première instance et les juges majoritaires de la Cour d'appel, en ne se préoccupant que de la question de savoir si l'appelant avait exprimé son intention de se retirer de la société intimée, ont esquivé la principale question en litige, à savoir celle du caractère abusif ou non de la conduite de la société intimée.

[165] L'article 76 *LCSA* est on ne peut plus clair. Une société ne peut inscrire un transfert d'actions dans ses registres sans d'abord procéder à certaines vérifications. La loi soumet l'inscription d'un transfert d'actions à des conditions préalables très strictes, dont l'endossement du titre et le caractère régulier du transfert :

76 (1) L'émetteur doit procéder à l'inscription du transfert d'une valeur mobilière nominative lorsque les conditions suivantes sont réunies :

a) la valeur mobilière est endossée par une personne compétente au sens de l'article 65;

b) des assurances suffisantes sur l'authenticité et la validité de cet endossement sont données;

c) il n'est pas tenu de s'enquérir de l'existence d'oppositions ou il s'est acquitté de cette obligation;

(d) any applicable law relating to the collection of taxes has been complied with;

(e) the transfer is rightful or is to a *bona fide* purchaser; and

(f) any fee referred to in subsection 49(2) has been paid.

(2) Where an issuer has a duty to register a transfer of a security, the issuer is liable to the person presenting it for registration for loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer.

[166] The *CBCA* and the respondent company's articles and by-laws required the company to make certain minimal inquiries before registering the transfer, one of which involved ensuring that the appellant's share certificate had been endorsed. The respondent company's failure to make such inquiries in this case was in itself a form of oppression. This conclusion is even more valid where, as here, this requirement is set out in black and white on the share certificate.

[167] It is contrary to basic principles of Quebec civil law to argue, as the respondent company does, that the intention expressed by the appellant in this case resulted in an agreement of wills even though there was no agreement on the juridical operation being contemplated. If the appellant and Mr. Rosati did not actually agree, on May 25, 2005, on the terms of the appellant's withdrawal from the respondent company as a shareholder, the intention the appellant expressed in this regard was at most an offer to contract. To conclude that the expression of such an intention bars the appellant's claim for oppression — thereby approving after the fact the transfer registered by the respondent company in its registers — is contrary to the law, to fairness and to common sense.

C. *Oppression Remedy*

[168] For the purposes of my analysis on the oppression remedy, I will deal in turn with: (1) the conditions for making a claim for oppression, (2) the duties owed by the respondent company

d) les lois relatives à la perception de droits ont été respectées;

e) le transfert est régulier ou est effectué au profit d'un acheteur de bonne foi;

f) les droits prévus au paragraphe 49(2) ont été acquittés.

(2) L'émetteur tenu de procéder à l'inscription du transfert d'une valeur mobilière est responsable, envers la personne qui la présente à cet effet, du préjudice causé par tout retard indu ou par tout défaut ou refus.

[166] La *LCSA* de même que les statuts et les règlements de la société intimée exigeaient que cette dernière fasse un minimum de vérifications, notamment s'assurer que le certificat d'actions de l'appelant avait été endossé, avant de procéder à l'inscription du transfert. L'omission de telles vérifications par la société intimée en l'espèce constituait en soi une forme d'abus. Pareille conclusion est d'autant plus justifiée lorsque, comme dans la présente affaire, cette exigence figure en toutes lettres dans le certificat d'actions.

[167] Soutenir, comme le fait la société intimée, que l'intention exprimée par l'appelant en l'espèce donnait lieu à un accord de volontés, et ce, malgré l'absence d'entente quant à l'opération juridique projetée, va à l'encontre de principes élémentaires du droit civil québécois. Si l'appelant et M. Rosati ne se sont effectivement pas entendus le 25 mai 2005 sur les modalités du retrait de l'appelant à titre d'actionnaire de la société intimée, l'intention exprimée par l'appelant à cet égard constituait tout au plus une offre de contracter. Conclure que l'expression d'une telle intention constitue une fin de non-recevoir au recours pour abus de l'appelant — avalisant ainsi a posteriori le transfert inscrit par la société intimée dans ses registres — heurte la loi, l'équité et le sens commun.

C. *Recours pour abus*

[168] Pour les fins de mon analyse au sujet du recours pour abus, j'aborderai tour à tour : (1) les conditions d'ouverture de ce recours, (2) les obligations de la société intimée quant à l'inscription d'un

in registering a transfer of shares and the oppression that resulted from its failure to discharge them, (3) the alleged agreement between the appellant and Mr. Rosati regarding the shares in question and, finally, (4) the question whether the claim is prescribed.

(1) Conditions for Making a Claim for Oppression

[169] Section 241(2) *CBCA* provides that a complainant may apply to a court to rectify matters resulting from a corporation's conduct where

> **(a)** any act or omission of the corporation . . . effects a result,
>
> **(b)** the business or affairs of the corporation . . . are or have been carried on or conducted in a manner, or
>
> **(c)** the powers of the directors of the corporation . . . are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer . . . .

[170] In *Budd v. Gentra Inc.* (1998), 111 O.A.C. 288, the Ontario Court of Appeal described the purpose of the oppression remedy and the nature of the relevant conduct as follows:

> Section 241 provides a statutory means whereby corporate stakeholders may gain redress for corporate conduct which has one of the effects described in s. 241(2). The section serves as a judicial brake against abuse of corporate powers, particularly, but not exclusively, by those in control of a corporation and in a position to force the will of the majority on the minority. Section 241 enables the court to intercede in the affairs and operation of a corporation and to effectively override the decisions of those charged with the responsibility of corporate governance. [para. 32]

[171] The oppression remedy introduced by the reform of corporate law that began in the 1970s

transfert d'actions et la situation d'abus provoquée par son omission de s'en acquitter, (3) la prétendue entente entre l'appelant et M. Rosati quant aux actions en cause et, enfin, (4) la question de la prescription du recours.

(1) Les conditions d'ouverture du recours pour abus

[169] Le paragraphe 241(2) *LCSA* prévoit qu'un plaignant peut demander au tribunal de redresser toute situation provoquée par la société lorsqu'elle

> abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :
>
> **a)** soit en raison de son comportement;
>
> **b)** soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;
>
> **c)** soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

[170] La Cour d'appel de l'Ontario, dans l'affaire *Budd c. Gentra Inc.* (1998), 111 O.A.C. 288, décrit ainsi l'objet du recours pour abus et la nature de la conduite visée :

> [TRADUCTION] L'article 241 [de la *LCSA*] permet à un intéressé dans la société d'obtenir une ordonnance pour remédier au comportement de la société qui a l'un des effets mentionnés au par. 241(2). Il constitue un frein judiciaire à l'abus des pouvoirs de la société, en particulier, mais pas seulement, par les actionnaires majoritaires susceptibles d'infléchir la volonté des actionnaires minoritaires. L'article 241 permet au tribunal de s'immiscer dans les affaires et dans l'exploitation d'une société et d'annuler les décisions des personnes auxquelles incombe la régie de l'entreprise. [par. 32]

[171] Le recours pour abus introduit par la réforme du droit des sociétés amorcée dans les années

gives the courts significant powers in respect of the internal affairs of the corporation in question. It is an equitable remedy that, *inter alia*, allows a corporation's directors, officers and shareholders to resolve their disputes in a case involving oppression.

[172] Shareholders of a closely held corporation sometimes find it unnecessary to enter into a detailed agreement to govern their internal relationships. However, a shareholder may have legitimate expectations that go beyond what is specifically provided for in the corporation's articles and by-laws; an oppression remedy such as the one provided for in s. 241 *CBCA* is therefore all the more justified.

[173] As this Court noted in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, s. 241 *CBCA* is extremely broad in scope. The broad powers this section confers on a court enable the court, *inter alia*, to prevent a corporation from arguing that, because its actions were lawful, the oppression remedy is not available to a complainant: Crête and Rousseau, at paras. 1576-77.

[174] In some circumstances, where an alleged illegality is also oppressive or unfairly prejudicial, the oppression remedy will also make it possible to sanction a corporation for failure to discharge its legal duties, although proof of such a failure is not a prerequisite under s. 241 *CBCA*:

> . . . the oppression remedy does not turn on legal rights as much as on concepts of fairness and equity. Conduct may be oppressive even if it is "legal" in the sense that it is based on the exercise of a legal right. The remedy gives the court broad, equitable jurisdiction to enforce not just what is legal but what is fair. Although some courts have tied oppression relief to the establishment of some type of common legal claim, the oppression remedy is not simply a codification of the common law. The weight of jurisprudence holds that, although a breach of a legal duty will constitute oppression, it is not a prerequisite to a finding of oppression. As a result, a finding of oppression does not require the applicant to

70 confère aux tribunaux d'importants pouvoirs à l'égard des affaires internes de la société visée. Il s'agit d'un recours en equity qui permet notamment aux administrateurs, aux dirigeants et aux actionnaires d'une société de résoudre leurs conflits en cas d'abus.

[172] Dans une société par actions à capital fermé, les actionnaires jugent parfois inutile de conclure une entente détaillée pour régir leurs rapports internes. Or, un actionnaire peut avoir des attentes légitimes qui dépassent le cadre de ce qui est spécifiquement prévu dans les statuts et règlements de la société; un recours pour abus comme celui que prévoit l'art. 241 *LCSA* est donc d'autant plus justifié.

[173] Comme le rappelle notre Cour dans l'arrêt *BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560, la portée de l'art. 241 *LCSA* est extrêmement large. Les vastes pouvoirs conférés au tribunal par cette disposition lui permettent notamment d'empêcher la société d'opposer la légalité de ses actes comme fin de non-recevoir au recours pour abus d'un plaignant : Crête et Rousseau, par. 1576-1577.

[174] Le recours pour abus permettra également, dans certaines circonstances, lorsque l'illégalité alléguée constitue par ailleurs un abus ou un acte injustement préjudiciable, de sanctionner la société qui omet de se conformer à ses obligations légales, même si la démonstration d'une telle omission ne constitue pas une condition préalable aux fins de l'art. 241 *LCSA* :

> [TRADUCTION] . . . le recours pour abus repose moins sur des droits reconnus par la loi que sur des notions d'équité et de justice. Une conduite peut être abusive même si elle est "légale" au sens où elle résulte de l'exercice d'un droit reconnu par la loi. L'exercice du recours confère au tribunal le pouvoir général, fondé sur l'equity, de faire respecter non seulement ce qui est légal, mais aussi ce qui est juste. Certains tribunaux ont subordonné leur intervention à l'établissement d'une quelconque réclamation en common law, mais le recours pour abus n'est pas seulement le résultat de la codification de la common law. Il appert de la jurisprudence que même si le manquement à une obligation légale constitue un abus,

establish conduct that is subject to redress at law. When determining whether conduct is oppressive, courts have been admonished to look at business realities and not narrow legalities. [Emphasis added; footnotes omitted.]

(M. Koehnen, *Oppression and Related Remedies* (2004), at pp. 78-79)

[175] According to the analytical approach set out in *BCE*, a court must proceed in two stages in considering a claim under s. 241 *CBCA*. First, the court must determine whether the evidence shows that the complainant had a reasonable expectation having regard to the facts of the case before it. Then, it must determine whether the conduct contrary to that expectation was oppressive or unfairly prejudicial within the meaning of s. 241 *CBCA*: *BCE*, at para. 68.

[176] If the court concludes that there was oppressive conduct on the corporation's part, it then has a broad discretion to decide what remedial order to make. Section 241 *CBCA* contains a non-exhaustive list of orders that can be made; the contemplated order must take the parties' mutual interests into account.

[177] At the first stage, that of the reasonable expectation, the court can consider various factors, as this Court noted in *BCE* (at para. 72):

Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

[178] I cannot subscribe to the view that, by expressing an intention to withdraw from the respondent company as a shareholder, Mr. Mennillo extinguished any reasonable expectations he may

il n'est pas requis pour que l'on puisse conclure à l'abus. Partant, pour prouver l'abus, le demandeur n'a pas à établir l'existence d'une conduite qui justifie un redressement en droit. On a exhorté les tribunaux appelés à se prononcer sur le caractère abusif d'une conduite à tenir compte de la réalité commerciale et non des considérations strictement juridiques. [Je souligne; notes en bas de page omises.]

(M. Koehnen, *Oppression and Related Remedies* (2004), p. 78-79)

[175] Dans le cadre d'un recours fondé sur l'art. 241 *LCSA*, le tribunal doit, suivant la méthode d'analyse mise de l'avant dans l'arrêt *BCE*, procéder en deux étapes. Il doit d'abord déterminer si la preuve démontre une attente raisonnable du plaignant compte tenu des faits propres à l'espèce. Il doit ensuite déterminer si la violation de cette attente constitue un abus ou un acte injustement préjudiciable au sens de l'art. 241 *LCSA* : *BCE*, par. 68.

[176] Lorsque le tribunal conclut qu'il y a eu conduite abusive de la part de la société, il dispose alors d'un large pouvoir discrétionnaire pour choisir l'ordonnance réparatrice à rendre. L'article 241 *LCSA* prévoit une liste non exhaustive d'ordonnances qu'il peut imposer, l'ordonnance envisagée devant prendre en compte les intérêts mutuels des parties.

[177] À la première étape axée sur l'attente raisonnable, le tribunal peut prendre en compte différents facteurs, comme l'a rappelé notre Cour dans *BCE* (par. 72) :

Des facteurs utiles pour l'appréciation d'une attente raisonnable ressortent de la jurisprudence. Ce sont notamment les pratiques commerciales courantes, la nature de la société, les rapports entre les parties, les pratiques antérieures, les mesures préventives qui auraient pu être prises, les déclarations et conventions, ainsi que la conciliation équitable des intérêts opposés de parties intéressées.

[178] Je ne puis souscrire à l'opinion selon laquelle en exprimant l'intention de se retirer de la société intimée à titre d'actionnaire, M. Mennillo mettait fin à toutes attentes raisonnables qu'il pouvait

have had as regards his remaining on the company's books as a shareholder, or that the expression of that intention barred his claim for oppression. By that logic, the mere expression of an intention to withdraw from a corporation as a shareholder would also extinguish the reasonable expectation that the corporation in question will act in accordance with the law and with its articles and by-laws and will make the necessary inquiries before depriving a person of his or her shareholder status, thereby defeating the oppression remedy. I cannot accept this reasoning for the reasons that follow.

[179] First, the *CBCA* itself does not limit access to the oppression remedy in such a manner. Section 238 provides that a complainant (including one who makes a claim for oppression) may be a registered holder of a security but may also be a former registered holder of a security of a corporation. The s. 241 remedy is therefore available to a former shareholder, not only one who has allegedly expressed an intention to cease to be a shareholder, but also one who has allegedly completed a specific juridical operation by which he or she effectively transferred his or her shares.

[180] Next, where the complainant's expectations are based on strict legal rules and the corporation's impugned conduct is alleged to have been unlawful, it is my view that the question of reasonable expectations plays an extremely limited role, or even no role at all. This is readily understandable, since shareholders are entitled to expect a corporation to act in accordance with its articles and by-laws and, more generally, with the law. These are, so to speak, presumed expectations:

> It is submitted that the shareholders' reasonable expectations analysis is the most appropriate theory to determine whether the interests of a shareholder have been unfairly prejudiced or unfairly disregarded in the context of a closely-held corporation. The analysis goes to the heart of the unfairness on an intuitive level. It also defines the standard of unfairness in a manner that is conducive to a principled application at law.
>
> Of course other circumstances can attract the remedial scope of the oppression remedy. Corporate action which

avoir de demeurer dans les registres de la société en tant qu'actionnaire, ni que l'expression de cette intention constituait une fin de non-recevoir à son recours pour abus. Selon cette logique, la simple expression de l'intention de se retirer d'une société en tant qu'actionnaire mettrait également fin à l'attente raisonnable que la société en question agisse en conformité avec la loi et ses statuts et règlements et qu'elle procède aux vérifications requises avant de priver une personne de son statut d'actionnaire, faisant ainsi échec au recours pour abus. Je ne peux souscrire à ce raisonnement pour les raisons qui suivent.

[179] Tout d'abord, la *LCSA* elle-même ne limite pas ainsi l'accès au recours pour abus. En effet, l'art. 238 prévoit qu'un plaignant (notamment en cas de recours pour abus) peut être le détenteur inscrit de valeurs mobilières, mais également un ancien détenteur de valeurs mobilières d'une société. Donc, le recours prévu à l'art. 241 est ouvert à un ancien actionnaire, non seulement celui qui aurait exprimé une intention de ne plus l'être, mais aussi celui qui aurait conclu une opération juridique précise en vertu de laquelle il a effectivement cédé ses actions.

[180] Ensuite, lorsque les attentes du plaignant se fondent sur le droit strict, et qu'il allègue l'illégalité de la conduite reprochée à la société, je suis d'avis que la question des attentes raisonnables joue un rôle extrêmement limité et n'en joue peut-être même aucun. Cela se comprend aisément puisque les actionnaires sont en droit de s'attendre à ce que la société agisse en conformité avec ses statuts et règlements et, plus généralement, avec la loi. Il s'agit pour ainsi dire d'attentes présumées :

> [TRADUCTION] Les attentes raisonnables de l'actionnaire constitueraient le meilleur cadre d'analyse pour décider si une société fermée s'est montrée injuste à l'égard d'un actionnaire en lui portant préjudice ou en ne tenant pas compte de ses intérêts. L'analyse s'attache alors intrinsèquement à la notion d'injustice et se veut intuitive. Elle définit aussi l'injustice d'une manière propice à l'application d'un principe de droit.
>
> D'autres situations peuvent évidemment justifier le prononcé d'une ordonnance pour remédier à un abus.

is contrary to the constitution of the corporation, or which constitutes a breach by the directors of their duties to the corporation, may be considered to be oppressive, or to unfairly prejudice or unfairly disregard the interests of the shareholders. In these situations, an analysis of shareholders' reasonable expectations is arguably of little substantive importance. To say that shareholders have a reasonable expectation that corporate action will be taken lawfully, or that directors will act in accordance with their duties, is a rather banal statement. The conclusion that unlawful conduct should give rise to relief under the oppression remedy could be reached on the basis of an alternative theory. [Emphasis added.]

(J. A. Campion, S. A. Brown and A. M. Crawley, "The Oppression Remedy: Reasonable Expectations of Shareholders", in *Law of Remedies: Principles and Proofs* (1995), 229, at p. 249)

[181] In my view, the question of reasonable expectations is of greater relevance to the determination of a shareholder's rights that are not specifically provided for in the legislation and in the corporation's articles and by-laws. Indeed, this Court observed in *BCE* that "[the] oppression [remedy] gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair" (para. 58).

[182] As a result, where, as in the instant case, a corporation is alleged to have acted unlawfully, the focus of the analysis is not so much on the question of reasonable expectations as on that of whether the corporation's conduct was in fact unlawful and, therefore, oppressive: Martel, at p. 31-80.

[183] While it is true, as the Court noted in *BCE*, that "[t]he size, nature and structure of the corporation are relevant factors in assessing reasonable expectations" and that "[c]ourts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company" (para. 74), that latitude depends, of course, on the nature of the alleged violation.

L'acte de la société qui va à l'encontre de ses statuts constitutifs ou qui constitue un défaut, par les administrateurs, de respecter leurs obligations envers la société peut être considéré comme un abus des droits de l'actionnaire ou comme une mesure injuste lui causant préjudice ou ne tenant pas compte de ses intérêts. Dans de telles situations, on pourrait soutenir que l'analyse fondée sur les attentes raisonnables de l'actionnaire a peu de pertinence. Que l'actionnaire s'attende raisonnablement à ce que la société agisse en toute légalité ou à ce que les administrateurs agissent conformément à leurs obligations est plutôt évident. La conclusion selon laquelle une conduite illégale devrait permettre un redressement dans le cadre d'un recours pour abus pourrait être tirée par application d'une autre théorie. [Je souligne.]

(J. A. Campion, S. A. Brown et A. M. Crawley, « The Oppression Remedy : Reasonable Expectations of Shareholders », dans *Law of Remedies : Principles and Proofs* (1995), 229, p. 249)

[181] À mon avis, la question des attentes raisonnables a une plus grande pertinence lorsqu'il s'agit de déterminer les droits d'un actionnaire au-delà de ce qui est spécifiquement prévu dans la loi et les statuts et règlements de la société. D'ailleurs, notre Cour, dans *BCE*, rappelait que « la demande de redressement pour abus [. . .] confère au tribunal un vaste pouvoir, en equity, d'imposer le respect non seulement du droit, mais de l'équité » (par. 58).

[182] En conséquence, lorsque l'illégalité de la conduite de la société est alléguée, comme c'est le cas en l'espèce, l'analyse ne porte pas tant sur la question des attentes raisonnables que sur celle visant à déterminer si la conduite de la société est effectivement illégale et, partant, abusive : Martel, par. 31-213.

[183] S'il est vrai, comme le souligne notre Cour dans *BCE*, que « [l]a taille, la nature et la structure de la société constituent [. . .] des facteurs pertinents dans l'appréciation d'une attente raisonnable » et qu'« [i]l est possible que les tribunaux accordent une plus grande latitude pour déroger à des formalités strictes aux administrateurs d'une petite société fermée qu'à ceux d'une société ouverte de plus grande taille » (par. 74), cette latitude dépend bien sûr de la nature de la violation alléguée.

[184] In sum, mere irregularities that are not oppressive or unfairly prejudicial will not be sufficient to justify granting the remedy to the complainant. On the other hand, a failure to comply with a mandatory legislative provision or with the requirements set out in the corporation's articles and by-laws that relate to the very recognition of shareholder status may justify granting the oppression remedy. In my view, this is particularly important for the protection of a minority shareholder in a closely held corporation like Intramodal. Otherwise, what remedy would be available to a shareholder who claims to have been unlawfully dispossessed?

(2) Oppressive Conduct on the Respondent Company's Part

[185] In this case, several aspects of the respondent company's conduct are problematic.

[186] First of all, there is the impugned resolution, which was passed in 2007, retroactive to 2005. There is nothing more specific in the evidence as regards the date it was passed. The resolution, of which the appellant learned only after he had brought his claim, reads as follows:

IT WAS RESOLVED THAT:

. . .

5. The Corporation also hereby approves and accepts the transfer by **Johnny MENNILLO** of the Forty-Nine (49) Class "A" Shares registered in his name, represented by Certificate number 2 unto **Mario ROSATI**.

6. In view of said transfer of Shares, it is hereby confirmed that effective this day **Mario ROSATI** is the Sole Shareholder of the Corporation, having One Hundred (100) Class "A" Shares registered in his name.

Each and every of the foregoing six (6) Resolutions is hereby consented to by the Sole Director and Sole Shareholder of the Corporation entitled to vote on such Resolutions pursuant to the Canada Business Corporations

[184] En somme, de simples irrégularités, qui ne constituent pas pour autant un abus ou un acte injustement préjudiciable, ne seront pas suffisantes pour donner ouverture au recours du plaignant. À l'inverse, l'omission de se conformer à une disposition impérative de la loi ainsi qu'aux exigences prévues par les statuts et règlements de la société en ce qui concerne la reconnaissance même du statut d'actionnaire pourra donner ouverture au recours pour abus. Je suis d'avis que cela est particulièrement important pour la protection de l'actionnaire minoritaire dans une société fermée telle qu'Intramodal. Sinon, quel recours serait à la disposition de l'actionnaire qui se prétend illégalement évincé?

(2) La situation d'abus provoquée par la société intimée

[185] En l'espèce, plusieurs aspects de la conduite de la société intimée posent problème.

[186] Il y a d'abord la résolution attaquée, qui a été adoptée en 2007, avec effet rétroactif en 2005. La preuve n'est pas plus précise quant à la date de son adoption. Cette résolution, dont l'appelant n'a eu connaissance qu'une fois son recours entrepris, est libellée comme suit :

[TRADUCTION]

IL A ÉTÉ RÉSOLU QUE :

. . .

5. Par la présente, la Société approuve et accepte la cession par **Johnny MENNILLO** à **Mario ROSATI** de quarante-neuf (49) actions de catégorie « A » immatriculées à son nom, tel qu'attesté par le certificat numéro 2.

6. En raison de cession d'actions, il est confirmé par la présente, avec effet immédiatement, que **Mario ROSATI** est l'unique actionnaire de la Société, cent (100) actions de catégorie « A » étant immatriculées à son nom.

Chacune des six (6) résolutions qui précèdent est par la présente approuvée par l'unique administrateur et actionnaire de la Société ayant droit de vote à l'égard de telles résolutions suivant la Loi canadienne sur les sociétés

Act as evidenced by his signature hereto this 25th day of May, 2005 10.00 a.m. [Underlining added; bold in original.]

(A.R., vol. VIII ("Minutes Book of Intramodal"), at p. 118)

[187] Next, the evidence shows that the respondent company registered the transfer referred to in the resolution in its registers. Under the *CBCA*, the company could not register such a transfer unless the security was endorsed, which was not the case here.

[188] Section 60(1) *CBCA* provides that it is only on "delivery" of a security, that is, at the time of the voluntary transfer of possession, that the purchaser acquires the rights in the security that the transferor had or had authority to convey:

(1) On delivery of a security the purchaser acquires the rights in the security that the transferor had or had authority to convey, except that a purchaser who has been a party to any fraud or illegality affecting the security or who as a prior holder had notice of an adverse claim does not improve their position by taking from a later *bona fide* purchaser.

[189] Furthermore, the purchaser of a security may become a *bona fide* purchaser only as of the time of its endorsement: s. 64 *CBCA*. It is worth nothing that s. 65(3) *CBCA* says the following about an endorsement for the purposes of the assignment or transfer of a security:

(3) An endorsement of a security in registered form is made when an appropriate person signs, either on the security or on a separate document, an assignment or transfer of the security or a power to assign or transfer it, or when the signature of an appropriate person is written without more on the back of the security.

[190] Endorsement is a condition that must be met for a contract entered into by two shareholders with respect to the purchase of a security to have any legal effect on the corporation. Moreover, if the necessary endorsements are not on or with the security and the corporation registers the transfer of the security anyway, it is liable for any loss incurred as a result of the registration: s. 79(1)(a) *CBCA*. And as

par actions, ce qui est attesté par sa signature apposée en ce 25e jour de mai 2005, à 10 heures. [Je souligne; en caractères gras dans l'original.]

(d.a., vol. VIII (les « registres d'Intramodal »), p. 118)

[187] Ensuite, la preuve révèle que la société intimée a inscrit dans ses registres le transfert auquel la résolution réfère. Or, en vertu de la *LCSA*, la société ne pouvait procéder à l'inscription d'un tel transfert que si la valeur mobilière était endossée, ce qui n'est pas le cas en l'espèce.

[188] En effet, le par. 60(1) *LCSA* prévoit que les droits transmissibles de celui qui cède la valeur mobilière ne passent à l'acquéreur qu'à la « livraison » de la valeur mobilière, c'est-à-dire au moment du transfert volontaire de possession :

(1) Dès livraison de la valeur mobilière, les droits transmissibles du cédant passent à l'acquéreur, mais le fait de détenir une valeur d'un acheteur de bonne foi ne saurait modifier la situation du cessionnaire qui a participé à une fraude ou à un acte illégal mettant en cause la validité de cette valeur ou qui, en tant qu'ancien détenteur, connaissait l'existence d'une opposition.

[189] Qui plus est, l'acquéreur d'une valeur mobilière ne devient acquéreur de bonne foi qu'après son endossement : art. 64 *LCSA*. Il est à noter que le par. 65(3) *LCSA* précise ce qui suit au sujet de l'endossement aux fins de cession ou de transfert d'une valeur mobilière :

(3) L'endossement d'une valeur mobilière nominative aux fins de cession ou de transfert se fait par l'apposition, soit à l'endos de cette valeur sans autre formalité, soit sur un document distinct ou sur une procuration à cet effet, de la signature d'une personne compétente.

[190] L'endossement constitue une condition *sine qua non* pour qu'un contrat intervenu entre deux coactionnaires quant à l'acquisition d'une valeur mobilière puisse avoir quelque effet juridique sur la société. D'ailleurs, si la valeur mobilière n'est pas assortie des endossements requis, et que la société procède tout de même à l'inscription de son transfert, elle est responsable du préjudice causé par une

I mentioned above, s. 76 *CBCA* expressly provides that a corporation may not register a transfer in its records and registers without first making certain inquiries, one of which relates to the required endorsements.

[191] In the instant case, the company's articles expressly imposed other restrictions, including that the company *could not* register a transfer of shares in its registers unless the share certificate had been duly endorsed and all requirements with respect to transfers had been met:

C. TRANSFER OF SECURITIES

. . .

133. Registration of transfers. Subject to the Act and to the provisions of paragraph 135 below, no transfer of securities or of warrants shall be registered in the securities' register of the Corporation unless:

(a) the security certificate has been duly endorsed by the proper person;

(b) a reasonable assurance has been given to the effect that the endorsement is genuine;

(c) every act or statute in Canada or in a province or territory of Canada with respect to the collection of income tax, sales taxes or charges, duties or fees has been complied with;

(d) any restriction on its issue, on its transfer or on the holding thereof as authorized by the articles has been complied with; and

(e) any lien on the securities as provided for in paragraph 131 above has been reimbursed. [Bold in original.]

(Minutes Book of Intramodal, at pp. 94-95)

[192] Clearly, endorsement of the share certificate, as a precondition to the registration of a transfer

telle inscription : al. 79(1)a) *LCSA*. De plus, tel que mentionné précédemment, l'art. 76 *LCSA* prévoit expressément qu'une société ne peut inscrire un transfert d'actions dans ses livres et registres sans d'abord procéder à certaines vérifications, y compris quant aux endossements requis.

[191] En l'espèce, d'autres restrictions s'appliquaient expressément en vertu des statuts de la société, notamment celle voulant que cette dernière *ne puisse* inscrire un transfert d'actions dans ses registres que si le certificat d'actions a été régulièrement endossé et que toutes les exigences relatives au transfert ont été respectées :

[TRADUCTION]

C. CESSION DE VALEURS MOBILIÈRES

. . .

133. Inscription d'une cession. Sous réserve de la Loi et du paragraphe 135, la cession d'une valeur mobilière ou d'un bon de souscription ne peut être inscrite au registre des valeurs mobilières de la Société que si :

(a) le certificat d'action est dûment endossé par la personne habilitée à le faire;

(b) des assurances raisonnables sont données que la signature ainsi apposée est authentique;

(c) les exigences de toute loi canadienne, y compris d'une province ou d'un territoire du Canada, relative à la perception de l'impôt sur le revenu, de la taxe de vente ou de frais ou de droits ont été respectées;

(d) toute restriction applicable à son émission, à sa cession ou à sa détention autorisées par les statuts a été respectée;

(e) toute sûreté réelle grevant la valeur mobilière comme le prévoit le paragraphe 131 a été levée. [En caractères gras dans l'original.]

(registres d'Intramodal, p. 94-95)

[192] De toute évidence, l'endossement du certificat d'actions, à titre de condition préalable à

of shares, was important enough for the respondent company's founders to consider it appropriate to include an express provision to this effect in their articles, in addition to mentioning it on the share certificates.

[193] The following note appears on the appellant's certificate: "Only the person whose name appears on the front of this certificate or his duly authorized agent or representative may validly transfer the shares represented by this certificate" (Minutes Book of Intramodal, at p. 170).

[194] The very existence of a legal duty that the respondent company make the necessary inquiries before registering a transfer of shares created a reasonable expectation for the company's shareholders. It is clear that the respondent company failed to discharge this duty and that its failure to do so was more than a mere irregularity.

[195] The appellant had a reasonable expectation that the respondent company would act in accordance with the law and with its articles and by-laws. He had a reasonable expectation that the respondent company would make the necessary inquiries before depriving him of his status as a shareholder. The failure to do so was unfairly prejudicial to the appellant insofar as it deprived him of that status.

[196] The evidence shows that the share certificate in question was not endorsed. It also shows that the respondent company made no inquiries before passing the resolution to transfer the appellant's shares, and that the resolution was passed retroactively and was signed by a single shareholder (namely Mr. Rosati). The respondent company's lawyer admitted on cross-examination that his job was to do what Intramodal's majority shareholder, Mr. Rosati, asked and nothing more:

Q. So, if you're told by a client to remove a shareholder without a signed document, will you do it?

l'inscription d'un transfert d'actions, était suffisamment important pour que les fondateurs de la société intimée jugent pertinent d'inclure une disposition expresse à cet effet dans leurs statuts, en plus d'en faire mention sur les certificats d'actions.

[193] Sur le certificat de l'appelant, on peut en effet lire la mention suivante : [TRADUCTION] « Seule la personne dont le nom figure au recto du présent certificat ou son mandataire ou son représentant dûment autorisé peut valablement céder les actions dont la détention est attestée par le présent certificat » (registres d'Intramodal, p. 170).

[194] L'obligation légale de la société intimée de procéder aux vérifications requises avant d'inscrire le transfert d'actions créait *ipso facto* une attente raisonnable chez ses actionnaires. Il est manifeste que la société intimée n'a pas respecté cette obligation et que son défaut dépasse le cadre d'une simple irrégularité.

[195] L'appelant avait l'attente raisonnable que la société intimée agisse en conformité avec la loi et ses statuts et règlements. Il avait l'attente raisonnable que la société intimée, avant de le priver de son statut d'actionnaire, procède aux vérifications requises. L'omission de ce faire constitue un acte injustement préjudiciable à l'appelant dans la mesure où elle le prive de son statut d'actionnaire.

[196] La preuve révèle que le certificat d'actions en cause n'a pas été endossé. Elle révèle également que la société intimée n'a fait aucune vérification avant d'adopter la résolution de transfert des actions de l'appelant, et que c'est rétroactivement et avec la signature d'un seul actionnaire (c'est-à-dire M. Rosati) que la résolution a été adoptée. L'avocat de la société intimée a reconnu en contre-interrogatoire que sa tâche consistait à obtempérer aux demandes de l'actionnaire majoritaire d'Intramodal, M. Rosati, sans plus :

[TRADUCTION]

Q. Donc, si un client vous dit de supprimer le nom d'un actionnaire sans vous remettre un document signé à l'appui, le faites-vous?

A. If I have instructions, I will do what the instructions are.

[197] Despite all the emphasis placed on the appellant's expressed intention to withdraw from Intramodal, the fact is that Intramodal had no way of knowing that such an intention had actually been expressed, since, by its own admission, it did not make the required inquiries in this regard, which it considered unnecessary.

[198] To conclude that there was oppression in the circumstances is not to allow Mr. Mennillo to use the oppression remedy provided for in s. 241 *CBCA* as an instrument of oppression, but simply to recognize the obvious: Mr. Rosati used his position as majority shareholder to strip Mr. Mennillo of his status as a shareholder. To paraphrase the Ontario Court of Appeal in *Budd*, it was to put a brake on this very type of conduct that Parliament thought it necessary to introduce the oppression remedy provided for in s. 241 *CBCA*.

[199] If the respondent company had made the necessary inquiries, it would not have registered the transfer of shares. Assuming that there was in fact an agreement between the appellant and Mr. Rosati in this regard, the parties to the agreement would therefore have had to meet again to take the necessary steps to record the agreement and ensure that the legislated conditions were met. If Mr. Mennillo had in fact agreed to transfer his shares, it would have been a simple matter to ask him to sign Intramodal's resolution in 2007. In the event of a disagreement, Intramodal's majority shareholder could then have taken the necessary action to require the appellant to endorse his share certificate and sign the relevant corporate documents:

> The law requires that the transferor provide the purchaser with any "requisite necessary to obtain registration" of the transfer, and states that if he does not comply with the demand within a reasonable time, the purchaser may reject the transfer or consider the transfer contract to be rescinded. [Footnote omitted.]
>
> (Martel, at p. 16-30)

R. Si on me donne des instructions, j'agis conformément à ces instructions.

[197] Malgré toute l'insistance mise sur l'intention manifestée par l'appelant de se retirer d'Intramodal, le fait est qu'Intramodal n'avait aucun moyen de savoir qu'une telle intention avait effectivement été exprimée car, de son propre aveu, elle n'a pas fait les vérifications requises à cet égard, estimant que de telles vérifications n'étaient pas nécessaires.

[198] Conclure à l'abus dans les circonstances ne revient pas à permettre à M. Mennillo d'instrumentaliser le recours pour abus prévu par l'art. 241 *LCSA*, mais tout simplement à reconnaître l'évidence : M. Rosati a utilisé sa position d'actionnaire majoritaire pour dépouiller M. Mennillo de son statut d'actionnaire. Pour paraphraser la Cour d'appel de l'Ontario dans l'affaire *Budd*, c'est précisément afin de mettre un frein à ce genre de conduite que le législateur a cru nécessaire d'introduire le recours pour abus prévu à l'art. 241 *LCSA*.

[199] Si la société intimée avait fait les vérifications requises, elle n'aurait pas inscrit le transfert d'actions. À supposer qu'il y ait effectivement eu entente entre l'appelant et M. Rosati à cet égard, les parties à l'entente auraient alors dû se rencontrer à nouveau afin de prendre les moyens nécessaires pour consigner cette entente et s'assurer que les conditions établies par la loi étaient satisfaites. Si M. Mennillo avait effectivement consenti au transfert de ses actions, il aurait été très simple de lui demander de signer la résolution d'Intramodal en 2007. En cas de mésentente, l'actionnaire majoritaire d'Intramodal aurait alors pu intenter les recours nécessaires afin de forcer l'appelant à endosser son certificat d'actions et à signer les documents corporatifs pertinents :

> La loi impose au cédant l'obligation de fournir à l'acquéreur les pièces nécessaires à l'inscription du transfert, et précise que s'il ne se conforme pas à toute demande à cet effet dans un délai raisonnable, l'acquéreur peut refuser le transfert ou en demander la rescision. [Note en bas de page omise.]
>
> (Martel, par. 16-106)

[200] A conclusion that Intramodal's conduct in this regard was prejudicial to the appellant does not require a lengthy explanation: that conduct unlawfully stripped him of his status as a shareholder. It is difficult to imagine how a business corporation could act more oppressively toward a shareholder than by depriving him or her of that status.

[201] The conduct of a corporation that approves a transfer of shares without making any inquiries and that confuses its interests with those of its majority shareholder, as if it were a mere puppet, is not less oppressive simply because another shareholder at some point expressed an intention to withdraw from the corporation without there being any agreement on the terms of such a withdrawal. To suggest otherwise would amount to encouraging a corporation's shareholders to refrain from participating in any kind of discussions or negotiations about a possible transfer of shares.

[202] The instant case concerns a complainant who was originally recognized as a shareholder, who alleges that the corporation has committed clear violations of the law and of its articles and by-laws, and who has applied for an oppression remedy under s. 241 *CBCA*. The oppressive situation created by the corporation can indeed be remedied by means of a claim for oppression, or of an application to rectify registers under s. 243 *CBCA* or an application under s. 247 *CBCA* to compel the corporation to discharge its duties, provided that the conditions for the chosen remedy are met, which is the case here. It should be noted that, independently of ss. 243 and 247 *CBCA*, s. 241(3)(k) gives the courts the power to order the rectification of registers and to sanction unlawful conduct on the corporation's part.

[203] The classic example of this situation can be found in *Journet v. Superchef Food Industries Ltd.*, [1984] C.S. 916, at p. 925, in which the Superior Court found the conduct of the corporation in question to be oppressive on the basis of several unlawful and fraudulent acts it had committed. The evidence that the acts were unlawful was considered sufficient

[200] Nul besoin d'une grande démonstration pour conclure que cette conduite d'Intramodal a été préjudiciable à l'appelant : elle l'a dépouillé illégalement de son statut d'actionnaire. Et il est difficile d'imaginer conduite plus abusive d'une société par actions à l'endroit d'un actionnaire que celle de le priver de ce statut.

[201] La conduite d'une société qui avalise un transfert d'actions sans vérification aucune, et qui confond ses intérêts avec ceux de son actionnaire majoritaire comme si elle n'était qu'une simple marionnette, n'est pas moins abusive seulement parce que, à un certain moment donné, un coactionnaire a exprimé son intention de se retirer de la société, sans qu'il y ait eu entente quant aux modalités d'un tel retrait. Soutenir le contraire revient à inciter les actionnaires d'une société à s'abstenir de toute forme de discussions ou de pourparlers relativement à un possible transfert d'actions.

[202] En l'espèce, il est question d'un plaignant dont le statut d'actionnaire a été initialement reconnu, qui reproche à la société des violations claires de la loi et de ses statuts et règlements, et qui intente un recours pour abus en vertu de l'art. 241 *LSCA*. La situation abusive provoquée par la société peut effectivement être corrigée par le truchement d'un tel recours, ou d'un recours en rectification des registres fondé sur l'art. 243 *LCSA*, ou encore d'un recours fondé sur l'art. 247 *LCSA* visant à contraindre la société à se conformer à ses obligations, pour autant que les conditions du recours choisi soient satisfaites, ce qui est le cas en l'espèce. Rappelons que l'al. 241(3)k), indépendamment des art. 243 et 247 *LCSA*, octroie au tribunal le pouvoir d'ordonner la rectification des registres et permet de sanctionner la société pour l'illégalité de sa conduite.

[203] L'exemple classique en la matière correspond à l'affaire *Journet c. Superchef Food Industries Ltd.*, [1984] C.S. 916, p. 925, où la Cour supérieure a conclu à une conduite abusive sur la base de plusieurs actes illégaux et frauduleux commis par la société en cause. La preuve de l'illégalité des actes a été jugée suffisante pour satisfaire les conditions

to meet the conditions for the oppression remedy, and no additional evidence was required.

[204] In my view, the same reasoning applies in the case at bar. With respect for those who disagree, I find that the appellant has discharged his burden of proving the validity of his claim for oppression. The evidence shows that the company's actions, namely passing the resolution to transfer the appellant's shares, registering that transfer in its registers and subsequently filing declarations to the same effect, constituted violations of express provisions of the legislation and the company's articles and by-laws. This evidence was sufficient to justify a finding that the company's conduct was oppressive and prejudicial and that it warranted revocation of the company's resolution and the rectification of its registers.

[205] The purpose of the appellant's application is to obtain a conclusion that the company failed to discharge its legal duties and an order that its registers be rectified accordingly. As I mentioned above, the appellant could very well have brought an application under s. 243 or 247 *CBCA*. Had he done so, he would have been successful. In view of the liberal interpretation that has been given to s. 241 *CBCA* and the nature of the remedy being sought, it would not be very pragmatic to dismiss his claim simply because it was made under s. 241 rather than s. 243 or 247 *CBCA*. Raymonde Crête and Stéphane Rousseau comment as follows in this regard:

[TRANSLATION] A review of the case law shows that, in some cases, claimants apply for the oppression remedy even where the alleged acts are in fact clear violations of the rules that could easily give rise to alternative recourses under the legislation. Despite those alternatives, judges take a pragmatic approach in this regard and agree to intervene on the basis of the oppression remedy even though, in this context, proof of the unlawful acts limits the usefulness of interventions based on fairness involving the oppression remedy. We note, however, that there is nothing to prevent a claimant from joining to his or her claim other recourses provided for in the legislation with respect to business corporations or flowing from general law principles, such as a derivative action or an application for an investigation, a mandatory or

d'ouverture du recours pour abus et aucune preuve additionnelle n'a été exigée.

[204] À mon avis, le même raisonnement s'applique en l'espèce. J'estime, avec égards pour l'opinion contraire, que l'appelant s'est déchargé de son fardeau de preuve quant au bien-fondé de son recours pour abus. La preuve démontre que les actes commis par la société, soit l'adoption de la résolution de transfert des actions de l'appelant, l'inscription de ce transfert dans les registres et les déclarations subséquentes au même effet, constituent des violations des dispositions expresses de la loi, de ses statuts et de ses règlements. Il s'agit d'une preuve suffisante pour conclure à une conduite abusive et préjudiciable justifiant l'annulation de la résolution adoptée par la société et la rectification de ses registres.

[205] Le redressement demandé vise à faire reconnaître l'inobservation par la société de ses obligations légales et à faire rectifier ses registres en conséquence. Tel que mentionné ci-dessus, l'appelant aurait certes pu entreprendre un recours sur le fondement des art. 243 ou 247 *LCSA*. Il aurait alors eu gain de cause. Vu l'interprétation libérale de l'art. 241 *LCSA* et la nature du redressement demandé, ce serait faire preuve de bien peu de pragmatisme que de rejeter son recours pour le seul motif qu'il a été entrepris en vertu de l'art. 241 plutôt que des art. 243 ou 247 *LCSA*. À cet égard, les auteurs Raymonde Crête et Stéphane Rousseau écrivent ce qui suit :

L'examen de la jurisprudence montre que, dans certains cas, les demandeurs font appel au recours en cas d'abus même si les actes reprochés constituent en fait des violations claires de la réglementation qui peuvent aisément donner lieu à des recours alternatifs conformément à la loi. Malgré la présence de ces mesures alternatives, les juges adoptent en cette matière une approche pragmatique et acceptent d'intervenir sur la base du recours pour abus bien que, dans ce contexte, la preuve des actes illégaux réduise l'utilité des interventions fondées sur l'équité en vertu du recours en cas d'abus. Notons, par ailleurs, que rien n'empêche un demandeur de joindre à sa demande d'autres recours prévus dans la loi sur les sociétés par actions ou dans les principes de droit commun, notamment en y joignant un recours de nature oblique

negatory order, the rectification of registers or even liquidation of the corporation. [Emphasis added; footnote omitted; para. 1629.]

[206] Section 241 *CBCA* is extremely broad in scope and gives a court broad powers: *BCE*, at para. 58. This extremely broad scope of the oppression remedy means that it is appropriate in the instant case to consider the recourse relating to rectification of registers (s. 243 *CBCA*) or the one relating to failure by the corporation to comply with the legislation or with its articles or by-laws (s. 247 *CBCA*).

[207] In any event, the conclusion that the respondent company unlawfully deprived the appellant of his status as a shareholder leads inescapably to the conclusion that its conduct in this case was oppressive. Indeed, what could be more oppressive than being unlawfully stripped of one's status as a shareholder?

[208] In my view, this conclusion is sufficient to dispose of the merits of the case. Nonetheless, in light of the importance attached by the parties to the agreement that is alleged to have been entered into by Mr. Mennillo and Mr. Rosati on May 25, 2005, and of my colleague's remarks in this regard, which could have serious consequences going beyond the scope of this case, I think it is important to discuss that issue.

(3) Alleged Agreement Between the Appellant and Mr. Rosati

(a) *Nature of the Alleged Agreement*

[209] My reading of the trial judge's reasons differs from that of the majority. In my view, the trial judge did not find that the appellant and Mr. Rosati had agreed on a transfer of shares. That interpretation, advanced by the respondent company, denotes a fragmented reading of the trial judge's reasons and distorts his conclusions. The trial judge instead concluded that, *given that the appellant's shares had been issued on condition that he guarantee the respondent company's debts*, the intention he

ou une demande en vue d'obtenir une enquête, une ordonnance mandatoire ou négatoire, la rectification des registres ou même la liquidation de la société. [Je souligne; note en bas de page omise; par. 1629.]

[206] La portée de l'art. 241 *LCSA* est extrêmement large et confère de vastes pouvoirs au tribunal : *BCE*, par. 58. Cette portée extrêmement large du recours pour abus permet de considérer dans la présente instance le recours en rectification des registres (art. 243 *LCSA*) ou celui pour inobservation par la société de la loi ou de ses statuts ou règlements (art. 247 *LCSA*).

[207] À tout événement, la conclusion selon laquelle la société intimée a illégalement privé l'appelant de son statut d'actionnaire mène irrémédiablement à la conclusion qu'il y a eu abus en l'espèce. En effet, quelle forme plus grave d'abus y a-t-il que celle de se faire dépouiller illégalement de son statut d'actionnaire?

[208] Cette conclusion suffit à mon avis pour statuer sur le fond de l'affaire. Néanmoins, vu l'importance accordée par les parties à la question et vu les propos de mon collègue sur celle-ci, lesquels pourraient avoir de lourdes conséquences dépassant le cadre du présent litige, j'estime important d'aborder la prétendue entente qui serait intervenue entre MM. Mennillo et Rosati le 25 mai 2005.

(3) La prétendue entente entre l'appelant et M. Rosati

a) *Nature de la prétendue entente*

[209] Ma lecture du jugement de première instance diffère de celle de la majorité. Je suis d'avis que le premier juge n'a pas conclu que l'appelant et M. Rosati s'étaient entendus afin de procéder à un transfert d'actions. Cette interprétation, mise de l'avant par la société intimée, dénote une lecture parcellaire du jugement de première instance et en dénature les conclusions. Le juge de première instance a plutôt conclu que l'intention exprimée par l'appelant de se retirer de la société, *dans la mesure*

expressed of withdrawing from the company was sufficient for him to be stripped of his status as a shareholder:

[TRANSLATION] The Court concludes that Mennillo held 49 common shares issued by Intramodal on condition that he guarantee all of Intramodal's debts once it began operating. Mennillo refused to participate in this venture and asked to be removed from the company as a shareholder and a director effective May 25, 2005. As of that date, Mennillo agreed only to be a lender of $440,000 to his friend Rosati. The failure to complete the transfer of Mennillo's shares to Rosati resulted from an error or oversight on the part of Rosati's lawyer.

Since May 25, 2005, Mennillo has no longer been a shareholder or director of Intramodal. [Emphasis added; paras. 74-75.]

[210] These remarks are not open to differing interpretations. There is no doubt that deference is owed to the trial judge's findings of fact in the absence of a palpable and overriding error, and an appellate court does not have *carte blanche* to take isolated passages from the trial judge's reasons and give them a meaning they do not have. The trial judge's findings of fact must be considered as they are, and as a whole. In short, it is, in my respectful opinion, inaccurate to say that the trial judge's finding that the shares had been transferred was independent of their having been issued conditionally.

[211] My colleague's reasoning strikes me as contradictory. He is of the view that the trial judge accepted as a finding of fact that "Mr. Mennillo agreed that he would remain a shareholder only so long as he was willing to guarantee the corporation's debts" (reasons of Cromwell J., at paras. 4 and 61 (emphasis added)) and that "Mr. Mennillo agreed that he would remain a shareholder of the corporation on the condition that he guarantee its debts" (para. 10 (emphasis added)). Yet the rest of the trial judge's statement to the effect that the occurrence of the suspensive condition *resulted in a transfer of*

où ses actions avaient été émises conditionnellement à ce qu'il garantisse le passif de la société intimée, était suffisante pour le dépouiller de son statut d'actionnaire :

Le Tribunal arrive à la conclusion que Mennillo a détenu 49 actions ordinaires émises par Intramodal, le tout conditionnellement à ce que ce dernier garantisse l'ensemble des créances de Intramodal dès que cette dernière débute ses activités. Mennillo a refusé cette aventure et a demandé son retrait de la compagnie à titre d'actionnaire et d'administrateur à compter du 25 mai 2005. À compter de cette date, Mennillo a accepté de n'être que le prêteur d'une somme de 440 000 $ à son ami Rosati. Le fait que la cession des actions de Mennillo à Rosati n'ait pas été complétée résulte de l'erreur ou l'oubli de la part de l'avocat de Rosati.

Depuis le 25 mai 2005, Mennillo n'est plus détenteur d'aucune action ni administrateur de Intramodal. [Je souligne; par. 74-75.]

[210] Ces propos ne peuvent donner lieu à des interprétations divergentes. Certes, les conclusions factuelles du juge de première instance doivent être traitées avec déférence, sauf erreur manifeste et dominante, mais les tribunaux d'appel n'ont pas carte blanche pour retenir isolément certains passages du jugement de première instance et leur donner un sens qu'ils n'ont pas. Les conclusions factuelles du juge de première instance doivent être considérées telles quelles, dans leur ensemble. Bref, avec égards, je suis d'avis qu'il n'est pas exact en l'espèce d'affirmer que le juge de première instance a conclu à la cession des actions, indépendamment du caractère conditionnel de leur émission.

[211] Le raisonnement de mon collègue me paraît contradictoire. Il est d'avis que le juge de première instance a accepté comme conclusion de fait que « M. Mennillo a convenu qu'il ne demeurait actionnaire que tant qu'il serait disposé à garantir le passif de la société » (motifs du juge Cromwell, par. 4 et 61 (je souligne)) et que « M. Mennillo [a] convenu qu'il demeurerait actionnaire de la société à condition d'en garantir le passif » (par. 10 (je souligne)). Or, le reste de l'affirmation du juge de première instance selon laquelle la réalisation de la condition suspensive *aurait donné lieu à une cession*

shares cannot be considered in isolation. Moreover, my colleague Cromwell J. finds that the evidence supports the trial judge's conclusion even though, in his view, that evidence is "confused and confusing" (para. 34), and "conflicting and inconsistent" (para. 68). I will return to the trial judge's assessment of the evidence below. For now, I note that my colleague acknowledges that there was no condition attached to the issuance of the shares in the case at bar and that it is wrong in law to say the opposite (para. 76), but he nevertheless finds that "the condition to which the trial judge referred was a result of an agreement between Messrs. Mennillo and Rosati that the former would be a shareholder only if he guaranteed Intramodal's debts" (para. 77). With respect, I do not see how it is possible both to accept the trial judge's conclusion that Mr. Mennillo held 49 common shares issued by Intramodal on condition that he guarantee all of its debts and to postulate that, in law, Mr. Mennillo could not be a conditional shareholder in this case.

d'actions ne peut être considéré en vase clos. De plus, mon collègue le juge Cromwell est d'avis que la preuve appuie la conclusion du juge de première instance, malgré que cette preuve soit, selon lui, « confuse et source de confusion » (par. 34) et « contradictoire et incohérente » (par. 68). Je reviendrai plus loin sur la question de l'appréciation de la preuve par le juge de première instance. Je note pour l'instant que mon collègue reconnaît qu'aucune condition n'était rattachée à l'émission des actions en l'espèce et qu'il est erroné en droit de prétendre le contraire (par. 76), mais qu'il conclut néanmoins que « la condition dont [le juge de première instance] fait mention résulte d'un accord entre MM. Mennillo et Rosati selon lequel le premier ne serait actionnaire que s'il se portait garant du passif d'Intramodal » (par. 77). Avec égards, je vois mal comment on peut à la fois accepter la conclusion du juge de première instance voulant que M. Mennillo ait détenu 49 actions ordinaires émises par Intramodal conditionnellement à ce qu'il garantisse l'ensemble des créances de celle-ci et postuler que M. Mennillo ne pouvait pas, en droit, être actionnaire conditionnel en l'espèce.

[212] The majority of the Court of Appeal also concluded that the appellant no longer had the status of a shareholder, but for another reason, namely that the intention he had expressed of withdrawing from the respondent company had resulted in the retroactive cancellation of his shares.

[212] Pour leur part, les juges majoritaires de la Cour d'appel ont également conclu que l'appelant n'avait plus le statut d'actionnaire, mais pour une autre raison, à savoir que l'intention manifestée de se retirer de la société intimée avait entraîné l'annulation rétroactive de ses actions.

[213] The parties characterized the agreement that was alleged to have been entered into by Mr. Mennillo and Mr. Rosati in several different ways, at times as a conditional issuance of shares, at times as a retroactive cancellation and at times as a contract of sale or a contract of gift. This reflects a more fundamental problem, namely that, without some speculation, no intention in this regard can be found in the evidence. Indeed, the difficulty the courts below had in characterizing the alleged agreement resulted from the fact that there was no evidence of the juridical operation contemplated by Mr. Rosati and Mr. Mennillo on May 25, 2005 that allegedly resulted in the transfer of Mr. Mennillo's shares. The same is true in this Court.

[213] Les parties ont qualifié l'entente qui serait intervenue entre MM. Mennillo et Rosati de maintes façons, y voyant tantôt une émission conditionnelle, tantôt une annulation rétroactive, tantôt un contrat de vente ou de donation. Cela traduit un problème plus fondamental : le fait que, sauf conjecture, aucune intention à cet effet ne ressort de la preuve. En fait, la difficulté éprouvée par les juridictions inférieures à qualifier la prétendue entente résulte du fait que la preuve est muette sur l'opération juridique qui aurait été envisagée par MM. Rosati et Mennillo le 25 mai 2005 et qui aurait eu comme résultat le transfert de ses actions. Il en est de même pour notre Cour.

[214] The *CBCA* provides, as a general rule, that the cancellation of shares held by a shareholder can happen in only two ways: by an amendment to the corporation's articles or by redemption of the shares by the corporation. In the case of redemption, two types are possible: unilateral redemption by the corporation and redemption by mutual agreement.

[215] In the instant case, the respondent company did not amend its articles at any time before May 25, 2005. Regarding the possibility that it redeemed the appellant's shares unilaterally, such a redemption would have had to be provided for in the company's articles, which was not the case for the Class "A" shares held by the appellant. The company's articles did give it a right of unilateral redemption, but only for Class "G" shares.

[216] As for a redemption by mutual agreement, it is subject to a number of formalities, including the passage of a directors' resolution to that effect and, under s. 34 *CBCA*, tests of solvency and liquidity.

[217] Even more importantly, the *CBCA* provides that such a redemption, whether unilateral or by mutual agreement, results in cancellation of the acquired shares:

39 ...

. . .

(6) Shares or fractions thereof of any class or series of shares issued by a corporation and purchased, redeemed or otherwise acquired by it shall be cancelled or, if the articles limit the number of authorized shares, may be restored to the status of authorized but unissued shares of the class.

[218] In the case at bar, even assuming that the appellant did in fact consent to the redemption of his shares — which he disputes — it must be acknowledged that none of the formalities applicable to such a redemption were performed, which means that it cannot be said that the appellant's shares were cancelled by way of redemption.

[214] La *LCSA* prévoit, en règle générale, que l'annulation des actions d'un actionnaire n'est possible que selon deux modalités, soit la modification des statuts de la société, soit le rachat des actions par la société. En cas de rachat, deux formes peuvent être envisagées : le rachat unilatéral par la société ou le rachat de gré à gré.

[215] En l'espèce, à aucun moment avant le 25 mai 2005, la société intimée n'a procédé à une modification de ses statuts. Quant à la possibilité qu'elle ait procédé unilatéralement au rachat des actions de l'appelant, un tel rachat devait être prévu par les statuts de la société, ce qui n'est pas le cas des actions de catégorie « A » détenues par l'appelant. Les statuts de la société prévoient certes un droit de rachat unilatéral par la société, mais pour les actions de catégorie « G » seulement.

[216] Le rachat de gré à gré est pour sa part soumis à plusieurs formalités, y compris l'adoption d'une résolution des administrateurs à cet effet et, en vertu de l'art. 34 *LCSA*, des tests de solvabilité et de liquidité.

[217] Plus important encore, la *LCSA* prévoit qu'un tel rachat, unilatéral ou de gré à gré, entraîne l'annulation des actions acquises :

39 ...

. . .

(6) Les actions ou fractions d'actions de toute catégorie ou série de la société émettrice acquises par elle, notamment par achat ou rachat, sont annulées; elles peuvent reprendre le statut d'actions autorisées non émises de la catégorie dont elles relèvent, au cas où les statuts limitent le nombre d'actions autorisées.

[218] Or, en l'espèce, même en tenant pour acquis qu'il y a effectivement eu consentement du principal intéressé du rachat de ses actions — ce que ce dernier conteste —, force est d'admettre qu'aucune des formalités applicables à un tel rachat n'a été accomplie, si bien que l'on ne peut prétendre que les actions de l'appelant ont été annulées par rachat.

[219] Indeed, the respondent company indicates in its factum that the stated capital was never reduced. Nor was any resolution passed to approve the company's redemption of the shares. As I will explain below, the only resolution at issue apparently concerned a transfer of shares between the appellant and Intramodal's majority shareholder, Mr. Rosati.

[220] What is more, it is difficult to see how the tests of liquidity and solvency could have been met given that, by the respondent company's own admission, it had no assets at the time.

[221] In short, the argument that the appellant's shares were cancelled retroactively by way of redemption fails not because of mere technical irregularities in the corporate documents, but on the basis of the legal requirements applicable to the redemption of shares and, hence, to their cancellation.

[222] The trial judge's conclusion — which the majority of the Court of Appeal rejected — that the appellant's shares were issued on condition that he would guarantee the respondent company's debts, and that the desire he expressed to cease guaranteeing those debts had the effect of depriving him of his status as a shareholder, is also contrary to the provisions of the *CBCA*.

[223] As I mentioned above, the trial judge referred to this possibility at para. 74 in writing that [TRANSLATION] "Mennillo held 49 common shares issued by Intramodal on condition that he guarantee all of Intramodal's debts once it began operating" (emphasis added).

[224] Finally, it can be seen from the respondent company's registers that no suspensive condition related to the issuance of the appellant's shares was set out in the resolution of the board of directors that authorized their issuance. For such a suspensive condition to have any effect, it would also have had to appear in the respondent company's registers. Otherwise, there would be no way for creditors to

[219] La société intimée, dans son mémoire, affirme d'ailleurs que le capital déclaré n'a en aucun temps été réduit. De plus, aucune résolution n'a été adoptée pour approuver le rachat de ses actions par la société. En fait, la seule résolution en cause vise, comme nous le verrons plus loin, un transfert d'actions qui serait intervenu entre l'appelant et l'actionnaire majoritaire d'Intramodal, M. Rosati.

[220] Qui plus est, on voit mal comment les critères de liquidité et de solvabilité auraient pu être satisfaits étant donné que la société intimée ne comptait alors, de son propre aveu, aucun actif.

[221] Bref, la thèse selon laquelle les actions de l'appelant auraient été annulées rétroactivement par voie de rachat se bute non pas à de simples irrégularités techniques dans la documentation corporative, mais bien aux exigences légales applicables à un rachat d'actions et, partant, à leur annulation.

[222] La conclusion du juge de première instance — écartée par les juges majoritaires de la Cour d'appel — selon laquelle les actions de l'appelant auraient été émises conditionnellement à ce qu'il garantisse le passif de la société intimée, le souhait exprimé par l'appelant de ne plus garantir celui-ci ayant eu pour effet de le priver du statut d'actionnaire, va également à l'encontre des dispositions de la *LCSA*.

[223] Comme mentionné précédemment, le juge de première instance réfère à cette possibilité au par. 74 lorsqu'il écrit que « Mennillo a détenu 49 actions ordinaires émises par Intramodal, le tout conditionnellement à ce que ce dernier garantisse l'ensemble des créances de Intramodal dès que cette dernière débute ses activités » (je souligne).

[224] Enfin, à la lecture des registres de la société intimée, on constate qu'aucune condition suspensive liée à l'émission des actions de l'appelant n'est prévue dans la résolution du conseil d'administration autorisant l'émission de celles-ci. Pour qu'une telle condition suspensive puisse produire quelque effet, encore aurait-il fallu qu'elle apparaisse dans les registres de la société intimée, sans quoi il n'y

know that the company's share capital could be affected at any time.

(b) *Effect of the Alleged Agreement*

[225] I also agree with the appellant and the dissenting judge of the Court of Appeal that it is impossible to find, as a matter of law, that the appellant transferred his shares to Mr. Rosati on May 25, 2005. Whatever conclusion might be reached about the credibility of the witnesses in this regard, the intention expressed by the appellant of withdrawing from the respondent company had no effect on his rights as a shareholder.

[226] Though governed by the *CBCA*, a transfer of shares remains subject to the conditions of formation of a contract.

[227] My colleague Cromwell J. states that the appellant transferred his shares to Mr. Rosati by means of an onerous contract, but he does not specify the nature of that contract, its essential elements and what prestation Mr. Mennillo received in return from Mr. Rosati. However, [TRANSLATION] "[t]he fact that a contract is innominate does not mean that it is subject to no legislative scheme": D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at para. 136.

[228] The *Civil Code of Québec* defines a contract as "an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation" (art. 1378). Where there is no meeting of the minds between the parties — unlike where the conditions of formation of a contract are not met, which results in the nullity of the contract — it cannot be found that a contract even exists: V. Karim, *Les obligations* (4th ed. 2015), at para. 507; see also para. 642. The proposal must be firmly directed toward the completion of a specific juridical operation: Lluelles and Moore, at para. 275.

[229] The respondent company submits that the appellant transferred his shares to Mr. Rosati and that, in return, he was relieved of his obligation to

avait aucun moyen pour les créanciers de savoir que son capital-actions pouvait à tout moment être affecté.

b) *Effet de la prétendue entente*

[225] Je partage par ailleurs l'avis de l'appelant et du juge dissident en Cour d'appel qu'il est impossible de conclure en droit que l'appelant a transféré ses actions à M. Rosati le 25 mai 2005. En effet, peu importe la conclusion à laquelle nous pouvons arriver sur la crédibilité des témoins à cet égard, l'intention manifestée par l'appelant de se retirer de la société intimée était sans effet sur ses droits en tant qu'actionnaire.

[226] Bien qu'il soit régi par la *LCSA*, le transfert d'actions demeure assujetti aux conditions de formation d'un contrat.

[227] Mon collègue le juge Cromwell dit que l'appelant a transféré ses actions à M. Rosati par le biais d'un contrat à titre onéreux, mais il omet de préciser quelle serait la nature du contrat, quels sont ses éléments essentiels et quelle prestation M. Mennillo aurait reçue en retour de la part de M. Rosati. Or, « [l]e caractère innommé d'un contrat ne signifie pas pour autant qu'il échappe à tout régime législatif » : D. Lluelles et B. Moore, *Droit des obligations* (2e éd. 2012), par. 136.

[228] Le *Code civil du Québec* définit le contrat comme « un accord de volonté, par lequel une ou plusieurs personnes s'obligent envers une ou plusieurs autres à exécuter une prestation » (art. 1378). L'absence de rencontre des volontés des parties, contrairement au non-respect des conditions de formation du contrat qui, lui, entraîne la nullité, empêche de conclure à l'existence même du contrat : V. Karim, *Les obligations* (4e éd. 2015), par. 507; voir aussi par. 642. La proposition doit tendre de manière ferme à la conclusion d'une opération juridique précise : Lluelles et Moore, par. 275.

[229] La société intimée soutient que l'appelant a transféré ses actions à M. Rosati et qu'il était libéré, en contrepartie, de son obligation de financer

finance Intramodal's operations and guarantee its debts. In my view, this is not a valid prestation. This submission by the respondent company, once again, confuses the company's distinct legal personality with that of its shareholder or shareholders.

[230] The intention expressed by the appellant in this case was at most an invitation to contract. The fact that a transfer of shares was registered by the respondent company where Mr. Rosati had spent no money to acquire the appellant's shares certainly does not prove that the appellant transferred his shares. To conclude from the respondent company's registration of a transfer of shares that a contract was formed is to engage in circular reasoning: because a transfer was registered, a contract was formed, and because the contract was formed, the transfer is necessarily valid.

[231] The parties also referred to the possibility that the alleged agreement of May 2005 was a contract of gift, but it is clear that there was no gift in the case at bar. There is a presumption in the civil law that acts are normally by onerous title. Two things must thus be proved before a gift can be found to exist: an absence of consideration and [TRANSLATION] "a deliberate intent to impoverish oneself" (*Martin v. Dupont*, 2016 QCCA 475, at paras. 26-31 (CanLII)). In its factum, the respondent company states that [TRANSLATION] "[the appellant] wants just one thing: to receive '. . . *money for the rest of [his] life, till [he dies]*'" (para. 30). On the face of it, this seems to me to be the exact opposite of an intent to impoverish oneself. Moreover, and this is not insignificant, neither the respondent company nor the appellant is arguing that the shares were given to Mr. Rosati on May 25, 2005. The former states in its factum that the alleged contract between the parties was [TRANSLATION] "anything but a gratuitous contract" (para. 77), while the latter denies the very existence of an exchange of wills but, in an alternative argument, responds to the fact that no valid consideration was received by reiterating the requirements for a gift under the *Civil Code of Québec* and the legal consequences of a failure to satisfy those requirements.

les opérations d'Intramodal et de garantir le passif de la société. À mon avis, cela ne constitue pas une prestation valide. Cette prétention de la société intimée confond, encore une fois, la personnalité juridique distincte de la société avec celle de son ou ses actionnaires.

[230] Tout au plus, l'intention exprimée par l'appelant en l'espèce constituait une invitation à contracter. Le fait qu'un transfert d'actions a été inscrit par la société intimée alors que M. Rosati n'a déboursé aucune somme pour acquérir les actions de l'appelant ne prouve certainement pas que l'appelant a cédé ses actions. Conclure de l'inscription d'un transfert d'actions par la société intimée qu'un contrat a été formé relève du raisonnement circulaire : parce qu'un transfert a été inscrit, un contrat a été formé et parce que le contrat a été formé, le transfert est nécessairement valide.

[231] Les parties ont également évoqué la possibilité que la prétendue entente du mois de mai 2005 constitue un contrat de donation. Or, il est clair qu'il n'y a pas eu de donation en l'espèce. En effet, il existe en droit civil une présomption selon laquelle un acte est normalement à titre onéreux. Deux éléments doivent alors être établis pour conclure à la donation : l'absence de contrepartie et « la volonté réfléchie de s'appauvrir » (*Martin c. Dupont*, 2016 QCCA 475, par. 26-31 (CanLII)). Dans son mémoire, la société intimée écrit qu'« [u]ne seule volonté [. . .] anime [l'appelant] : de recevoir [TRADUCTION] "(. . .) *de l'argent [s]a vie durant, jusqu'à [s]on décès*" » (par. 30). Cela me semble, a priori, l'antithèse d'une volonté de s'appauvrir. Par ailleurs, et ce n'est pas anodin, ni la société intimée ni l'appelant ne prétendent que les actions ont été données à M. Rosati le 25 mai 2005. La première indique dans son mémoire que le prétendu contrat intervenu entre les parties est « tout sauf un contrat à titre gratuit » (par. 77). Le second nie l'existence même d'un échange de volontés, mais répond subsidiairement à l'absence de contrepartie valide en rappelant les exigences du *Code civil du Québec* en matière de donation et les conséquences du non-respect de telles exigences en droit.

[232] Article 1824 *C.C.Q.* reads as follows:

1824. The gift of movable or immovable property is made, on pain of absolute nullity, by notarial act *en minute*, and shall be published.

These rules do not apply where, in the case of the gift of movable property, the consent of the parties is accompanied by delivery and immediate possession of the property.

[233] In the absence of a published notarial act *en minute*, a gratuitous contract must be consistent with the definition of a manual gift, according to which either the donee must be put in immediate possession of the property or all hindrances must be removed so that the donee can take possession of the property (art. 1825 *C.C.Q.*). If the contract does not meet the conditions for a manual gift, it is absolutely null: *Paré v. Paré (Succession de)*, 2014 QCCA 1138.

[234] Furthermore, s. 65(3) of the *CBCA* imposes a second requirement for possession in the case of a manual gift: the share certificate for the transferred shares must, at a minimum, be endorsed by the transferor (*Grusk v. Sparling* (1992), 44 C.A.Q. 219).

[235] In the instant case, not only did the appellant never express an intention to make a gift of his shares, but it is clear that these conditions were not met.

[236] In short, I cannot accept the proposition that the onus was on the appellant to seek a conclusion that the alleged agreement of May 25, 2005 was null after inferring that a contract existed from the fact that a transfer had been registered even though there had been no exchange of wills on that date concerning a specific juridical operation and even though the appellant did not know that the transfer had been registered in the respondent company's registers until he had instituted this proceeding.

(4) Trial Judge's Assessment of the Evidence

[237] In his claim, the appellant alleges wrongful conduct on the respondent company's part, that is,

[232] L'article 1824 *C.c.Q.* se lit ainsi :

1824. La donation d'un bien meuble ou immeuble s'effectue, à peine de nullité absolue, par acte notarié en minute; elle doit être publiée.

Il est fait exception à ces règles lorsque, s'agissant de la donation d'un bien meuble, le consentement des parties s'accompagne de la délivrance et de la possession immédiate du bien.

[233] En l'absence d'un acte notarié en minute et publié, le contrat à titre gratuit doit correspondre à la définition d'un don manuel, ce qui implique que le donataire soit mis en possession immédiate du bien ou, sinon, que tous les obstacles soient écartés afin qu'il puisse en prendre possession (art. 1825 *C.c.Q.*). S'il ne respecte pas les conditions du don manuel, le contrat est nul de nullité absolue : *Paré c. Paré (Succession de)*, 2014 QCCA 1138.

[234] Dans la même veine, pour qu'il y ait possession aux fins d'un don manuel, la *LCSA*, à son par. 65(3), prévoit une seconde exigence : le certificat d'actions constatant les actions cédées doit au minimum être endossé par le cédant (*Grusk c. Sparling* (1992), 44 C.A.Q. 219).

[235] En l'espèce, non seulement l'appelant n'a jamais exprimé l'intention de donner ses actions, mais il est évident que ces conditions n'ont pas été satisfaites.

[236] En somme, je ne puis souscrire à la thèse qu'il appartenait à l'appelant de soulever la nullité de la prétendue entente du 25 mai 2005, après avoir inféré qu'il y avait eu contrat parce qu'un transfert avait été inscrit, alors qu'il n'y avait pas eu, à ce jour-là, d'échange de volontés sur une opération juridique précise et que l'appelant n'a eu connaissance de l'inscription du transfert dans les registres de la société intimée qu'à une fois le présent recours intenté.

(4) Appréciation de la preuve par le juge de première instance

[237] Dans le cadre de son recours, l'appelant reproche à la société intimée sa conduite fautive, à

that it failed to discharge its legal duties and that it registered a transfer of shares without having observed the necessary formalities.

[238] However, insofar as my colleague Cromwell J. accepts the trial judge's finding of fact that the appellant had expressed his intention of withdrawing from Intramodal as a shareholder and had transferred his shares to Mr. Rosati in May 2005, and given that my colleague bases his analysis on that finding, I believe it is important to point out the errors the trial judge made in assessing the evidence. In addition to having no basis in law, that finding by the trial judge is not supported by the evidence and is thus based on palpable and overriding errors. I therefore agree with the dissenting judge of the Court of Appeal that the trial judge's analysis on this point contained errors warranting appellate intervention: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[239] The finding that the appellant told Mr. Rosati he wanted to withdraw from Intramodal as a shareholder on May 25, 2005 is based solely on Mr. Rosati's testimony. The trial judge erred in rejecting the appellant's testimony, since, as the dissenting judge of the Court of Appeal rightly noted, he did so on the basis of an unreasonable interpretation of several pieces of evidence in the record.

[240] First, there is the letter of resignation signed by the appellant on May 25, 2005, which speaks for itself. The appellant withdrew from the company as a director and officer at that time. That letter prepared by the respondent company's lawyer — who, according to the evidence, was following the majority shareholder's instructions — could easily have provided for more if that had been the parties' intention. But it did not.

[241] Next, there are various documents relating to life insurance taken out on the appellant and Mr. Rosati, of which the respondent was the beneficiary. One of those documents stated that

savoir l'omission de se conformer à ses obligations légales et l'inscription d'un transfert d'actions sans le respect des formalités requises.

[238] Toutefois, dans la mesure où mon collègue le juge Cromwell accepte la conclusion de fait du juge de première instance selon laquelle l'appelant aurait exprimé son intention de se retirer d'Intramodal en tant qu'actionnaire et aurait transféré ses actions à M. Rosati en mai 2005, et puisqu'il en fait le fondement de son analyse, j'estime qu'il est important de souligner les erreurs commises par le juge de première instance dans son appréciation de la preuve. En effet, en plus de n'avoir aucun fondement en droit, cette conclusion du juge de première instance ne trouve aucune assise dans la preuve et repose donc sur des erreurs manifestes et dominantes. Je partage ainsi l'avis du juge dissident de la Cour d'appel selon lequel l'analyse du juge de première instance sur ce point comporte des erreurs justifiant l'intervention en appel : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235.

[239] La conclusion selon laquelle l'appelant aurait indiqué à M. Rosati qu'il voulait se retirer en tant qu'actionnaire d'Intramodal le 25 mai 2005 s'appuie exclusivement sur le témoignage de ce dernier. Lorsque le juge de première instance rejette le témoignage de l'appelant, il commet une erreur puisque, comme le souligne à juste titre le juge dissident de la Cour d'appel, il le fait en s'appuyant sur une interprétation déraisonnable de plusieurs pièces versées au dossier.

[240] Il y a d'abord la lettre de démission signée par l'appelant le 25 mai 2005, laquelle lettre parle d'elle-même. L'appelant se retirait alors de la société comme administrateur et dirigeant. Cette lettre, préparée par l'avocat de la société intimée, lequel suivait, selon la preuve, les instructions de l'actionnaire majoritaire, aurait facilement pu prévoir davantage si telle avait été l'intention des parties. Or, ce n'est pas le cas.

[241] Il y a aussi les divers documents relatifs à la souscription d'une assurance-vie sur les personnes de l'appelant et de M. Rosati et dont l'intimée était la bénéficiaire. L'un de ces documents indique que

Mr. Rosati was the respondent company's sole shareholder. Yet the policy in question was on the lives of both the appellant and Mr. Rosati. What insurable interest did Intramodal have in the appellant's life if he was no longer a shareholder? To ask the question is to answer it.

[242] As for the letter written by Mr. Kaufman on October 31, 2007 that was sent to the appellant, I also agree with the dissenting judge of the Court of Appeal that it could not reasonably lead to an inference that the appellant was, by insisting on being repaid his investment, relinquishing his shares.

[243] Nor could the formal notice of February 25, 2010 prepared by Mr. Kaufman lead to any negative inference. In it, the appellant claimed to be entitled to receive 50 percent of the respondent company's profits and to continue his partnership with Rosati. But by February 25, 2010, it had become clear that the appellant was no longer a shareholder *in the respondent company's registers*. According to his testimony and that of his professional advisers, the purpose of the letter was to have the situation remedied, failing which $1,000,000 would be claimed from Mr. Rosati.

[244] Finally, another ground advanced by the trial judge for rejecting the appellant's version was that, in his opinion, the reason the appellant gave for his withdrawal as a director and officer, namely the visit to Intramodal's premises and the examination of the company's books by representatives of Labatt, was false. Yet the dissenting judge of the Court of Appeal noted that, even though the company had not been active at the time, the appellant's assertion that meetings had taken place with representatives of Labatt had not been contradicted. Moreover, amounts were advanced before December 2005 and continued to be advanced until October 2006.

[245] In short, in my view, the evidence does not support the conclusion that the two shareholders entered into an agreement under which the appellant withdrew from the company as a shareholder. In arriving at that conclusion, the trial judge made

M. Rosati est le seul actionnaire de la société intimée. Pourtant, ladite police couvre tant la vie de l'appelant que celle de M. Rosati. Quel intérêt assurable Intramodal détenait-elle sur la vie de l'appelant si celui-ci n'était plus un actionnaire? Poser la question, c'est y répondre.

[242] Quant à la lettre rédigée par M^e^ Kaufman le 31 octobre 2007 et transmise à l'appelant, je suis également d'accord avec le juge dissident en Cour d'appel pour dire qu'on ne pouvait raisonnablement en inférer que l'appelant, en insistant pour se faire rembourser son investissement, renonçait par le fait même à ses actions.

[243] La mise en demeure du 25 février 2010 rédigée par M^e^ Kaufman ne permettait pas non plus de tirer d'inférence négative. L'appelant y revendique son droit à 50 p. 100 des profits de la société intimée et son partenariat avec M. Rosati. Or, en date du 25 février 2010, il était devenu clair que l'appelant n'était plus actionnaire *dans les registres de la société intimée*. Selon son témoignage et celui de ses représentants professionnels, la lettre visait à faire corriger la situation à défaut de quoi une somme de 1 000 000 $ serait réclamée à M. Rosati.

[244] Enfin, le juge de première instance a également rejeté la version de l'appelant parce que, selon lui, le motif avancé du retrait à titre d'administrateur et de dirigeant, soit la visite du local d'Intramodal et l'examen des livres de la société par les représentants de Labatt, était faux. Le juge dissident en Cour d'appel souligne que même si la société intimée n'était pas alors active, l'affirmation de l'appelant selon laquelle des rencontres avaient eu lieu avec des représentants de Labatt n'a pas été contredite. Des sommes ont d'ailleurs été avancées avant décembre 2005 et ont continué de l'être jusqu'en octobre 2006.

[245] Bref, à mon avis, la conclusion selon laquelle une entente est intervenue entre les deux actionnaires en vertu de laquelle l'appelant s'est retiré de la société intimée en tant qu'actionnaire n'est pas étayée par la preuve. Pour arriver à cette

palpable and overriding errors and disregarded key aspects of the evidence. At most, the evidence shows that the appellant expressed an intention to divest himself of his shares, but no agreement was reached on how he would dispose of them.

(5) Prescription of the Claim

[246] In the alternative, the respondent company argues that the appellant's claim must be dismissed on the ground that it is prescribed. The trial judge and the majority of the Court of Appeal agreed with that argument.

[247] The *CBCA* does not specify the prescription period that applies to the oppression remedy, although it does provide for a two-year prescription period for other remedies, two examples of which can be found in ss. 118(7) and 119(3) *CBCA*. It can therefore be assumed, at least where this remedy is concerned, that Parliament intended to defer to general civil law principles where a claim for oppression is made in Quebec: Martel, at pp. 31-191 to 31-192.

[248] In this regard, art. 2925 *C.C.Q.* provides as follows:

2925. An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise determined.

[249] A claim under s. 241 *CBCA* is normally brought to enforce a personal right. This is the case, for example, where the complainant alleges that a corporation's majority shareholder has acted in disregard of minority shareholders' interests (*Bénard v. Gagnon*, 2002 CanLII 23768 (Que. Sup. Ct.), aff'd by 2004 CanLII 73057 (Que. C.A.)) or where what is described as oppression consists of acts committed by the directors, who are alleged to have misled and unfairly treated certain shareholders in the same class (*Regroupement des marchands actionnaires inc. v. Métro Inc.*, 2011 QCCS 2389). An oppression claim can also be made to enforce a real right where, for example, the corporation in question refuses to pay

conclusion, le juge a commis des erreurs manifestes et dominantes et a fait abstraction d'éléments clés de la preuve. Tout au plus, la preuve démontre qu'une intention de se départir de ses actions a été exprimée par l'appelant, sans toutefois qu'il n'y ait eu d'entente quant à la façon dont il disposerait de ses actions.

(5) Prescription du recours

[246] Subsidiairement, la société intimée fait valoir que le recours de l'appelant doit être rejeté au motif qu'il est prescrit. Le juge de première instance et les juges majoritaires de la Cour d'appel ont également conclu en ce sens.

[247] Le délai de prescription applicable au recours pour abus n'est prévu nulle part dans la *LCSA*. Celle-ci prévoit pourtant, pour d'autres recours, un délai de prescription de deux ans. C'est le cas des par. 118(7) et 119(3) *LCSA*. On peut donc supposer, dans le cas de ce recours du moins, que le législateur fédéral entendait s'en remettre aux principes généraux du droit civil lorsqu'un tel recours est intenté au Québec : Martel, par. 31-482.

[248] À cet égard, l'art. 2925 *C.c.Q.* prévoit ce qui suit :

2925. L'action qui tend à faire valoir un droit personnel ou un droit réel mobilier et dont le délai de prescription n'est pas autrement fixé se prescrit par trois ans.

[249] Le recours fondé sur l'art. 241 *LCSA* tend normalement à faire valoir un droit personnel. C'est le cas notamment lorsque le plaignant allègue que l'actionnaire majoritaire d'une société agit sans tenir compte des intérêts des actionnaires minoritaires (*Bénard c. Gagnon*, 2002 CanLII 23768 (C.S. Qc), conf. par 2004 CanLII 73057 (C.A. Qc)), ou lorsque l'abus s'entend d'actes des administrateurs qui auraient induit en erreur et traité inéquitablement certains actionnaires d'une même catégorie (*Regroupement des marchands actionnaires inc. c. Métro Inc.*, 2011 QCCS 2389). Le recours pour abus peut également tendre à faire valoir un droit réel lorsque, par exemple, la société en cause refuse

dividends owed to the complainant despite acknowledging the complainant's status as a shareholder.

[250] Sometimes, as in the case at bar, the claim is instead premised on the complainant's ownership of shares and on the corporation's refusal to acknowledge the complainant's status as a shareholder. In such cases, a claim under s. 241 *CBCA* is brought not to *enforce* a real right but to have it *acknowledged*.

[251] In the civil law, the right of ownership (in this case the right of ownership of a security) is perpetual, which means that it is not lost either by non-use or by the mere passage of time:

[TRANSLATION] The right of ownership is *perpetual*. This does not mean that the right remains forever attached to the same patrimony or that it can be transmitted perpetually; it means that it is not lost through non-use (*supra*, at No. 18). However, an owner can destroy (corporeal) property, in which case the right will disappear with the property, which explains why the right is identified with the property. The owner can also renounce the right (the abandoned property then becomes a thing without an owner — arts. 934 et seq. C.C.Q.) or transfer the property to a trust patrimony without an owner (art. 1261 C.C.Q.), or the right may be acquired by a third party possessor through acquisitive prescription . . . . [Emphasis in original; footnote omitted.]

(D.-C. Lamontagne, *Biens et propriété* (7th ed. 2013), at para. 207)

[252] Professor Pierre-Claude Lafond states the following on this same subject:

[TRANSLATION] One characteristic of the right of ownership is that it is not lost by way of extinctive prescription (see *supra*, at 3.1.2.4). Since an action in revendication sanctions the right of ownership, it too is therefore *imprescriptible*, unlike other types of actions to enforce a real right, which are prescribed by ten years (art. 2923 C.C.Q.) or by three years (art. 2925 C.C.Q.), depending on whether the right is immovable or movable. In our view, those two provisions cannot apply, given that the purpose of a petitory action is not to *enforce* a right but to *have it acknowledged* (art. 912 C.C.Q.).

de verser au plaignant, à qui elle reconnaît pourtant le statut d'actionnaire, les dividendes qui lui sont dus.

[250] Il arrive, comme c'est le cas en l'espèce, que le recours se fonde plutôt sur la prémisse que le plaignant est propriétaire d'actions et qu'on reproche à la société de refuser de lui reconnaître le statut d'actionnaire. Le recours fondé sur l'art. 241 *LCSA* vise alors non pas à *faire valoir* un droit réel, mais à le faire *reconnaître*.

[251] Or, le droit civil reconnaît le caractère perpétuel du droit de propriété (en l'occurrence un droit de propriété portant sur une valeur mobilière), ce qui signifie que celui-ci ne se perd ni par le non-usage ni par le simple écoulement du temps :

Le droit de propriété est *perpétuel*. Cela signifie non pas que le droit demeure attaché à perpette au même patrimoine ou qu'il est transmissible perpétuellement, mais qu'il ne se perd pas par le non-usage (*supra*, n° 18). Cependant, le propriétaire peut détruire son bien (corporel), le droit disparaissant avec celui-ci, ce qui permet de comprendre l'identification du droit au bien. Il peut encore renoncer à son droit (le bien abandonné devenant un bien sans maître — 934 et s. C.c.Q.), transférer son bien à un patrimoine fiduciaire dépourvu de propriétaire (1261 C.c.Q.), ou le droit peut se prescrire acquisitivement au bénéfice d'un tiers possesseur . . . [En italique dans l'original; note en bas de page omise.]

(D.-C. Lamontagne, *Biens et propriété* (7e éd. 2013), par. 207)

[252] Sur ce même point, le Professeur Pierre-Claude Lafond s'exprime ainsi :

Une des caractéristiques du droit de propriété est qu'il ne se perd pas par l'effet de la prescription extinctive (voir *supra*, 3.1.2.4). Puisque l'action en revendication sanctionne le droit de propriété, elle est donc aussi *imprescriptible*, et ce contrairement aux autres espèces d'actions qui visent à faire valoir un droit réel, lesquelles se prescrivent par dix ans (art. 2923 C.c.Q.) ou trois ans (art. 2925 C.c.Q.), selon qu'il s'agit d'un droit immobilier ou mobilier. À notre avis, ces deux dispositions ne peuvent s'appliquer, car l'action pétitoire ne vise nullement à *faire valoir* un droit, mais plutôt à le *faire reconnaître* (art. 912 C.c.Q.).

In practice, this imprescriptibility may be defeated where acquisitive prescription is claimed by a possessor (arts. 2917 to 2919 C.C.Q.) (see *infra*, at 6.3.3.3.2), although this does not change the principle that the right of ownership cannot be lost by reason of the passage of time. [Emphasis added; citations omitted.]

(*Précis de droit des biens* (2nd ed. 2007), at para. 1205)

[253] Thus, extinctive prescription cannot be set up against a person seeking to have his or her ownership of property *acknowledged*.

[254] A share of a company is a real right in respect of which a shareholder can seek recognition of a right of ownership: "For a shareholder, ownership of shares is a real right, not a personal right, which can render inadmissible in Quebec an action taken to be declared owner of shares of which the *situs* is outside Quebec" (Martel, at p. 12-11 (emphasis added; footnotes omitted)).

[255] As a result, the prescription period applicable to a claim under s. 241 *CBCA* will depend on the basis for the claim. Where — as in this case — the complainant has been acknowledged to be a shareholder at some point and is claiming to have been unlawfully stripped of shareholder status by the corporation, the claim is therefore imprescriptible.

[256] This was the conclusion reached by the Quebec Court of Appeal in *Greenberg v. Gruber*, 2004 CanLII 14882 (Que. C.A.).

[257] In that case, the complainant submitted that shares in several corporations were being held for him by the respondents as *prête-noms* (nominees). He argued that he actually owned a third of the shares of those corporations, and he requested, *inter alia*, that the registers be rectified and that a share certificate be delivered to him.

[258] The respondents sought to set up extinctive prescription against the claim. The trial judge held that prescription was applicable but that the claim

En pratique, cette imprescriptibilité peut cependant être mise en échec par l'effet d'une prescription acquisitive réclamée d'un possesseur (art. 2917 à 2919 C.c.Q.) (voir *infra*, 6.3.3.3.2), ce qui ne change rien au principe que le droit de propriété ne saurait se perdre par l'écoulement du temps. [Je souligne; références omises.]

(*Précis de droit des biens* (2e éd. 2007), par. 1205)

[253] Ainsi, la personne qui cherche à se voir *reconnaître* la propriété d'un bien ne peut se faire opposer la prescription extinctive.

[254] L'action d'une société constitue un droit réel sur lequel l'actionnaire peut demander que son droit de propriété soit reconnu : « Pour l'actionnaire, la propriété des actions est un droit réel, et non un droit personnel, ce qui peut rendre irrecevable au Québec un recours intenté pour se faire déclarer propriétaire d'actions dont le *situs* est hors du Québec » (Martel, par. 12-42 (je souligne; notes en bas de page omises)).

[255] Suivant ce raisonnement, le délai de prescription applicable au recours exercé en application de l'art. 241 *LCSA* dépendra du fondement du recours. Lorsque le statut d'actionnaire a été à un moment reconnu au plaignant — comme c'est le cas en l'espèce — et que celui-ci prétend que la société l'en a illégalement dépouillé, le recours est alors imprescriptible.

[256] C'est la conclusion à laquelle est arrivée la Cour d'appel du Québec dans *Greenberg c. Gruber*, 2004 CanLII 14882 (C.A. Qc).

[257] Dans cette affaire, le plaignant soutenait que les intimés détenaient pour lui, à titre de prête-noms, des actions dans plusieurs sociétés. Il faisait valoir qu'il était dans les faits propriétaire du tiers des actions de ces sociétés et demandait notamment que les registres soient rectifiés et qu'un certificat d'actions lui soit remis.

[258] En réponse à ce recours, les intimés ont tenté d'opposer la prescription extinctive. Le juge de première instance ayant conclu que la prescription

was not prescribed, and the respondents appealed that decision. The issue before the Quebec Court of Appeal was whether, in such a case, extinctive prescription can be relied on [TRANSLATION] "in order to argue that a shareholder has lost the right of ownership in his shares because of his failure to act in a timely manner" (*Greenberg*, at para. 6). If the answer was yes, the Court of Appeal also had to determine which prescription period was applicable, that of 10 years under art. 2922 *C.C.Q.* or that of three years under art. 2925 *C.C.Q.*

[259] The Court of Appeal accepted the complainant's argument that extinctive prescription cannot be raised where, in the case of a claim under s. 241 *CBCA*, the complainant seeks to assert a right of ownership or seeks acknowledgment of his or her status as a shareholder in connection with that right.

[260] More specifically, the Court of Appeal reached the conclusion that [TRANSLATION] "the fact that [the complainant] failed to contest the 'denial' of his status as a shareholder within three years (or any other period) does not mean that he can no longer assert his right of ownership in the shares" (*Greenberg*, at para. 43). To terminate the complainant's right of ownership, the respondents would have had to show that they had acquired the shares by way of acquisitive prescription, but they were not making that argument. The Court of Appeal added that, "[a]s an owner, the [complainant] certainly cannot be prevented from asserting his right of ownership by someone who simply refuses to acknowledge that right" (*Greenberg*, at para. 44).

[261] I am in complete agreement with that reasoning.

[262] Like the respondents in *Greenberg*, the respondent company in the case at bar is not arguing that it became the owner of the appellant's shares by way of acquisitive prescription. It is simply refusing to acknowledge the appellant's status as a shareholder, and its argument is that its majority shareholder, Mr. Rosati, now owns his shares as a result of an alleged informal verbal agreement between the appellant and Mr. Rosati. However, I

était applicable mais que le recours n'était pas prescrit, les intimés ont fait appel de la décision. La question dont la Cour d'appel du Québec était saisie était de savoir si, dans un tel cas, la prescription extinctive pouvait être invoquée « pour prétendre qu'un actionnaire a perdu le droit de propriété de ses actions vu son défaut d'agir en temps utile » (*Greenberg*, par. 6). Dans l'affirmative, la Cour d'appel devait également déterminer quel délai de prescription était applicable, celui de 10 ans prévu à l'art. 2922 *C.c.Q.* ou celui de trois ans prévu à l'art. 2925 *C.c.Q.*

[259] La Cour d'appel a fait droit à la prétention du plaignant selon laquelle la prescription extinctive ne pouvait être invoquée lorsque, dans le cadre d'un recours fondé sur l'art. 241 *LCSA*, un plaignant cherche à faire valoir son droit de propriété ou demande que, en lien avec ce droit, le statut d'actionnaire lui soit reconnu.

[260] Plus particulièrement, la Cour d'appel est arrivée à la conclusion que « ce n'est pas parce que [le plaignant] a omis de contester la "négation" de son statut d'actionnaire à l'intérieur d'un délai de trois ans (ou de tout autre délai) qu'il ne peut plus faire valoir son droit de propriété sur les actions » (*Greenberg*, par. 43). Pour mettre fin au droit de propriété du plaignant, les intimés devaient démontrer qu'ils avaient acquis les actions par voie de prescription acquisitive, ce qu'ils ne soutenaient pas. Toujours selon la Cour d'appel, « [e]n tant que propriétaire, [le plaignant] ne peut certainement pas être empêché de faire valoir son droit de propriété par quelqu'un qui refuse simplement de reconnaître ce droit » (*Greenberg*, par. 44).

[261] Je souscris entièrement à ce raisonnement.

[262] En l'espèce, tout comme dans affaire *Greenberg*, la société intimée ne prétend pas être devenue propriétaire des actions de l'appelant par application de la prescription acquisitive. Elle refuse tout simplement de reconnaître à l'appelant son statut d'actionnaire et soutient que c'est son actionnaire majoritaire, M. Rosati, qui est dorénavant propriétaire de ses actions en raison d'une prétendue entente verbale et intervenue informellement entre

would stress once again that the situation in this case differs from the one in *Greenberg*, as Mr. Rosati is not a party to the litigation and therefore cannot claim acquisitive prescription in relation to the shares. Nor can the respondent company do so on his behalf.

VI. Conclusion

[263] For all these reasons, I would allow the appeal, revoke the resolution to transfer the appellant's shares and order that the respondent company's registers be rectified to reflect the appellant's status as a shareholder, with costs throughout.

Appeal dismissed with costs, CÔTÉ J. *dissenting.*

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

Solicitors for the respondent: Langlois lawyers, Montréal.

l'appelant et M. Rosati. Or, contrairement à la situation dans l'affaire *Greenberg*, et j'insiste une fois de plus sur ce point, M. Rosati n'est pas partie au litige et ne peut par conséquent revendiquer la prescription acquisitive des actions. La société intimée ne peut non plus le faire pour lui.

VI. Conclusion

[263] Pour tous ces motifs, je suis d'avis d'accueillir le pourvoi, d'annuler la résolution de transfert des actions de l'appelant et d'ordonner la rectification des registres de la société intimée afin de refléter le statut d'actionnaire de l'appelant, le tout avec dépens devant toutes les cours.

Pourvoi rejeté avec dépens, la juge CÔTÉ *est dissidente.*

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

Procureurs de l'intimée : Langlois avocats, Montréal.