Case Comments
Commentaires d'arrêt

Droit à l'image : La vie privée devient veto privé : *Aubry* c. *Éditions Vice-Versa Inc.* [1998] I.R.C.S. 591.

Pierre Trudel*

Les faits ayant donné lieu à cet arrêt reflètent des pratiques très répandues sur le continent. Une photo d'une jeune fille assise sur un marchepied, devant un immeuble de la rue Ste-Catherine à Montréal est prise par un photographe et publiée dans une revue à vocation artistique tirée à 722 exemplaires. Tous admettent que la photo a été prise dans un lieu public et publiée sans le consentement de la personne photographiée. Il est également reconnu que la photo ne porte pas atteinte à la réputation de la personne ni ne révèle quoi que ce soit d'autre que son image.

En première instance, la Cour du Québec juge que la publication non autorisée de la photographie constitue une faute et prononce une condamnation solidaire de 2000$ contre la revue et le photographe[1]. En Cour d'appel, les juges LeBel et Biron concluent que la faute résidait, non dans la prise de photographie, mais dans sa publication. Selon le juge LeBel, la diffusion de la photographie était fautive car elle n'était pas justifiée par un motif d'intérêt public, la photo ayant été publiée dans un périodique consacré à l'art de la photographie[2]. La Cour d'appel se divise au sujet des dommages subis par la demanderesse. Le juge Baudouin, tout en convenant que le droit de la demanderesse a été transgressé, conclut que les dommages n'ont pas été établis.

L'arrêt de la Cour suprême reprend la même analyse en y retranchant quelques nuances. Le juge Lamer et le juge Major signent une opinion minoritaire reprenant les conclusions du juge Baudouin au sujet de l'inexistence des dommages. Dans l'opinion majoritaire rédigée par les juges Bastarache et L'Heureux-Dubé, on peut lire ce qui constitue à notre sens le motif déterminant de la décision:

> Puisque le droit à l'image fait partie du droit au respect de la vie privée, nous pouvons postuler que toute personne possède sur son image un droit qui est protégé. Ce droit surgit lorsque le sujet est reconnaissable. Il faut donc parler de violation du droit à l'image, et par conséquent de faute, dès que l'image est publiée sans consentement et qu'elle permet l'identification de la personne. (Par. 54)

Le reste de la décision s'attache à déterminer si un motif pouvait excuser la faute résultant de la publication de l'image. Les juges Bastarache et L'Heureux-Dubé

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[1] [1991] R.R.A. 421. (C.Q.)

[2] [1996] R.J.Q. 2137. (C.Q.)

passent en revue certaines dimensions de la notion d'intérêt public. S'agissant de ce qui est appelé le "contexte de la liberté d'expression qui est au centre de l'intérêt du public à être informé", la décision majoritaire reprend l'ancienne doctrine française, aujourd'hui délaissée[3], suivant laquelle le caractère licite de la diffusion de l'image d'une personne découle "du consentement exprès ou tacite de la personne à la publication de son image."

Les médias se sont inquiété des répercussions de cette décision[4] tandis que plusieurs ont jugé que les médias exagéraient la portée de la décision et l'ampleur des méfaits qu'elle pourrait avoir sur le travail de ceux qui font profession d'informer le public[5]. Ce qui inquiète dans la décision de la Cour suprême, c'est qu'elle cumule les difficultés d'identifier les situations dans lesquelles doit prévaloir le droit à la vie privée et celles dans lesquelles l'intérêt public commande de laisser prévaloir la liberté d'expression et de la presse. Bien plus, elle accorde au sujet photographié, dans un lieu public, rien de moins qu'un droit de veto qui est de surcroît élevé à un rang supérieur à la liberté d'expression. Ce droit de veto ne cède que lorsque le photographe ou le média concerné parvient à démontrer au tribunal que l'intérêt public justifie la diffusion du cliché.

Un droit dérivé du droit à la vie privée

Le droit à l'image est dérivé du droit à la vie privée: il ne s'agit pas d'un droit reconnu à titre autonome mais plutôt à titre de composante de la vie privée[6]. L'arrêt reconnaît cela puisqu'on peut y lire au paragraphe 52 que "le droit à l'image, qui a un aspect extrapatrimonial et un aspect patrimonial est une composante du droit à la vie privée inscrit à l'art. 5 de la Charte québécoise." C'est pourquoi la plupart s'entendent pour poser que le droit à l'image ne protège que les images qui concernent la vie privée des personnes. S'il est une composante du droit à la vie privée, on voit mal, en simple logique, comment le droit à l'image pourrait protéger plus que les informations qui font partie de la vie privée. Il est donc nécessaire, avant de conclure qu'une personne a le droit de s'opposer à la diffusion de son image, de démontrer que cette image porte sur sa vie privée. C'est en vain que l'on cherche, dans la décision, une démonstration que l'image incriminée concerne la vie privée de la demanderesse. Au contraire, on postule péremptoirement un droit quasi-absolu de contrôle des personnes sur

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[3] Voir P. Kaiser, *La protection de la vie privée par le droit-Protection du secret de la vie privée*, 3e édition, Paris, Économica, 1995, nº 88.

[4] J. Lachapelle, "Une mauvaise journée pour la liberté d'expression, commente la Fédération des journalistes", *Le Devoir*, p. 5 10 avril 1998 à la p. A2.

[5] F. Sauvageau, "Un jugement nuancé", *Le 30*, juin 1998 à la p. 16; M. Venne, "Le droit à l'image", Le Devoir, 15 avril 1998, <http://www.ledevoir.com/REDaction/SOCiete/SOC_priv210597 /SOC_privAccueil.html>

[6] H. Patrick. Glenn, "Right to Privacy in Quebec, Recent Cases", (1974) 52 R. du B. can. 297 : du même auteur, "Le secret de la vie privée en droit québécois", [1974] 5 R.G.D., 24.

leur image sous réserve de l'intérêt public, comme on témoigne l'extrait de la décision cité plus haut.

Ainsi, la faute est commise dès que le sujet est reconnaissable et que l'image est publiée: il n'y a pas de liberté de publier l'image d'une personne. Il y a tout au plus des circonstances atténuantes. Les médias ont le fardeau de démontrer le consentement du sujet ou qu'on est dans une situation où l'intérêt public doit prévaloir. En l'espèce, comme l'intérêt public dans la publication de l'image n'a pas été démontré, on en conclut qu'il y a atteinte à la vie privée.

Définir le droit à la vie privée comme réservant à une personne le droit de s'opposer à la diffusion d'une image, même prise dans un contexte notoirement public, c'est faire dépendre la liberté d'expression, non des impératifs d'un autre droit fondamental, mais plutôt des sensibilités infiniment variables des individus. D'une part, on confère un droit de veto général à la personne photographiée, un droit plus vaste que ce qui est nécessaire pour protéger sa vie privée. D'autre part, on renvoie sur les épaules de celui qui s'exprime le fardeau d'établir que la diffusion de l'image se fait dans l'intérêt public.

Par conséquent le photographe doit savoir, lors de la prise de la photo, qu'il est dans une situation ou prévaut l'intérêt public; il lui faut espérer que cet intérêt public sera également démontrable lorsque la photo sera publiée! Avec un tel veto ainsi reconnu aux personnes sur leur image, il n'y a pas d'autres solutions que de demander, à titre préventif, le consentement du sujet. À défaut de pareille précaution, le photographe est toujours exposé à la possibilité qu'une personne, photographiée dans un contexte que l'on aurait pu croire relever de l'intérêt public, se plaigne d'une atteinte à son droit à l'image. En de telles circonstances, le fardeau de convaincre le tribunal de l'intérêt public est tout entier supporté par le photographe ou le média.

Certes, la Cour mentionne certaines situations dans lesquelles l'intérêt public pourra prévaloir. Des commentateurs ont vu là une reconnaissance d'un droit de prendre des photos de personnes et de les publier. La décision majoritaire énonce que:

L'intérêt public ainsi défini est donc déterminant, dans certains cas. La pondération des droits en cause dépend de la nature de l'information, mais aussi de la situation des intéressés. C'est une question qui est dépendante du contexte. Ainsi, il est généralement reconnu que certains éléments de la vie privée d'une personne exerçant une activité publique ou ayant acquis une certaine notoriété peuvent devenir matière d'intérêt public. C'est le cas, notamment, des artistes et des personnalités politiques, mais aussi, plus globalement, de tous ceux dont la réussite professionnelle dépend de l'opinion publique. Il peut aussi arriver qu'un individu jusqu'alors inconnu soit appelé à jouer un rôle de premier plan dans une affaire qui relève du domaine public, par exemple, un procès important, une activité économique majeure ayant une incidence sur l'emploi de fonds publics, ou une activité qui met en cause la sécurité publique. L'on reconnaît également qu'il y a exonération de responsabilité du photographe et de ceux qui publient sa photographie lorsque par son action, même involontaire, un simple

particulier se trouve accidentellement et accessoirement dans la photographie. La personne est alors, en quelque sorte, projetée sous les feux de la rampe. Nous n'avons qu'à penser à la photographie d'une foule durant un événement sportif ou une manifestation. (par. 59)

À l'égard de l'un et l'autre de ces cas de figure, la Cour ne dit pas qu'il s'agit d'une situation procurant une immunité. Au contraire, il ne s'agit que d'une énumération de circonstances dans lesquelles certains éléments de la vie privée (donc, selon la Cour, de l'image) d'une personne *peuvent* devenir matière d'intérêt public. Aussi, il est pour le moins audacieux de conclure comme l'ont fait certains commentateurs[7] que la Cour reconnaît le droit de prendre et de publier des photographies dans certaines situations d'intérêt public. Ce qui est ici reconnu n'est pas un droit mais plutôt une excuse qui peut être invoquée, à la condition que le tribunal chargé de trancher partage la même vision de l'intérêt public! On peut évidemment convenir qu'il y a des cas évidents pour lesquels le consensus sera facile à faire sur la question de savoir s'il y avait intérêt public. Mais les difficultés se présenteront à la marge, lorsque les avis deviendront partagés à cet égard. Avec le précédent établi par la décision *Aubry*, ce sera aux tribunaux de juger de l'intérêt public. Les difficultés pratiques que posent une approche aussi peu soucieuse de l'équilibre qui doit prévaloir entre la liberté d'expression et le droit à la vie privée ne sont pas que de détails.

La vie privée

Il aurait été facile d'opérer un départage plus respectueux de l'équilibre qui doit prévaloir entre le droit à la vie privée et la liberté d'expression. On aurait pu, d'entrée de jeu, se demander si la photo a été prise dans des circonstances où la personne photographiée pouvait raisonnablement s'attendre à être vue, voire photographiée. Dans l'affaire *Aubry*, la photo a été prise dans la rue. La rue est un endroit public: une personne raisonnable s'attend à y être vue.

La notion de vie privée a suscité de nombreuses analyses et réflexions aussi bien en France qu'au Québec. Et ces réflexions ont été faites dans le contexte du droit civil. La Cour a choisi de ne retenir que celles qui évitent d'aborder la question pourtant cruciale du départage des situations où la vie privée doit prévaloir de celles où elle trouve ses limites au nom de l'intérêt public. Au Québec, ce sont les tribunaux qui ont permis l'émergence du droit à la vie privée en se fondant sur la notion de faute de l'article 1053 du Code Civil du Bas-Canada. En adoptant l'article 5 de la *Charte des droits et libertés de la personne*[8] du Québec, qui consacre spécifiquement le droit au respect de la vie privée, le législateur a consacré un droit qui était déjà largement élaboré par la doctrine et la jurisprudence.

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[7] Voir notamment : M. Venne, "Le droit à l'image", Le Devoir, 15 avril 1998, <http://www.ledevoir.com/REDaction/SOCiete/SOC_priv210597/SOC_privAccueil.html>.

[8] *Charte des droits et libertés de la personne*, L.R.Q., c. C-12. Art. 5 : "Toute personne a droit au respect de sa vie privée."

Les contours de la notion de vie privée restent imprécis[9]. La plupart des auteurs constatent qu'il est impossible d'en arriver à une définition qui pourrait faire l'unanimité[10]. Mais l'on s'entend au moins pour convenir que la vie privée participe aux principes d'autonomie et de dignité de la personne[11].

Pour établir s'il y a atteinte à la vie privée, il est nécessaire de déterminer si une divulgation d'information ou une intrusion porte sur un élément de la vie privée[12]. Le domaine de la vie privée regroupe certains types d'informations qui y sont, en principe, rattachées. Il connaît aussi des variations selon les qualités et la situation des personnes.

On identifie deux volets de la vie privée. Le premier réfère aux faits et aux aspects de la vie d'une personne qui sont inclus dans un domaine protégé. Il permet d'identifier objectivement les éléments traditionnellement reconnus par la société comme étant inclus dans le domaine de la vie privée d'une personne, à une époque donnée. Mais le contenu concret de ce domaine varie suivant les personnes, la position qu'elles occupent dans la société et d'autres circonstances.

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[9] Voir notamment A.F. Westin, *Privacy and Freedom*, New York, Atheneum, 1968 aux pp. 8 et suiv.; R.A. Parker, "A Definition of Privacy", (1973-74) 27 Rutgers L.R. 275; R. Badinter, "Le droit au respect de la vie privée", (1968) *J.C.P.*, n° 2136, par. 12.

[10] "Nous reconnaissons tous que chaque membre de la société doit pouvoir réserver à l'intimité certains moments. L'être humain a toujours ressenti qu'il devait préserver l'anonymat de certains de ses gestes. Aussi, plusieurs tentatives de définition du droit à la vie privée ont ponctué les dernières décennies. Certains ont tenté d'articuler une définition autour du corps humain, ou encore autour de l'information que chacun de nous génère. D'autres ont cru pouvoir définir la vie privée en opposant simplement cette notion à celle de vie publique. Dans les faits, ainsi que l'écrit le professeur Benyekhlef, "il apparaît difficile, voire impossible, d'en arriver à une définition consensuelle du droit à la vie privée. *[...]* Loin de permettre un exercice efficient et harmonieux du droit à la vie privée, une définition ne peut qu'enferrer cette notion et nuire à son développement". Voir M. Michaud, *Le droit au respect de la vie privée dans le contexte médiatique: de Warren et Brandeis à l'inforoute*, Montréal, Éditions Wilson & Lafleur, 1996 aux pp. 1 et 2. L'extrait du texte cité du professeur Benyekhlef était tiré de K. Benyekhlef, "Les dimensions constitutionnelles du droit à la vie privée", dans P. Trudel et F. Abran,dir., *Droit du public à l'information et vie privée : deux droits irréconciliables ?*, Montréal, Les Éditions Thémis, 1992 à la p. 18. Voir sur les tentatives et les difficultés de cerner la notion de vie privée, R. Lindon, "La protection de la vie privée : champ d'application", (1971) 2 J.C.P. 6734; J. Malherbe, *La vie privée et le droit moderne*, Paris, Librairie du Journal des notaires et des avocats, 1968; R. Nerson, "La protection de l'intimité", (1959) J.T. 713; J. Velu, *Le droit au respect de la vie privée*, Travaux de la Faculté de droit de Namur, vol. 10, Namur, Presses universitaires de Namur, 1974. En droit canadien voir aussi P. Burns, "The Law and Privacy : the Canadian Experience", (1976) 54 R. du B. can. 1; G. Marshall, "The Right to Privacy : A Sceptical View", (1975) 21 R.D.McGill. 242; H. Rowan, "Privacy and the Law" in *Special Lectures of the Law Society of Upper Canada*, Toronto, Richard De Boo Ltd, 1973, 259; J.S. Williams, "Invasion of Privacy", (1973) 11 Alta L. Rev. 15.

[11] F. Rigaux, *La protection de la vie privée et des autres biens de la personnalité*, Parix, L.G.D.J., 1990, n^{os} 1 à 10 et 639 à 655.

[12] Voir P. Trudel, "Le rôle de la loi, de la déontologie et des décisions judiciaires dans l'articulation du droit à la vie privée et de la liberté de presse", dans P. Trudel et F. Abran, dir., *Droit du public à l'information et vie privée : deux droits irréconciliables?*, Montréal, Éditions Thémis, 1992, 181, 194-95.

Ce deuxiéme volet, contextuel, permet d'apprécier le contenu du domaine de la vie privée en fonction des circonstances, notamment la participation de l'individu à la vie de la Cité[13].

Tout n'est pas vie privée lorsqu'il s'agit d'information relative aux personnes. Si l'on s'accorde pour reconnaître que toute personne doit pouvoir soustraire sa vie privée aux ingérences et aux divulgations, l'on convient que la vie publique doit être ouverte et transparente. Comme nous vivons en société, il est des aspects de notre vie qui ont un caractère public tandis qu'il y a certains types d'informations référant à des aspects de la vie d'une personne qui sont inclus dans le "domaine" de sa vie privée.

La plupart des décisions ayant eu à déterminer ce qui fait partie du champ de la vie privée concernaient des vedettes ou des personnes ayant autrement défrayé la manchette. Kaiser rappelle que "les éléments de la vie privée des simples particuliers sont rarement l'objet d'une décision de justice, parce qu'ils ne sont pas souvent l'objet d'investigations ni de divulgations.[14]" Toutefois, ajoute cet auteur, lorsqu'il a été décidé qu'une divulgation ou une recherche d'information est illicite, parce qu'elle a pour objet un élément de la vie privée, fût-ce d'une vedette, il en découle, à plus forte raison que ce type d'information fait partie de la vie privée des simples particuliers. On trouve dans la jurisprudence québécoise de même que la jurisprudence française plusieurs éléments de la vie d'une personne qui sont fréquemment rattachés à la sphère privée : l'intimité de son foyer[15], son état de santé[16], son anatomie et son intimité corporelle[17], sa vie conjugale, familiale et amoureuse[18], ses opinions politiques, philosophiques ou religieuses[19] et l'orientation sexuelle[20]. Ce sont en quelque sorte des informations se rattachent à des dimensions de la vie qui sont fréquemment associées à l'intimité.

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[13] P.A. Molinari et P. Trudel, "Le droit au respect de l'honneur, de la réputation et de la vie privée : Aspects généraux et applications", dans Barreau du Québec, Formation Permanente, *Application des chartes des droits et libertés en matière civile*, Cowansville, Éditions Yvon Blais, 1988, 197, 211.

[14] P. Kaiser, *La protection de la vie privée par le droit. Protection du secret de la vie privée*, 3e édition, Paris, Économica, 1995, nº 143.

[15] *Robbins* c. *CBC*, (1958) C.S. 152; 12 DLR (2d) 35; en droit français: *Dame Bardot c. Société Beaverbrook*, tr. gr. inst. Seine, 24-11-65, J.C.P 1966. 14521.

[16] *Valiquette* c. *The Gazette*, [1991] R.R.A. 327; *Gazette (The) (Division Southam Inc.)* c. *Valiquette*, [1997] R.J.Q. 30, en droit français: *SARL France Editions et publications* c. *Dame Nagaux vve Gérard Philippe*, cass. civ., 12-7-1966, Gaz Pal. 1966. 2 187.

[17] *Dame Carole Laure* c. *Soc VM Productions*, tr. gr. inst. Paris, 11-5-1974, D. 1974. 767.

[18] M. Contamine-Raynaud, "Le secret de la vie privée" dans *L'informa tion en droit privé*, Paris, L.G.D.J. (Bibliothèque de droit privé CLII), 1978, 401, 426, nº 20; *Soc Presse - Office "Lui"* c. *De Villalonga, D.* 1976.I.421; *Dame Catherine Dorléac, dite Deneuve* c. *Soc. d'Éditions Parisiennes Associées, Gaz. Pal.* 1970.2.150; P.A. Molinari, "Le droit de la personne sur son image en droit québécois et français", (1977) 12 R.J.T. 95, 96 à 105.

[19] *Chabert* c. *Dame Germain dite Manouche*, Gaz. Pal. 1975.3.180.

[20] A. Popovici, "L'altération de la personnalité aux yeux du public", [1994] 28 R.J.T. 289, <http://www.droit.umontreal.ca/pub/themis/94vol28n1/POPOVICI.html> M. Michaud, *Le droit au respect de la vie privée dans le contexte médiatique : de Warren et Brandeis à l'inforoute*, Montréal, Éditions Wilson & Lafleur, 1996 à la p. 40.

Or, dans l'affaire *Aubry*, la photo fut prise dans un lieu où une personne raisonnable s'attendrait à être vue et photographiée. De façon constante, il est reconnu que la rue est a priori publique. Raymond Lindon écrit à ce sujet que:

La rue est à tout le monde. A propos d'une prise de vues cinématographique effectuée sur la voie publique, le tribunal de Paix de Narbonne (4 mars 1905, D.P., 1905.2.389) fait état "du droit que chacun possède en principe sur ce qu'il y a dans la rue et sur les scènes qui s'y déroulent". Dans le même sens, le tribunal d'Yvetot (2 mars 1932), Gaz Pal., 1932.1.855) à l'occasion d'un procès intenté par une personne qui s'était reconnue sur une carte postale représentant une scène de la vie agricole, à savoir le marché d'Yvetot, et qui demandait réparation, a jugé que nonobstant "le droit qu'a l'individu d'interdire la reproduction de son image prise dans le privé", ce droit ne joue pas "quand il s'agit de photographies prises sur la voie publique: l'image d'un individu dans la rue se trouve livrée à tous les regards que le dessin ou la photographie ne fait que fixer d'une façon durable, et la représentation, dans ces conditions, des individus par le dessin ou la photographie rentre dans les servitudes normales de la vie en société et ne peut être davantage prohibée que les compte rendus descriptifs par la voie de la presse, de la présence de l'individu dans les mêmes circonstances.[21]

Au surplus, l'image incriminée dans l'arrêt Aubry ne révèle rien qui soit a priori rattachable à la vie privée suivant l'ensemble des critères connus. Outre les traits de la demanderesse, on ne sait rien d'elle. Si cette dimension avait été considérée, on aurait assurément conclu qu'il ne s'agissait pas d'une situation où l'on peut s'attendre à demeurer incognito. Pierre Kaiser constate, après avoir analysé le droit français et le droit de plusieurs pays que la protection des personnes à l'égard de la publication de leur image est limitée à leur vie privée et s'arrête au seuil de la vie publique. Il écrit que:

Cette protection des personnes est limitée à leur vie privée: elle ne s'étend pas à leurs activités publiques. Leur image, dans l'exercice de ces activités, peut être réalisée et publiée sans leur autorisation. On l'explique généralement en disant qu'une personne exerçant une activité publique donne une autorisation tacite à la réalisation et à la publication de son image. Mais cette explication, inspirée par l'influence persistante de la doctrine de l'autonomie de la volonté, n'est pas exacte, car une personne ne peut s'opposer à la réalisation et à la publication de son image dans l'exercice d'une activité publique. La raison véritable est que la protection de la vie privée s'arrête, à raison de sa finalité, au seuil de la vie publique.[22]

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[21] R. Lindon, *Les droits de la personnalité*, Paris, Dalloz, 1974, n° 67.

[22] Voir P. Kaiser, *La protection de la vie privée par le droit- Protection du secret de la vie privée*, 3e édition, Paris, Économica, 1995, n° 88.

Voir entre autres Xavier AGOSTINELLI, Le droit a l'information face a la protection civile de la vie privee, Aix-en-Provence, Librairie de l'Universite, 1994, p. 153 et ss. Pour le droit belge, voir Marc ISGOUR et Bernard VINCOTTE, Le droit a l'image, Bruxelles, Larcier, 1998, p. 97 et ss. Plutot que de se fonder sur ces autorites doctinales et plusieurs autres allant dans le meme sens, la Cour prefere s'en remettre a des ouvrages qui n'ont pas le souci de departager les limites respectives du droit a la vie privee et des autres droits qui viennent le baliser. Il est donc impossible de considerer qu'elle s'est livree a une demarche de ponderation entre le droit a la vie privee et la liberte d'expression.

L'étape liminaire à toute démarche visant à établir si la prise et la diffusion d'une image est fautive est donc d'établir qu'il ne s'agit pas d'une image prise dans le cadre d'une activité publique. Il n'y a rien sur cet aspect dans la décision de la Cour, pas plus que dans les décisions des tribunaux d'instance inférieure. C'est dire l'ampleur du revirement.

Nombreux sont ceux qui croient que lorqu'on se trouve assis sur un marchepied donnant directement sur une rue publique, on est dans une situation ressortant à notre vie publique. Il est difficile de s'attendre à contrôler l'information que nous révélons du fait de cette participation à une activité aussi éminemment sociale que la présence dans un espace public.

Ayant ignoré cette étape essentielle consistant avant tout à déterminer si en l'espèce la demanderesse se trouvait dans une situation relevant de sa vie privée, les juges Bastarache et L'Heureux-Dubé s'y prennent à revers. Ils se demandent, après avoir établi péremptoirement que la diffusion de l'image est en soi fautive, si un motif d'intérêt public ne pourrait pas avoir un effet exonérateur. Avec une pareille démarche, on devine que le fardeau est invariablement sur les épaules de celui qui s'exprime. Il lui faut, à tout coup, démontrer un motif légitime de publier la photo. La liberté d'expression, que l'on croyait être une faculté de poser des gestes qui ne sont pas explicitement interdits, devient une justification qu'on est admis à invoquer uniquement s'il y a un intérêt public. Le droit d'une personne à s'opposer à la diffusion de son image ne s'arrête plus aux confins de sa vie privée: elle prévaut aussi longtemps que l'intérêt public à la publication n'a pas été démontré.

Mais à quelle notion d'intérêt public fait-on référence? Cette partie de la décision est probablement la plus critiquable tant elle dénote une vision étroite de l'intérêt public. Il aurait mieux valu que la Cour s'abstienne d'aborder une telle tentative de définition de l'intérêt public car elle a soulevé plus de questions qu'elle n'a apporté de réponses. D'abord, la Cour définit ainsi la notion d'intérêt public:

> Le droit du public à l'information, soutenu par la liberté d'expression, impose des limites au droit au respect de la vie privée dans certaines circonstances. Ceci tient au fait que l'expectative de vie privée est réduite dans certains cas. Le droit au respect de la vie privée d'une personne peut même être limité en raison de l'intérêt que le public a de prendre connaissance de certains traits de sa personnalité. L'intérêt du public à être informé est en somme une notion permettant de déterminer si un comportement attaqué dépasse la limite de ce qui est permis. (par. 58)

Mais tout en reconnaissant que "l'intérêt public ainsi défini est donc déterminant, dans certains cas, "au par. 59, la Cour ajoute que la "pondération" des droits "dépend de la nature de l'information, mais aussi de la situation des intéressés. C'est une question qui est dépendante du contexte." Malheureusement, plutôt que d'aller au bout du raisonnement et s'interroger sur le contexte dans lequel avait été prise la photographie incriminée, la Cour cesse à ce point de traiter du contexte pour passer à une tout autre question. On aborde en effet les balises que connaît la vie privée des personnes exerçant une activité publique, comme si seules les personnes exerçant une activité publique ou celles qui sont projetées au premier plan de l'actualité avaient une vie publique.

Ainsi, le contexte dans lequel fut prise la photo n'est pas pertinent pour déterminer si on est dans une situation qui relève de la vie privée d'une personne, mais uniquement pour savoir s'il présente des circonstances susceptibles d'exonérer d'une atteinte qui est à tout coup commise, même à l'encontre d'une personnalité notoirement publique. À preuve, ce passage de la décision qui est fort révélateur: "Ainsi, il est généralement reconnu *que certains éléments de la vie privée d'une personne exerçant une activité publique* ou ayant acquis une certaine notoriété peuvent devenir matière d'intérêt public. " (nous italiques) Pour la Cour, il n'est pas question de dire que la vie privée d'une personne exerçant une activité publique est moins étendue que celle des autres personnes, mais plutôt que certains aspects de sa vie privée *peuvent* devenir d'intérêt public. La Cour prétend opérer ici une pondération entre deux droits fondamentaux. En réalité, elle confirme la subordination de la liberté d'expression face à ce droit de veto qu'elle crée au profit des individus.

Tant en droit français qu'en droit québécois, dans les affaires ou le droit à l'image a été reconnu, et la diffusion de l'image sanctionnée, il s'agissait invariablement d'images ayant été prises dans une situation ressortant à la vie privée du sujet ou qui avaient pour conséquence de lui faire subir une altération publique de sa personnalité.

Ainsi, dans les affaires Rachel[23] et Gérard Philippe[24], les médias ont été sanctionnés pour voir publié des images prises dans le cadre de la vie privée des personnes en cause. Dans *Field* c. *United Amusement*, le requérant en injonction alléguait qu'il avait été ridiculisé et qu'on avait atteint son honneur en le filmant en tenue sommaire en compagnie d'une amie à l'occasion du festival pop de Woodstock[25]. Le tribunal reconnaît que le requérant se trouvait dans une situation relevant de sa vie publique.

Au plan de l'altération publique de la personnalité, il s'agit de se demander si la photographie, même prise dans un contexte public, constitue ou non une représentation préjudiciable du sujet. Par exemple, la publication d'une photo représentant des inconnus dans un bar coiffés d'un titre les associant à la prostitution a été jugée fautive.[25a] En France, le critère de la "nécessité de l'information" impose au photo-journaliste de s'interroger afin de savoir si le cliché (ou la scène filmée), illustre de façon appropriée et adéquate l'article ou le reportage[26] à défaut de quoi, il y a faute. Même situation dans *Rebeiro* c. *Shawanigan Chemicals*[27] où le demandeur se plaignait d'être représenté dans une situation qui laissait présumer qu'il était travailleur d'usine alors que tel n'était plus le cas.

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[23] *D.P.* 1858.I.313.

[24] *SARL France Editions et publications* c. *Dame Nagaux vve Gérard Philippe*, cass. civ., 12-7-1966, Gaz Pal. 1966. 2 187.

[25] *Field* c. *United Amusement*, [1971] C.S. 283.

[25a] A... c. B..., trib. gr. inst. Seine, 18 mars, 1966. D. 1966. 566.

[26] Voir jurisprudence citée dans C. Bigot, "Les exigences de l'information et la protection de la vie privée", (novembre 1995) 126 Légipresse 83-93, 89, notamment T.G.I. Paris, 5-1-1994, J.-Data doc. 040196 et T.G.I. Paris, 17-11-1993, J.-Data doc. 047243.

[27] [1973] C.S. 389.

Mais avec la décision *Aubry*, toutes ces nuances, héritées de plusieurs décennies où l'on a eu à coeur de pondérer deux droits fondamentaux, sont balayées. La publication de l'image d'une personne est *a priori* fautive. C'est le consentement du sujet ou l'intérêt public, non la liberté d'expression, qui établissent la frontière entre la diffusion excusable et la diffusion fautive de l'image d'une personne. En dehors des situations où l'on a le consentement du sujet, l'espace d'exercice de la liberté d'expression est limité au champ fort étroit des situations où l'intérêt public peut être démontré à la satisfaction d'un tribunal.

Les dommages

La décision de la Cour suprême, à l'instar de celle de la Cour d'appel, comporte une dissidence sur la question du quantum des dommages. Dans sa décision, le juge Lamer constate que la preuve des dommages n'a pas été faite et rappelle que le droit québécois de la responsabilité exige la preuve d'un préjudice résultant de la faute. Or, un tel préjudice n'a pas été démontré selon le juge Lamer, qui rejoint sur ce point l'analyse du juge Baudouin de la Cour d'appel. Il est vrai que la violation d'un droit n'entraîne pas toujours de dommages. Mais cet aspect de la décision *Aubry* met en lumière l'intensité du lien qui existe entre les préjudices subis et les critères permettant de situer les limites aux droits fondamentaux en matière d'information. Dans le domaine de l'information, tous les droits sont interreliés. Chacun de ceux-ci trouve ses limites dans les impératifs découlant de l'exercice des autres. Ainsi, la liberté de presse trouve ses limites dans les exigences du respect du droit à la vie privée, et inversement.

C'est pourquoi il est si important de délimiter les frontières respectives de ces droits en prenant garde de ne pas donner à l'un de ces droits une extension allant au-delà des impératifs de la protection des intérêts que le droit vise à préserver. La définition du droit à l'image que propose l'arrêt *Aubry* ne tient pas compte de la nécessité de préserver l'équilibre entre les droits fondamentaux. En se mettant à définir le droit à l'image de façon si large qu'il protège même contre des dommages qui demeurent impossibles à identifier, on se retrouve dans une démarche où les caprices des uns et des autres sont élevés au rang d'intérêt protégés par les droits fondamentaux. Ce surcroît de protection ainsi accordé à l'égard de l'image des personnes l'est aux dépens de la liberté d'expression et de la presse.

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La décision *Aubry* opère un revirement dangereux pour l'équilibre entre le droit à la vie privée et la liberté d'expression et de la presse. La méthode qu'elle retient afin d'évaluer si l'image peut être publiée ou non repose sur le postulat de la suprématie du droit à la vie privée par rapport à la liberté d'expression. Les seules limites au droit de veto d'une personne sur la diffusion de son image tiennent à des excuses qui renvoient à l'intérêt public tel que pourront le juger les tribunaux, dont on confirme la prérogative de revoir les décisions éditoriales.

Avec une telle approche, il revient au tribunal chargé de trancher entre les prétentions de la personne photographiée et le média de substituer son appréciation à celle du journaliste ou du créateur quant à l'existence ou non de l'intérêt public. Or, en démocratie, il est dangereux de faire dépendre la liberté d'expression et de la presse d'une appréciation judiciaire sur la question de savoir si l'intérêt public justifiait ou non la diffusion d'une image. Les tribunaux existent pour trancher entre les droits des justiciables venant en conflit, pas pour dicter, a posteriori, ce qu'il est d'intérêt public de publier!

Un raisonnement plus soucieux de préserver le nécessaire équilibre entre la liberté d'expression, et de la presse et la vie privée aurait posé que le droit d'une personne de s'opposer à la diffusion de son image est tributaire de la démonstration que l'image a été prise dans le contexte de sa vie privée. Il aurait été facile de poser les limites entre le droit à l'image et la liberté de presse en identifiant les intérêts qu'il faut protéger lorsqu'on interdit, au nom du droit à la vie privée, de prendre et de diffuser l'image d'une personne. On aurait alors tenu compte que la finalité du droit à la vie privée et à l'image est de protéger la dignité de la personne, de lui assurer une zone d'intimité, afin de la protéger des intrusions et des divulgations qui pourraient nuire à la protection de sa dignité. Le droit à la vie privée n'a jamais été envisagé comme procurant aux individus un droit de veto contre les inconvénients normaux de la vie en société. Avec l'arrêt *Aubry*, la protection du droit à l'image est si étendue que le droit protégé n'est plus celui du sujet à sa vie privée mais à ses caprices.

Negligent misstatement — principle of incorporation — personal liability of company directors: *Williams* v. *Natural Life Health Foods Ltd and Mistlin.*

John P. Lowry*
Rod Edmunds**

On a casual reading of the unanimous decision of the House of Lords in *Williams* v. *Natural Life Health Foods Ltd and Mistlin,*[1] one might be forgiven for believing that their Lordships were being called upon to consider whether or not to bolster the celebrated principle in *Salomon* v. *Salomon & Co.*[2] From the tenor of the only reasoned speech, delivered by Lord Steyn, one might all too readily suppose that at the root of the dispute was a claim that the corporate veil should be pierced, to hold a director personally liable for the company's tortious conduct. More broadly, there is a sense in which it seems that the House of Lords saw itself as being confronted with the need to hold the tension between two fundamental aims, one of the law of tort (the proper identification of the tortfeasor and the consequent attribution of responsibility) and the other of company law (the integrity of the principle of corporate personality). The same premise can be discerned in the judgments of both lower courts. But it can be argued that the real issue is more straight-forward than is recognised in the judicial reasoning. It revolves around the critical need to determine correctly the appropriate anterior question in any civil action, which is: what is the basis of liability and whose liability is it. There is a sense in which by failing to disentangle these overlapping questions with sufficient precision, the House of Lords has perpetuated the lower courts tendency to over-complicate the underlying issue and exaggerate the dangers which the respondents' claim posed to the integrity of the principle of incorporation.

(I) *Setting the scene — the case before the lower courts*

The respondents wished to open a health food shop in Rugby, England. Having found suitable premises, they sought a franchise agreement from the defendant company which was incorporated with limited liability by Richard Mistlin (hereafter referred to as M) in 1986 in order to franchise the concept of a 'chain' of retail outlets under the name 'Natural Life Health Foods' — based on the model of his shop located in Salisbury. M was the company's managing director and principal shareholder. His wife was a nominal shareholder who worked in the business together with two other employees. Assured by the pitch of the company's brochure on the benefits of franchising, the respondents were supplied with detailed financial projections demonstrating the likely profitability of their proposed enterprise.

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Although M played a significant part in producing the projections, the respondents had no direct pre-contractual dealings with him, but instead dealt with a company employee and an outside consultant. All material contractual documents were produced on the company's notepaper. Part of the franchise agreement was the 'benefit' of being backed by a skilled team with M at its head.

The respondents' turnover was substantially lower than predicted and they traded at a loss for eighteen months before finally being forced to close the business. They therefore sued the company for damages representing the losses suffered by them as a result of the company's negligent advice. When the defendant company was wound up, M was joined as second defendant. Thereafter their claim proceeded against him. At first instance the respondents' action succeeded.[3]

Langley J. held that the company was liable to the respondents for negligent advice and also, that the company's managing director, M, was personally liable. In determining liability, the trial judge applied the settled principles of *Hedley Byrne & Co Ltd* v. *Heller & Partners Ltd*.[4] Finding that M fulfilled the requirement of proximity (special relationship), Langley J. took account of the fact that ownership of M's shop in Salisbury, the model for the franchising business, was vested in him, not the company. The judge was therefore able to conclude that in a sense there was a more direct relationship between M and the respondents than might otherwise have been the case had the company acquired the shop in its own name. Langley J. further noted that it was legitimate to take into account M's refusal to give evidence in court. This was so despite M's offer to waive the management fee and to buy out the respondents (though the report does not disclose at what price) when it became apparent that they were facing serious financial problems.

On appeal to the English Court of Appeal,[5] only one of the grounds canvassed at first instance survived, whether or not M could be personally liable for the negligently prepared financial projections. By a majority, M's appeal was dismissed on the ground that where a director assumes personal responsibility for the misstatement in question, the case falls within a special category so that "the fact of incorporation ... does not preclude the establishment of personal liability."[6] The court was clearly moved by the plight of the respondents who

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[1] [1998] 1 W.L.R. 830.

[2] [1897] A.C. 22.

[3] *Williams and Another* v. *Natural Life Health Foods Ltd and Another*, [1996] B.C.L.C. 288.

[4] [1964] AC 465 (adopted by the Supreme Court of Canada in *Haig* v. *Bamford*, [1977] 1 S.C.R. 466). It has, of course, long been recognised that claims for pure economic loss may be brought for negligent misrepresentation. As such, the question of when new categories of pure economic loss may be recoverable was not an issue on the facts. See, further, *Canadian National Railway Co.* v. *Norsk Pacific Steamship Co.* (1992), 1 S.C.R. 1021.

[5] [1997] 1 B.C.L.C. 131, Hirst and Waite L.JJ. (Sir Patrick Russell dissenting); noted by R.Grantham (1997) Cambridge L.J. 259; J.Payne (1998) J. Bus. L. 153.

[6] *Ibid.* at 152, *per* Hirst L.J.

were of modest means and had, with M's knowledge, put their homes up as collateral to finance the business. The evidence also suggested that M knew that the projections were overly optimistic and that he was exposing the respondents to a very high degree of risk. Citing *Trevor Ivory Ltd* v. *Anderson,*[7] the court noted that a director will not normally be held personally liable for torts committed *qua* director. However, emphasising the special facts of the case, particularly the trial judge's finding of fact that M had assumed personal responsibility for the financial misstatements, Hirst and Waite L.JJ. were at pains to stress that no new ground was being broken by finding against the director.

There is scope for defending the Court of Appeal's decision in terms of the equity of the respondents' claim. It is also instructive to note that both Hirst and Waite L.JJ. perceived that there was a lurking danger to the practical efficacy and separate status of corporate identity. It was therefore felt necessary to circumscribe the potential for liability on the part of a director, not least because of the fear of opening the litigation floodgates. This was achieved by emphasising that the facts fell within "special circumstances setting the case apart from the ordinary."[8] Sir Patrick Russell in his dissenting judgment agreed that while such special circumstances might exist in principle, none were to be found in the present case. Similar policy anxieties also pervade the House of Lords decision and seemingly shaped its approach towards the issue of personal liability.

(II) *The House of Lords decision*

Lord Steyn, delivering the leading speech,[9] reviewed the jurisprudence surrounding the *Hedley Byrne* principle. The scope of the principle has, of course, been extended as a result of a trilogy of cases decided by the House of Lords in the mid-1990s, the central decision being *Henderson* v. *Merrett Syndicates Ltd.*[10] In this case the parameters of the rule governing liability for negligent misstatements were substantially redrawn. Lord Goff of Chieveley, who delivered the leading speech in *Henderson,* took the opportunity to subject the speeches in *Hedley Byrne* to considerable analysis. He considered that it was of the essence in cases (such as the present) where liability under *Hedley Byrne* arises because the relationship between the parties is equivalent to contract, that there is a need to make an objective assessment of whether or not the defendant has personally assumed responsibility to the plaintiff. Once this is established, liability will only follow where the plaintiff can demonstrate the necessary causal connection that he or she has relied upon the defendant's assumption of responsibility.

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[7] [1992] N.Z.L.R. 517.

[8] *Supra* note 5 at 152, *per* Hirst L.J.

[9] Lords Goff of Chieveley, Hoffmann, Clyde and Hutton concurring.

[10] [1995] 2 A.C. 145. See also, *Spring* v. *Guardian Assurance plc,* [1995] 2 A.C. 296 and *White* v. *Jones,* [1995] 2 A.C. 207. See further, J. Murphy, "Expectation Losses, Negligent Omissions And The Tortious Duty Of Care" (1996) Camb. L.J.

Taking the first of these two governing principles, assumption of responsibility, Lord Steyn concluded that the objective test means "that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff."[11] While the respondents focussed their argument on the "pivotal role" which M played in the company's business, counsel for M countered by emphasising the absence of any direct dealings between himself and the respondents. In applying the objective test to the present situation, which involved the more unusual triangular as opposed to bi-lateral relationship (the franchisees, the franchisor company, and the director), it had to be shown that the director had assumed "a personal commitment as opposed to a known company obligation."[12] On its view of the facts, the House of Lords held that in the absence of any exchanges or personal dealings between the respondents and M, he could not be taken as representing an assumption of personal responsibility to them.

Given the finding that there was no assumption of responsibility, there was no need for the House of Lords to address the second governing principle, the necessary causal requirement, by which a plaintiff has to establish reliance upon the defendant's assumption of personal responsibility. Nevertheless, Lord Steyn, presumably by way of *obiter dictum*,[13] surveyed the applicable legal principles and paid particular heed to two judgments of La Forest J. on the requirement of reliance. The first was delivered in *London Drugs Ltd* v. *Kuehne & Nagel International Ltd.*[14] in which La Forest J. drew the distinction between reliance in fact and reasonable reliance, and the second was delivered in *Edgewoarth Construction Ltd* v. *N.D. Lea & Associates Ltd.*[15] In this case, the plaintiff company had successfully tendered for a contract to construct a new highway for British Columbia. The plaintiffs allegedly suffered financial loss as a result of faulty drawings and specifications prepared for the province by the defendant engineers. The Supreme Court held that while the engineering company owed a duty of care to the plaintiffs, no such duty was assumed by the individual engineers personally. The mere fact that they had affixed their seals to the drawings was not sufficient in itself to give rise to a duty of care. Lord Steyn, noting that the formulation of La Forest J. was consistent with the

[11] *Supra* note 1 at 835.

[12] *Ibid.* at 836, citing McGechan J. in *Trevor Ivory Ltd* v. *Anderson*, *supra* note 7 at 532. Lord Steyn also referred to *Fairline Shipping Corp* v. *Adamson*, [1975] Q.B. 180, finding it a paradigm example of a situation where a director will be held to owe a personal duty of care in negligence. The director in question had not communicated with the plaintiff on company notepaper, nor had he rendered an invoice on behalf of the company. Accordingly, there was, on the facts, an assumption of risk.

[13] Calling in aid Lord Cooke of Thorndon's analysis of the Canadian jurisprudence in his 1997 Hamlyn Lecture, "Turning Points of the Common Law."

[14] [1992] 3 S.C.R. 299.

[15] [1993] 3 S.C.R. 206. For a full analysis of these decisions, see N. Siebrasse, "Third-Party Beneficiaries In The Supreme Court: Categorization And The Interpretation Of Ambiguous Contracts" (1995) 45 U.T.L.J. 47.

position in English law,[16] cited at length from his judgment. The material passage for present purposes being:

> "the appellant could not reasonably rely for indemnification on the individual engineers. It would have to show that it was relying on the particular expertise of an individual engineer without regard to the corporate character of the engineering firm."[17]

Endorsing this approach Lord Steyn stated that: "The test is not simply reliance in fact. The test is whether a plaintiff could *reasonably* rely on an assumption of personal responsibility by the individual who performed the services on behalf of the company."[18] It will be posited below that on the findings of fact by the trial judge in the present case, the role played by M can be viewed as transcending the corporate character of the franchise business. It therefore follows that the respondents' reliance on his expertise was, in the circumstances, reasonable given that (as with the defendant company) M had actual knowledge that the projections would be relied upon by the respondents.[19]

Finally, the House of Lords dealt with the substance of what was essentially a new pleading that had not appeared in either of the lower courts. This was the attempt to sustain the decision on the alternative basis that M was, at the very least, liable as a joint tortfeasor. This was rejected because it was premised on the fallacy that as M was not liable personally, he could not be held jointly liable for the company's tort in which he played no part.

At its simplest level the decision of the House of Lords allowing M's appeal is, of course, entirely in accord with the current vogue of adopting an absolutist

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[16] The position in English law was summarised by Lord Browne-Wilkinson in *White* v. *Jones, supra* note 10 at 272, who said: "[S]ince this House was concerned [in *Hedley Byrne*] with cases of negligent misstatement or advice, it was inevitable that any test laid down required both that the plaintiff should rely on the statement or advice and that the defendant could reasonably foresee that he would do so." Lord Mustill said at 288: "without reliance there could be no damage, and without damage there could be no cause of action in negligence."

[17] *Supra* note 1 at 836-37, citing *supra* note 15 at 212. In similar terms, McLachlin J concluded: "The only basis upon which [the individual engineers] are sued is the fact that each of them affixed his seal to the design documents. In my view, this is insufficient to establish a duty of care between the individual engineers and *Edgeworth*. The seal attests that a qualified engineer prepared the drawing. It is not a guarantee of accuracy. The affixation of a seal, without more, is insufficient to found liability for negligent misrepresentation." Professor Siebrasse has cogently argued that this reasoning is unconvincing. He stresses that on the facts of the case, the criteria laid down in *Hedley Byrne*, as interpreted in *Haig* v. *Bamford, supra* note 4, (*ie.* that the party who made the misrepresentation had actual knowledge of the limited class that will use and rely on the statement and that the representation was, in fact, reasonably relied upon by that class) were indeed satisfied. He therefore concludes, *supra* note 15 at 57: "The seal may not be a guarantee of accuracy, but it is certainly an invitation to reliance."

[18] *Supra* note 1 at 837.

[19] Such an approach would, to some extent, address the criticisms of the analogous decision in *Edgeworth, supra* note 15. See N. Siebrasse, *supra* note 17.

view of the *Salomon* principle.[20] However, it is our contention that on the facts of the present case, any threat poised to the orthodoxy of incorporation was more illusory than real and the apparent pre-occupation with defending the principle was ill-founded. By way of contrast, it is noteworthy that the Supreme Court of Canada in *Edgeworth's* case expressed no such reservations concerning the plaintiffs claim against the individual engineers. Rather, the tenor of the language adopted by La Forest J. proceeds on the basis that had reliance on the engineers been established, a prima facie case would have been found to exist for holding them personally liable notwithstanding the corporate character of the firm. There is no suggestion that such a finding would be tantamount to holding the engineers liable for a tort committed by the company. As such, therefore, the pleading was not viewed as challenging the principle of incorporation.

(III) *The False Shadow of Salomon?*

While all three courts appear to proceed from the same underlying assumption, namely that to hold M personally liable, without more, would threaten the sanctity of the principle of incorporation, there is little if any recourse to the leading decision in *Salomon* or its jurisprudential legacy. But this is not the only reason why it is worth dwelling upon why this was thought to be so. It would, in the words of Waite L.J., "set at naught" the protection of limited liability.[21] This view seemed imperceptibly to support the containment of directorial liability within special limits. Lord Steyn saw the matter in a similar light:

> "What matters is not that the liability of the shareholders of a company is limited but that a company is a separate entity, distinct from its directors, servants or other agents. The trader who incorporates a company to which he transfers his business creates a legal person on whose behalf he may afterwards act as a director."[22]

The unstated corollary here is that the company alone should be held responsible for any liability arising from the acts and omissions of a director acting *qua* director. For to hold otherwise would be to question the inviolability of incorporation and undermine its effectiveness and rationale.[23] But it is our contention that the essential issue is perhaps even more fundamental. It is not subsumed within the vexed question of choosing whether or not to pierce the corporate veil in order to hold a company director liable for a wrong committed by the company, but rather to determine, as the anterior question, who is, in fact, the actual tortfeasor. If it is found that the director committed the tort in his own

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[20] See, for example, the decision of the English Court of Appeal in *Adams* v. *Cape Industries plc*, [1990] Ch. 433.

[21] *Supra* note 5 at 154.

[22] *Supra* note 1 at 835.

[23] See further, the speech of Lord Macnaughten in *Salomon* v. *Salomon & Co.*, *supra* note 2, in which the House of Lords was primarily concerned with the question of whether a director could be held personally liable for contract debts incurred by the company.

right, liability can and should attach without any threat to *Salomon*.[24] Similarly, where the company and a human organ/agent act together to cause damage, liability will be joint. Throughout the course of the litigation this point does not always emerge with total clarity or consistency. At the outset of his speech, Lord Steyn frames the matter in terms of the M's personal liability for the negligent advice given to the respondents by the company. Yet later in his speech he goes on to recognise that:

> "Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal."[25]

However, such recognition is not enough to remove two lingering suspicions about the way in which the present case has been decided. First, the real issue was (or should) have been seen as determining whether the director was liable, not for the company's obvious wrongdoing, but for any tortious behaviour of his own. Yet this is a matter on which there is a discernible, if differing, measure of inconsistency within and between the judgments handed down by the judges engaged in hearing both appeal stages in the present proceedings.[26] To take but one example, in the Court of Appeal Waite L.J. opens his judgment by saying:

> "The law does, however, recognise a category of case in which a director of the representor will be fixed with personal liability for the negligent statement. It is a rare category, and a severely restricted one. If that were not so, representees could set at naught the protection which limited liability is designed to confer on those who incorporate their business activities."[27]

Citing this passage, Lord Steyn states that "in each case the decision is one of fact and degree."[28] What starts out as a correct identification of the company as the location of primary liability for the director's misstatement, then becomes ambiguous on the point of the so-called rare category of liability namely, that of the director's own or personal liability for statements made outside of the

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[24] For tacit acknowledgment of this approach see the speech of Lord Keith of Kinkel in *Woolfson* v. *Strathclyde Regional Council* (1978), 38 P. & C.R. 521. See also, the judgment of La Forest J. in *Edgeworth Construction Ltd.* v. *N.D. Lea & Associates Ltd.*, *supra* note 15. See further, note 41 *infra,* and associated text.

[25] *Supra* note 1 at 835.

[26] It is not contended that the obfuscation definitely pervades these judgments. For example, it is arguable that there are passages where the judges, including Lord Steyn, are referring to a director's personal liability, see, for example, *supra* note 1 at 837 F-G. To his credit the learned trial judge showed greater consistency in this matter. Langley J. who, explaining the view of Aldous J. in *PLG Research Ltd.* v. *Ardon International Ltd.*, [1993] F.S.R. 197, at 238, that the director's liability depended upon the level of involvement that would make him liable as a joint tortfeasor , observed, *supra* note 3 at 300: "I take that to mean that either the director must himself have directed or procured the tortious act, or — and notwithstanding the corporate context in which he may have been acting — in effect committed the relevant tort himself." See, more generally, the judgment of the Federal Court of Appeal of Canada in *Mentmore Manufacturing Co. Ltd.* v. *National Merchandising Manufacturing Co. Inc.* (1978), 89 D.L.R. (3d) 195.

[27] *Supra* note 5 at 154.

[28] *Supra* note 1 at 834.

scope of his or her office. This may in part be explained by reference to the shifting tactical considerations that beset litigation, that of choosing how best to plead the case as it progressed through its judicial determination. But whatever the reasons for this uncertainty, its influence on the decision is regrettable. If liability arises because of something which the director does, and for which the company cannot be held responsible, then it is not easy to see in what way that challenges the protection afforded by limited liability. It may well be that this category is severely restricted less as a matter of policy and more on the basis that cases in which directors' tortious acts are performed beyond their remit are relatively uncommon.[29]

The second concern is of wider import. It lies in the fact that the House of Lords seems to have felt that it was faced with the need to hold the tension between the proper attribution of tortious liability on the one hand, with the need to preserve the principle of corporate personality on the other. What needs to be asked is how far the House of Lords have overplayed the significance of any threat to the principle of limited liability at the expense of appreciating the rudimentary concern of the law of tort. Once it is accepted that it is not the liability of the director *qua* director that is in issue, then there is neither any threat to the separate identity of the company nor any question of its veil being pierced. This much at least has been judicially recognised elsewhere in the Anglo-Commonwealth where, in terms of approach, a degree of flexibility is discernible. For example, in *Jagwar Holdings Ltd* v. *Julian*,[30] Thorp J. observed that:

> "it would be natural, and in accordance with fairness and justice, to require directors who accept the responsibility of conveying information ... to accept that failure on their part to exercise reasonable care in providing such information will not simply rebound on the company whose agents they are, but also on themselves personally."[31]

To counter the perceived threat to the principle of incorporation, Lord Steyn stressed the importance of maintaining some constraining balance with the notion of limited liability and the separate entity theory of companies. As has been seen, this had clearly troubled both Hirst L.J. and Waite L.J. in the Court of Appeal. The governing principle was therefore framed by Lord Steyn in the following terms:

> "in order to establish personal liability under the principle of *Hedley Byrne*, which requires the existence of a special relationship between plaintiff and tortfeasor, it is not sufficient that there should have been a special relationship with the principal. There must have been an assumption of responsibility such as to create a special relationship with the director or employee himself."[32]

The House of Lords appear to proceed on the basis that the sanctity of the principle of incorporation can be best preserved by having recourse to the confining principle, compendiously termed, the assumption of responsibility

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[29] A point conceded by Langley J., *supra* note 3 at 298.

[30] (1992) 6 N.Z.C.L.C. 68, 040.

[31] *Ibid.* at 68, 088.

[32] *Supra* note 1 at 835.

test. Discounting the significant body of literature criticising the test as resting on a fiction used to justify a finding that a duty of care exists,[33] Lord Steyn said:

> "Returning to the particular question before the House it is important to make clear that a director of a contracting company may only be held liable where it is established by evidence that he assumed personal liability and that there was the necessary reliance. There is nothing fictional about this species of liability in tort."[34]

Such strident dismissal of the weight of academic criticism gives rise to the suspicion that, perhaps somewhat expediently, the House of Lords utilised the test of assumption of responsibility as a device for ensuring that as a matter of principle and policy, directors retain wide ranging immunity against personal liability for negligent misstatements. Given the perception that *Salomon* was under attack, perhaps this formalistic approach is hardly surprising. However, in the light of the generally accepted view that each case will depend upon its own facts and will inevitably involve difficult questions of degree,[35] a wider-visioned approach would have been more appropriate. Yet, in reaching its conclusion the House necessarily adopted an overly narrow and restrictive view of the facts, particularly with respect to the significance of M's expertise in the enterprise and his continued ownership of the 'model' shop. It is suggested that the Court of Appeal's analysis of the factual issues, as based on the findings of Langley J, is therefore the more realistic and defensible position. This is so especially when taken against the backcloth of M's pre-eminent, albeit indirect, role in the transaction and the respondents' awareness of his pervasive influence and presence. Hirst L.J. found support for his stance from the observations of Hardie Boys J. in *Trevor Ivory,* who had expressed the view that in appropriate circumstances there is nothing on policy grounds to prevent the court holding a director personally liable. Hardie Boys J. said:

> "In the policy area, I find no difficulty in the imposition of personal liability on a director. ... To make a director liable for his personal negligence does not in my opinion run counter to the purposes and effect of incorporation. Those purposes relevantly include protection of shareholders from the company's liabilities, but that affords no reason to protect directors from the consequences of their own acts and omissions. What does run counter to the purposes and effect of incorporation is a failure to recognise the two capacities in which directors may act."[36]

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[33] Citing K. Barker, "Unreliable Assumptions in the Modern Law of Negligence" [1993] 109 L.Q.R. 461; B. Hepple, "The Search for Coherence" (1997) 50 C.L.P. 67 at 88; P. Cane, *Tort Law and Economic Interests*, 2d ed., (Oxford: Clarendon Press, 1996) at 177-200, which base their criticisms upon the decisions in *Smith* v. *Eric S. Bush*, [1990] 1 A.C. 831 and *White* v. *Jones, supra* note 10. By way of riposte, Lord Steyn commented that: "In my view the general criticism is overstated. Coherence must sometimes yield to practical justice."

[34] *Supra* note 1 at 837.

[35] See note 28, *supra,* and associated text. See further, *Evans & Sons Ltd.* v. *Spritebrand Ltd. and Sullivan*, [1985] B.C.L.C. 105. See also, *Mentmore Manufacturing Co. Ltd.* v. *National Merchandising Manufacturing Co. Inc., supra* note 26, in which the Federal Court of Appeal of Canada observed that identifying the circumstances in which a director can be held personally liable is "a question of fact to be decided on the circumstances of each case."

[36] *Supra* note 7 at 526.

While this analysis of the underlying rationale of incorporation is inevitably unsophisticated, nevertheless it does point to the fact that the corporate veil is not designed as a shield behind which a culpable director can expect to conceal his personal wrongdoing.[37] In this respect, Langley J. referred to the decision in *Saunders* v. *Harvey*,[38] in which the dual capacities of the defendant director were severed in order to find him personally liable under *Hedley Byrne*. Reviewing the finding of the court in *Saunders*, the judge explained that, "although the director was acting on company's business when he made the representation, the words were his and his alone and, at least by implication, he had assumed responsibility for what was said."[39] Such an implication or inference was presumably and, it is suggested, rightly drawn by the lower courts in the present case. It was material in Langley J's analysis that that the company had no experience of its own, it was selling M's personal knowledge and skill and M must have known "that any potential franchisee would expect, as Mr Williams said he expected, the projections to have his personal stamp of approval, based on his experience at Salisbury."[40] On this analysis it can be seen that the test for determining the causative effect of M's negligent misstatement, that is the requirement of reasonable reliance as formulated by La Forest J,[41] is manifestly satisfied on the facts of the present case. Further, the requirement that the defendant misrespresentor should reasonably foresee that the plaintiff would rely on the statement,[42] can similarly be seen as being satisfied in the light of Langley J's view that M must have anticipated the respondent's reliance on his expertise and the accuracy of the projections.

In swinging the pendulum firmly back against the imposition of personal liability, *Williams* may well provide greater impetus to those who have long viewed *Salomon* primarily as a device for facilitating the evasion of personal liability by sole traders and under capitalised quasi-partnerships.[43] Yet

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[37] Statutory recognition of this can be seen in the language of the Insolvency Act 1986, ss. 213-215; and the Companies Act 1985, s. 458.

[38] (1989) 30 Con. L.R. 103.

[39] *Supra* note 3 at 300.

[40] *Ibid.* at 302.

[41] In *London Drugs Ltd.* v. *Kuehne & Nagel International Ltd.* and *Edgeworth Construction Ltd.* v. *N.D. Lea & Associates Ltd.*, *supra* notes 14 and 15 respectively. It will be recalled that Lord Steyn expressly adopted this approach, see *supra* note 17 and associated text.

[42] See the speech of Lord Morris of Borth-y-Gest in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, *supra* note 4 at 503. See also the speeches of Lord Bridge of Harwich and Lord Oliver in *Caparo Industries* v. *Dickman plc*, [1990] 2 A.C. 605. See further, *Haig* v. *Bamford*, *supra* note 4, and N. Siebrasse, *supra* note 15, and text to note 17, *supra*.

[43] For contemporary arguments against the universal availability of incorporation and limited liability, see for example, A. Hicks, "Limiting the rise of limited liability" in R. Baldwin and P. Cane (eds), *Law and Uncertainty* (London and The Hague: Kluwer International, 1997); M. Whincup, "Inequitable Incorporation — the Abuse of a Privilege" (1981) 2 Co. Law 158. See further, O. Khan-Freund, "Some Refelections on Company Law Reform" (1944) 7 M.L.R. 54, in which he describes the decision in *Salomon* as "calamitous".

paradoxically, Lord Steyn was moved to observe that "[c]oherence must sometimes yield to practical justice."[44] It is regrettable that his lordship did not mould his *dictum* towards a more positive response to the respondents' claim rather than merely view it as an appropriate riposte to academic criticism of the assumption of responsibility test.

The determination of whether or not a duty of care is owed by a company director, or for that matter by any tortfeasor, is imbued with policy considerations.[45] However, on the present facts little guidance can be gleaned from the authorities because of the dearth of caselaw on the issue of the tortious liability of companies and, more particularly, the personal liability of directors under the *Hedley Byrne* principle.[46] It may well be that it was this factor that strait-jacketed the House of Lords into the restrictive reasoning displayed in this case. If this is so, then an opportunity to add to and thereby develop the jurisprudence on the question of the personal liability of company directors was sadly missed.

[44] *Supra* note 1 at 837.

[45] Prominent amongst these are arguments centred first, on holding the floodgates and, second, defensive practices. See, for example, *Caparo Industries plc* v. *Dickman, supra* note 42; *Hill* v. *Chief Constable of West Yorkshire Police*, [1989] A.C. 53; *X* v. *Bedfordshire CC*, 2 A.C. 633. See J. Lowry and D. Oughton, "A Saga Of Neglect By England's Townhalls" [1996] 4 Tort L.R. 12. See further, P. Cane *The Anatomy of Tort Law* (Oxford: Hart Publishing, 1997) at 136, 206, 226-27.

[46] Langley J. noted that the majority of authorities he was referred to addressed torts of strict liability. Only two decisions on the question of negligent misstatement were cited in argument, *Trevor Ivory Ltd* v. *Anderson, supra* note 7 and *Saunders* v. *Harvey, supra* note 38.

Damages for Wrongful Maritime Arrest: *Armada Lines Ltd.* v. *Chaleur Fertilizers Ltd.*

M. Paul Michell*

Introduction

When should damages be available for the wrongful arrest of a ship or cargo? Since the Privy Council's decision in *The Evangelismos*,[1] damages for wrongful maritime arrest may be awarded only where it is demonstrated that the arresting party acted in bad faith or with gross negligence—that is, *male fides* or *crassa negligentia*—in initiating the arrest.[2] In practice, this has proven to be a high threshold to overcome. *The Evangelismos* continues to represent the law in much of the common law world, including England,[3] Hong Kong,[4] Singapore,[5] and the United States.[6] Academic opinion as to the merits of the *Evangelismos*

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[1] *Xenos* v. *Aldersley, The Evangelismos* (1858), 12 Moo. P.C. 352, 14 E.R. 945 (P.C.).

[2] See also *The Walter D. Wallett*, [1893] P. 202; *The Eudora* (1879), 4 P.D. 208; *The Strathnaver* (1875), 1 App. Cas. 58 at 66-67 (P.C.); *The Cathcart* (1867), L.R. 1 A. & E. 314; *The Volant* (1864) 167 E.R. 385, 386. Damages may also be awarded where an initially valid arrest is wrongfully continued: *The Margaret Jane* (1869), L.R. 2 A. & E. 345; *The Cheshire Witch* (1858), Br. & Lush. 362, 167 E.R. 402. See W. Tetley, "Abus de droit—Wrongful Arrest of Ships (Erroneous or Malicious)" in J.E.C. Brierly *et al.*, eds., *Mélanges Paul-André Crépeau offerts par ses collégues de McGill* (Cowansville, Quebec: Éditions Y. Blais, 1997) at 679 (surveying existing law). The mere existence of a defence to the action *in rem* does not render the arrest wrongful: *The Gina*, [1980] 1 Lloyd's Rep. 398 at 399 (Q.B. (Adm. Ct.)).

[3] *The Kommunar (No. 3)*, [1997] 1 Lloyd's Rep. 22 at 29-32 (Q.B. (Adm. Ct.)); *The "Saetta"*, [1994] 1 W.L.R. 1334, [1993] 2 Lloyd's Rep. 268 at 280-81 (Q.B. (Adm. Ct.)).

[4] See *The Maule*, [1995] 2 H.K.C. 769 (Hong Kong C.A.), rev'd on other grounds, [1997] 1 W.L.R. 528, [1997] 1 Lloyd's Rep. 419 (P.C.).

[5] *The Tanto Utama*, [1995] 1 S.L.R. 767 (H.C.); *The "Ohm Mariana" ex "Peony"*, [1992] 2 S.L.R. 623 (H.C.), rev'd [1993] 2 S.L.R. 698 (Sing. C.A.); *The Evmar*, [1989] S.L.R. 474 (Sing. H.C.).

[6] An action for the wrongful arrest of a vessel will lie only where it is demonstrated that the arresting party acted with bad faith, malice, or gross negligence. The rule set out in the leading case, *Frontera Fruit Company* v. *Dowling*, 1937 AMC 1259, 91 F.2d 293, 297 (5th Cir. 1937), has been followed consistently. See *Result Shipping Co. Ltd.* v. *Ferruzzi Trading USA Inc.*, 56 F.3d 395, 402 n.5 (2d Cir. 1995) (attachment); *Coastal Barge Corp.* v. *M/V Maritime Prosperity*, 901 F.Supp. 325, 328-330 (M.D. Fla. 1994) (damages awarded); *Marastro Compania Naviera S.A.* v. *Canadian Maritime Carriers, Ltd.*, 1993 AMC 2268, 959 F.2d 49, *reh'g denied*, 963 F.2d 754 (5th Cir. 1992); *Arochem Corp.* v. *Wilomi, Inc.*, 962 F.2d 496, 499 (5th Cir. 1992); *Furness Withy (Chartering), Inc.* v. *World Energy Systems Associates, Inc.*, 854 F.2d 410, 411-412 (11th Cir. 1988); *Central Oil Co.* v. *M/V Lamma-Forest*, 821 F.2d 48, 51 (1st Cir. 1987); *Ocean Ship Supply, Ltd.* v. *MV Leah*, 1984 AMC 2089, 729 F.2d 971, 974 (4th Cir. 1984); *State Bank & Trust Co. of Golden Meadow* v. *Boat D.J. Griffen*, 755 F.Supp. 1389, 1401 (E.D.La. 1991), stay granted, 926 F.2d 449 (5th Cir. 1992). Before *Frontera*, the rule in *The Evangelismos* had a mixed reception in the United States. Compare *Artinano* v. *W.R. Grace & Co.*, 1923 AMC

rule is divided.[7] Support for the rule, however, has been grounded in precedent rather than principle, and none of the cases which have considered the *Evangelismos* rule in recent years has articulated a modern rationale for it.

The Supreme Court of Canada was recently presented with a rare opportunity to reconsider the *Evangelismos* rule in *Armada Lines Ltd.* v. *Chaleur Fertilizers Ltd.*[8] Regrettably, the Court declined to interfere with the rule. The Supreme Court of Canada's reluctance to reformulate the *Evangelismos* rule is puzzling, given that the rule lacks a principled underpinning, and the Court's well-known willingness to revise common law rules (particularly in the maritime context) even in the absence of legislative intervention. This note argues that in declining to revisit the *Evangelismos* rule, the Supreme Court missed a prime opportunity to narrow a procedural distinction between maritime and non-maritime actions. In the light of technological and economic developments, that distinction now appears both arbitrary and incongruous, and can no longer be justified.

Facts

Armada, a shipowner, contracted to transport Chaleur's cargo of fertilizer from New Brunswick to Togo. Chaleur did not have its cargo ready for loading onto Armada's ship by the date specified in the contract. Armada brought an action *in rem* against the cargo and an action *in personam* against Chaleur for breach of contract. After filing the statement of claim, Armada had the cargo arrested pursuant to what was then Rule 1003 of the Federal Court Rules.[9] Chaleur posted security of $80,000 to obtain the release of the cargo on bail.

Some 20 months later, Chaleur succeeded on a motion to have Armada's statement of claim in the *in rem* action struck out. Armada's *in personam* action against Chaleur seeking damages for breach of contract continued. Chaleur counterclaimed for damages stemming from the arrest of its cargo. At trial before Reed J. in the Federal Court (Trial Division), Armada's claim for breach of contract succeeded, and Chaleur's counterclaim for damages for wrongful arrest was dismissed, largely on the basis that any costs incurred by Chaleur

546, 286 F. 702, 706-707 (E.D. Va. 1923) (disapproving) and *Briggs Excursion Co.* v. *Fleming*, 40 F. 593 (D.N.J. 1889) (same, albeit in the attachment context) with *Henderson* v. *Three Hundred Tons of Iron Ore*; *Marvel* v. *The Scandinavia*, 38 F. 36, 41 (S.D.N.Y. 1889) (approving).

[7] Compare R. Margolis, "Damages for the wrongful arrest of a vessel: the venerable rule confirmed" [1998] Lloyd's Mar. & Comm. L.Q. 11 (supporting rule) and D.J. Cremean, "*Mala fides* or *crassa negligentia*?" [1998] Lloyd's Mar. & Comm. L.Q. 9 (same, although also favouring Australian rule) with S. Nossal, "Damages for the wrongful arrest of a vessel" [1996] Lloyd's Mar. & Comm. L.Q. 368 (critical of rule).

[8] [1997] 2 S.C.R. 617.

[9] Federal Court Rules, C.R.C. 1978, c. 663, as amended, now Federal Court Rules, 1998, Rule 481. Subsection 43(2) of the Federal Court Act, R.S.C. 1985, c. F-7, endows the Federal Court with jurisdiction *in rem* in any action relating to a ship.

were attributable to its own delay in moving to have the arrest set aside.[10] In the Federal Court of Appeal, Heald J.A. allowed Chaleur's appeal, dismissed Armada's action for breach of contract, and allowed Chaleur's counterclaim for wrongful arrest of the cargo.[11] Armada then brought a further appeal to the Supreme Court of Canada in respect of the damages awarded to Chaleur for wrongful arrest.

The Supreme Court of Canada's Decision

Two issues were before the Supreme Court of Canada. First, whether Chaleur should have been awarded damages for loss of interest in posting security to obtain the release of its cargo. Second, whether the Federal Court of Appeal was right to have awarded damages to Chaleur for the loss of use of working capital under the heading "damages for wrongful arrest." The Supreme Court addressed the first issue only briefly, holding that the Federal Court of Appeal had not erred in awarding Chaleur damages to compensate it for the cost of interest on the $80,000 it had posted as security to obtain release of its cargo. Indeed, specific evidence indicated that Chaleur had borrowed this sum to post as security, and had paid some $3,800 in interest charges to its creditor.

The second issue was more difficult. Counsel for Chaleur, faced with the *Evangelismos* rule, advanced a two-pronged argument. First, Chaleur argued that the doctrine advanced in that case was wrong, and should no longer be followed. Second, and in the alternative, counsel argued that the bad faith or gross negligence threshold set by *The Evangelismos* had been satisfied in the present case.

Iacobucci J., writing for the Court, observed that the bad faith or gross negligence test adumbrated in *The Evangelismos* was of long standing. Of all the common law jurisdictions, only Australia had departed from the rule, and had done so by statute.[12] This suggested to Iacobucci J. held that any modification of the traditional rule should be undertaken by the legislature, not the courts.[13] Moving to the second submission, Iacobucci J. held that there was no evidence on the record of bad faith or gross negligence on the part of Armada. Iacobucci J. did not accept Chaleur's invitation to reach his own finding of *mala fides* or *crassa negligentia*. As the threshold set by *The Evangelismos* had not been satisfied, Iacobucci J. held that the appeal should be allowed.[14]

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[10] (1993), 60 F.T.R. 232 (F.C.T.D.).

[11] [1995] 1 F.C. 3 (Fed.C.A.).

[12] Australian Admiralty Act 1988, No. 34 of 1988, s. 34(1)(a)(ii) (a party may recover damages arising out of the arrest of property if the arrest was obtained "unreasonably and without good cause").

[13] *Armada Lines Ltd.* v. *Chaleur Fertilizers Ltd.*, [1997] 2 S.C.R. 617 at 627 (citing *"Rhône" (The)* v. *"Peter A.B. Widener" (The)*, [1993] 1 S.C.R 497 at 531).

[14] *Ibid.* at 628.

Discussion

Presented with opportune circumstances to modify or erase the *Evangelismos* rule, the Supreme Court chose not to disturb it. With respect, the Court's decision was unfortunate. To begin, the *Evangelismos* rule was not of the Supreme Court's making: it had simply entered Canadian law along with the rest of the Imperial inheritance.[15] Indeed, remarkably little Canadian law addresses the question of the appropriate standard for damages for wrongful arrest.[16] Admittedly, there is implicit support for the *Evangelismos* rule in *Banco do Brasil S.A.* v. *The Alexandros G. Tsavliris.*[17] Elsewhere, *The Evangelismos* had been cited to support the proposition that "[i]f a vessel is arrested by reason of bad faith or gross negligence on the part of the plaintiffs, the owners of the ship are entitled to recover damages for such arrest."[18] Yet, as the Supreme Court had never addressed the question, the Court might have chosen to entertain it as one of first impression, rather than consider itself bound by ancient precedent from the Privy Council.

Iacobucci J. held that the Supreme Court was barred from evaluation of the *Evangelismos* rule, because legislative intervention was required to alter a longstanding common law rule. This could, at first blush, constitute a principled reason for declining to reexamine the *Evangelismos* rule on its merits. Indeed, there may be a stronger case to be made in commercial law than in other fields for a strict adherence to the doctrine of precedent. Regardless of its theoretical attractions, however, Iacobucci J.'s putative doctrine of precedent is simply not reflected in the practice of the Supreme Court of Canada. The Supreme Court rarely exhibits any reluctance to overrule private law precedent for reasons of

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[15] English admiralty law was adopted into Canadian law by virtue of the Admiralty Act, 1934 S.C., c. 31. See *ITO—International Terminal Operators Ltd.* v. *Miida Electronics Inc.* (1986), 28 D.L.R. (4th) 641, [1986] 1 S.C.R. 752. This position has proven controversial, but the issue need not be resolved here. See generally W. Tetley, "A Definition of Canadian Maritime Law" (1996) 30 U.B.C. L.Rev. 137 at 144-49.

[16] Although see *The Abby Palmer* (1904), 8 Ex. C.R. 462 at 463, 10 B.C.R. 383 (B.C.Ad.Dist.) (observing during oral argument that ships must not be arrested on the basis of "extravagant claims"). A later case emphasized that where an arrest demonstrated *mala fides* and an abuse of process it would be considered a sham and without legal effect, but did not address the possibility of damages for wrongful arrest: *Erikson Bros.* v. *SS. Maple Leaf*, [1923] Ex. C.R. 39 at 43 (B.C.Ad.Dist.).

[17] [1992] 3 F.C. 735 (Fed.C.A.).

[18] *Galano* v. *The "S/S Lowell Thomas Explorer"*, [1978] 1 F.C. 703 at 706-707 (F.C.T.D.). See also *Mondel Transport Inc.* v. *Aframe Lines Ltd.* (1990), 36 F.T.R. 187, [1990] 3 F.C. 684 at 693-94 (F.C.T.D.).

principle,[19] and so the Court's professed adherence to a rigid doctrine of precedent rings hollow.[20]

This may be seen in two of the Supreme Court of Canada's recent decisions, both of which were released only months after *Armada Lines Ltd.* v. *Chaleur Fertilizers Ltd.* In *Porto Seguro Companhia De Seguros Gerais* v. *Belcan S.A.*,[21] and again in *Bow Valley Husky (Bermuda) Ltd.* v. *Saint John Shipbuilding Ltd.*,[22] the Supreme Court explicitly reaffirmed its power to modify common law rules, and set out principles by which to determine whether it is appropriate to modify a common law rule. In *Porto Seguro*, the Supreme Court abolished the ancient rule barring the reception of expert evidence in cases where assessors sit with the trial judge. The Supreme Court held that "Courts may change common law rules where this is necessary to achieve justice and fairness by bringing the law into harmony with social, moral, and economic changes in society, and where the change will not have complex and unforeseeable consequences."[23] Likewise, in *Bow Valley*, the Supreme Court removed the old maritime law rule barring a contributorily-negligent plaintiff from recovering damages in negligence on similar reasoning.[24]

The principles set out in *Porto Seguro* and *Bow Valley* render Iacobucci J.'s reluctance to intervene in *Armada Lines Ltd.* v. *Chaleur Fertilizers Ltd.* particularly surprising, because the application of these principles leads to the conclusion that the Supreme Court should have taken the opportunity to dispense with the *Evangelismos* rule. As I argue below, the rule in *The Evangelismos* conflicts with modern conceptions of justice and fairness, and abolishing the rule would not have complex and unforeseeable consequences. To the contrary, this note contends that modifying the rule would bring the law of maritime arrest into line with civil remedies more generally, and would do so on a principled basis.

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[19] So, for example, in *Semmelhago* v. *Paramadevan*, [1996] 2 S.C.R. 415, the Supreme Court effectively overruled the ancient rule that specific performance is almost automatically available to a purchaser in a contract for the sale of land. No legislative intervention was thought necessary there. See also *Soulos* v. *Korkonzilas*, [1997] 2 S.C.R. 217.

[20] Moreover, even taking Iacobucci J.'s precedent argument on its face, *Armada Lines Ltd.* v. *Chaleur Fertilizers Ltd.* concerned a procedural question, and was thus quite distinct from *The Rhône*, the case cited by Iacobucci J. in support of the argument that any change in the law was for Parliament, not the courts. *The Rhône* concerned the interpretation of statutory provisions limiting the liability of shipowners for damages caused to other vessels occurring without actual fault or privity on the part of the shipowners, a question much more obviously one of substantive policy than the present issue. The Supreme Court indicated in *Porto Seguro Companhia De Seguros Gerais* v. *Belcan S.A.*, [1997] 3 S.C.R. 1278 at 1292, 1299, that it is more likely to modify a common law rule that is procedural (as opposed to substantive) in nature.

[21] [1997] 3 S.C.R. 1278.

[22] [1997] 3 S.C.R. 1210.

[23] [1997] 3 S.C.R. 1278 at 1292 (McLachlin J., dissenting on other grounds).

[24] [1997] 3 S.C.R. 1210 at 1262-1268 (McLachlin J., dissenting on other grounds).

Given that efforts to defend *The Evangelismos* on the basis of its precedential status are weak, what are the merits of the direct challenge to the rule in *The Evangelismos*? Counsel for Chaleur had argued that the maritime arrest procedure was analogous to a *Mareva* injunction, and as damages are available for wrongful use of the latter procedure without the requirement that the defendant demonstrate malice or gross negligence on the part of the plaintiff, damages should be available in the same way for the misuse of the former procedure in the same way. Iacobucci J. indicated that "the rules surrounding the two remedies differ in certain important respects", but went on to outline only two differences.[25] It is submitted that upon analysis, the two alleged differences collapse into only one, and the sole alleged difference does not withstand scrutiny.

Iacobucci J. began with the observation that a plaintiff who seeks a *Mareva* injunction must give an undertaking in damages, so that if it is subsequently determined that the injunction should not have been awarded, the plaintiff will be required to compensate the defendant for any damages suffered as a result of the order of the *Mareva* injunction.[26] By contrast, Iacobucci J. noted that no obligation to give an undertaking in damages was imposed upon applicants for maritime arrest by what was then Rule 1003(2) of the *Federal Court Rules*.[27] Second, Iacobucci J. noted that the threshold for the imposition of liability against plaintiffs who are unsuccessful at trial differs as between the two procedures. In *Mareva* injunction cases, the plaintiff's liability to pay damages to the defendant if the defendant is successful at trial is strict, whereas in maritime arrest cases, the defendant must bring a separate claim against the plaintiff in tort, and demonstrate that the plaintiff acted with *mala fides* or *crassa negligentia,* before damages may be awarded.[28]

Although each of Iacobucci J.'s observations is true, they confuse cause and effect. No undertaking is required in maritime arrest cases precisely because the *Evangelismos* doctrine stipulates that the plaintiff is liable for damages occasioned by a maritime arrest only in extreme circumstances—an arrest motivated by bad faith or gross negligence—that arise only rarely.[29] Accordingly, the courts have never imposed an undertaking requirement in maritime arrest cases to ensure that the defendant will be able to recover damages from the plaintiff if the arrest

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[25] *Armada Lines Ltd.* v. *Chaleur Fertilizers Ltd.*, [1997] 2 S.C.R. 617 at 626.

[26] *Third Chandris Shipping Corp.* v. *Unimarine S.A.*, [1979] 2 Lloyd's Rep. 184 (C.A.).

[27] This has now changed with the promulgation of Federal Court Rules, 1998, Rule 373(2).

[28] *Astro Vencedor Compania Naviera S.A. of Panama* v. *Mabanaft G.m.b.H.*, [1971] 2 Q.B. 588 at 595, (indicating that as a practical matter the claim for wrongful arrest, though technically distinct, is usually addressed at the same time as the claim in aid of which the arrest was made).

[29] E.g., *Artinano* v. *W.R. Grace & Co.*, 286 F. 202 (E.D.Va. 1923) (awarding damages where wrong vessel was arrested and it should have been obvious to the plaintiff that the two ships were "of a totally different character and description").

is subsequently determined to have been wrongful. The real question, then, should have been whether the *Evangelismos* rule is still good law. Iacobucci J. held that it was. He expressed "sympathy" with the suggestion that the *Evangelismos* rule was an anachronism, but indicated that any change to it must await legislative intervention.

Shane Nossal has recently suggested that *The Evangelismos* has been interpreted too narrowly, and argues for a broader interpretation of the rule set out in that case.[30] The respondent in *Armada Lines Ltd.* v. *Chaleur Fertilizers Ltd.* argued that a party who initiates a maritime arrest but whose claim is dismissed at trial should be liable for all damage caused by the arrest, without the other party having to prove any mental element on the plaintiff's part. This note endorses the latter approach, and argues that there is no reason why the requirement of an undertaking in damages could not also be imposed by the courts in maritime arrest cases, just as it was imposed in interlocutory injunction cases.

The analogy drawn between maritime arrest and *Mareva* injunctions undermines Iacobucci J.'s position. The *Mareva* injunction is a creature of judicial innovation, as is the requirement of an undertaking in damages. Neither originated as creatures of statute.[31] If the courts could impose the requirement of an undertaking in damages upon plaintiffs in non-maritime cases, why can they not do likewise in maritime arrest cases? The *Mareva* injunction example demonstrates that the Court need not have awaited legislative intervention to modify the rule in *The Evangelismos*. Admittedly, the Federal Court of Canada (from which, it will be recalled, the appeal was taken) is not a court of general or inherent jurisdiction: its entire existence is derived from federal statute.[32] Yet the Federal Court has on numerous occasions referred to the well-known requirements of a *Mareva* injunction,[33] which, as noted above, include the requirement that the plaintiff provide an undertaking in damages.[34] It is essential to observe that even in the Federal Court, the requirement of an

[30] Nossal, *supra* note 7.

[31] The jurisdiction to award a *Mareva* injunction has a statutory foundation in Canadian common law provinces (as it does in England), and in England, the Supreme Court Act, 1981 confirmed existing *Mareva* practice rather than creating it. Similarly, only in a few jurisdictions does a statute impose the obligation upon plaintiffs to give an undertaking in damages when seeking an interlocutory injunction: e.g., British Columbia Rules of Court, Rule 45(6); Ontario Rules of Civil Procedure, Rule 40.03. In the other jurisdictions, it has been imposed by the courts without explicit statutory authorization. Put another way, the undertaking in damages requirement is a common law development which has in some jurisdictions, but not all, subsequently been codified by statute.

[32] Federal Court Act, R.S.C. 1985, c.F-7, as amended, on which see *Monk Corp.* v. *Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779; *ITO—International Terminal Operators Ltd.* v. *Miida Electronics Inc.* (1986), 28 D.L.R. (4th) 641 at 650.

[33] *Marine Atlantic Inc.* v. *Blyth* (1993), 113 D.L.R. (4th) 501 (Fed.C.A.) (adopting criteria set out in *Third Chandris Shipping*, [1979] Q.B. 645); *Standal Estate* v. *Swecan International Ltd.*, [1990] 1 F.C. 115 at 134 (Fed.C.A.) (expressing some doubt as to whether the Federal Court may order *Mareva* injunctions, although in the end holding that it may).

[34] *Reading & Bates Horizontal Drilling Co.* v. *Spie Horizontal Drilling Co. Inc.* (1986), 9 F.T.R. 261 (F.C.T.D.).

undertaking in damages was imposed by the judges. The statutory authority to award injunctions made no reference to any undertaking requirement, or indeed, to any of the other recognized *Mareva* injunction requirements, although an undertaking requirement has since been incorporated into the most recent version of the Federal Court Rules.[35] Iacobucci J.'s reasoning leads to the surprising suggestion that the Federal Court has no jurisdiction to award *Mareva* injunctions, or to impose an undertaking in damages, because, at least at the time of judgment (1997), no statutory language specifically provided such jurisdiction. That cannot be right.

The undertaking in damages requirement is imposed *whenever* a plaintiff seeks an interlocutory injunction, not merely in *Mareva* injunction cases. The rationale underlying the undertaking in damages requirement is clear: if the defendant succeeds at trial, it should be compensated for the interference to its legal rights occasioned by the plaintiff's invocation of the legal process. The defendant need not prove that the plaintiff was grossly negligent or that the plaintiff acted in bad faith. Indeed, in the absence of a narrow category of "special circumstances", the plaintiff is liable to pay damages to the defendant even if the plaintiff acted reasonably and in good faith.[36] Without an undertaking in damages, the defendant is made to bear all of the cost associated with the risk that the plaintiff may be unsuccessful at trial. The undertaking in damages shifts some of the cost of the uncertainty as to the outcome of the trial on the merits to the plaintiff.[37] Is there anything about the maritime context which suggests that the balance should be struck differently?[38] In my view, there is not.

Although *Mareva* injunctions and maritime arrest are discrete procedures, the distinctions between them are easily overestimated.[39] Both are legal

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[35] The old Federal Court Rules, Rule 469. Rule 373(2) of the Federal Court Rules, 1998, now provides that "Unless a judge orders otherwise, a party bringing a motion for an interlocutory injunction shall undertake to abide by any order concerning damages by the granting or the extension of the injunction." The authority of the Federal Court to order injunctions is contained in the Federal Court Act, R.S.C. 1985, c. F-7, section 44: ("In addition to any other relief that the Court may grant or award, a *mandamus*, injunction or order for specific performance may be granted or a receiver appointed by the Court in all cases in which it appears to the Court to be just or convenient to do so, and any such order may be made either unconditionally or on such terms and conditions as the Court deems just.")[emphasis added]

[36] *Vieweger Construction Co. Ltd.* v. *Rush & Tompkins Construction Ltd.*, [1965] S.C.R. 195; *Nelson Burns & Co.* v. *Gratham Industries Ltd.* (1987), 25 O.A.C. 89 (C.A.), leave to appeal refused, [1988] 1 S.C.R. xii.

[37] A.A.S. Zuckerman, "The Undertaking in Damages—Substantive and Procedural Dimensions" (1994) 53 Camb. L.J. 546.

[38] See also J. Crawford, "The Australian Admiralty Act: Project and Practice" [1997] Lloyd's Mar. & Comm. L.Q. 519 at 522.

[39] In some cases, the same set of facts may enable the plaintiff to invoke either or both procedures: *The Rena K*, [1979] Q.B. 377 at 407, 409-10, [1978] 1 Lloyd's Rep. 545. See also *Parmar Fisheries Ltd.* v. *Parceria Maritima Esperanca L. Da. and Sousa* (1982), 141 D.L.R. (3d) 498, 53 N.S.R. 338 (N.S.S.C.T.D.); *Irving Oil Limited* v. *Biornstad, Biorn & Co.* (1981), 35 N.B.R. (2d) 265 (N.B.Q.B.) (dissolving *Mareva* injunction against ship where defendant alleged that it would be unable to post bond as security to obtain release of ship).

processes by which a plaintiff may obtain pre-judgment security for a claim. Neither a *Mareva* injunction nor arrest in aid of an action *in rem* creates a preference or priority.[40] A *Mareva* injunction acts *in personam*, not *in rem*, although it does possess some features of an *in rem* action.[41] Similarly, an *in rem* action, though nominally brought against a ship or its cargo, can be brought only where an *in personam* action would lie against the ship- or cargo-owner.[42] Under Anglo-Canadian law, it is now widely acknowledged that arrest pursuant to an action *in rem* is really only a thin legal fiction, the purpose of which is to permit jurisdiction to be established over an absentee ship- or cargo-owner,[43] and to provide the plaintiff with pre-judgment security for its claim.[44]

The *Mareva* injunction and maritime arrest should be, for most practical purposes, substitutes in the maritime context. The broader question as to the wisdom of maintaining a separate set of procedures for maritime cases is not at issue here. Rather, the argument made here is that any differences between maritime and non-maritime procedure must be justified by reference to relevant distinctions between the contexts in which the respective procedures operate.[45]

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[40] *Coastal Equipment Agencies Ltd.* v. *The "Comer"*, [1970] Ex.C.R. 13 (*in rem* action); *Benson Bros. Shipbuilding Co. (1960) Ltd.* v. *The Miss Donna*, [1978] 1 F.C. 379 (F.C.T.D.) (*in rem* action); *Iraqi Ministry of Defence* v. *Arcepey Shipping Co. S.A.: The "Angel Bell"*, [1981] Q.B. 65 (*Mareva* injunction); *Cretanor Maritime Co. Ltd.* v. *Irish Marine Management Ltd.*, [1978] 1 Lloyd's Rep. 425 (C.A.) (*Mareva* injunction).

[41] E.g., a *Mareva* injunction binds third parties and takes effect before notice is served on the defendant: *Z. Ltd.* v. *A-Z and AA-LL*, [1982] 1 Lloyd's Rep. 240 (C.A.).

[42] In order to bring an action *in rem* against a ship, a party must also have a right of action *in personam* against the beneficial owner of the ship, although personal jurisdiction over the beneficial owner need not have been established by service of process: *Margem Chartering Co.* v. *Bocsa (The)*, [1997] 2 F.C. 1001 at 1022 (F.C.T.D.); *Pegasus Lines Ltd. S.A.* v. *Devil Shipping Ltd.* (1996), 120 F.T.R. 241 at 256 (F.C.T.D.), rev'd on other grounds (1996), 207 N.R. 293 (Fed.C.A.). See also *Frisol Bunckering B.V.* v. *"M.V. Alexandria" (The)* (1991), 47 F.T.R. 3 (F.C.T.D.); *McCain Produce Co. Ltd.* v. *The "Rea"*, [1978] 1 F.C. 686 at 690-91 (F.C.T.D.); *Sabb Inc.* v. *Shipping Ltd.*, [1976] 2 F.C. 175 at 195 (F.C.T.D.), aff'd [1979] 1 F.C. 461 (Fed.C.A.); *Westcan Stevedoring Ltd.* v. *The "Armar"*, [1973] F.C. 1232 at 1236-37 (F.C.T.D.).

[43] *Mount Royal/Walsh Inc.* v. *Jensen Star (The)*, [1990] 1 F.C. 199 at 216 (Fed.C.A.), leave to appeal refused [1989] 2 S.C.R. ix ("A claim against a ship cannot be viewed apart from the owner; it is essentially a claim against the owner."); See *The Deichland*, [1990] 1 Q.B. 361 at 374, 389, (C.A.); *Benson Bros. Shipbuilding Co. (1960) Ltd.* v. *The Miss Donna*, [1978] 1 F.C. 379 at 386 (F.C.T.D.); *The Dictator*, [1892] P. 304. See also Laskin C.J., dissenting in *Antares Shipping* v. *The Ship "Capricorn"*, [1977] 2 S.C.R. 422 at 439 ("the arrest was a coercive act to compel appearance"). Cf. *The Bold Buccleugh* (1851), 7 Moo. P.C. 267, 13 E.R. 884 (P.C.) (distinguishing *in rem* action from foreign attachment).

[44] *Mount Royal/Walsh Inc.* v. *Jensen Star (The)*, [1990] 1 F.C. 199 at 214 (Fed.C.A.), leave to appeal ref'd [1989] 2 S.C.R. ix; *Canadian Imperial Bank of Commerce (CIBC)* v. *Ocean Harvest (The)*, [1984] F.C.J. No. 444 (Tax. Off.).

[45] This proposition seems implicit from *Porto Seguro Companhia De Seguros Gerais* v. *Belcan*, [1997] 3 S.C.R. 1278 at 1299. It has been made more explicitly in the United States, where, for example, due process challenges to arrest under Federal Supplemental Admiralty and Maritime Claims Rule C in aid of an action *in rem* (on the basis of *Shaffer* v. *Heitner*, 433 U.S. 186 (1977) and its progeny) have often been rejected on the basis that the requirements of due process must take into account the maritime context and distinct history of admiralty procedure. See, e.g., *Amstar Corp.* v. *S/S Alexandros T.*, 664 F.2d 904 (4th Cir. 1981).

Seen in this light, it seems incongruous that the cost consequences to the parties for the use of the respective procedures should diverge so greatly. These divergent cost consequences mean, not surprisingly, that although a *Mareva* injunction is available to a maritime claimant—one may obtain a *Mareva* injunction which has the effect of freezing a ship or its cargo[46]—maritime arrest in aid of an *in rem* action is, as a general rule, far more attractive to a plaintiff where available. The plaintiff has few disincentives to attempt arrest because there is little risk of loss: the plaintiff need not provide an undertaking in damages, or be concerned in most cases with possible liability for damages for wrongful arrest.[47]

It may be objected that beyond the obvious advantage of providing the plaintiff with pre-judgment security, the other major advantage of the *in rem* action is that it allows the court's jurisdiction to be founded independently of establishing personal jurisdiction over the owner.[48] That an *in rem* action permits the establishment of jurisdiction in this way is undoubted: indeed, that is its *raison d'être*.[49] However, an action *in rem* must be distinguished from an arrest. Maritime arrest is merely a procedure by which the plaintiff obtains pre-judgment security: it does not endow the court with jurisdiction.[50] Moreover, the extent of the advantage provided by maritime arrest in aid of an *in rem* action

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[46] *Cretanor Maritime Co. Ltd.* v. *Irish Marine Management Ltd.*, [1978] 1 Lloyd's Rep. 425 (C.A.); *Galaxia Maritime S.A.* v. *Mineralimportexport*, [1982] 1 Lloyd's Rep. 351 (C.A.); *Clipper Maritime Co. Ltd. of Monrovia* v. *Mineralimportexport*, [1981] 2 Lloyd's Rep. 458 (Q.B.).

[47] There are other distinctions not material here. For example, a *Mareva* injunction may be ordered against more than one ship, whereas an action *in rem* can be brought only against one ship. Moreover, an action *in rem* may be brought only against the property "that is the subject of the action", according to the Federal Court Act, R.S.C. 1985, c. F-7, s. 43(2): *Scandia Shipping Agencies Inc.* v. *Alam Veracruz (The)*, [1997] F.C.J. No. 1810 at ¶ 7 (F.C.T.D.) ("Otherwise, all actions in rem could lead to Mareva injunctions."). See generally W. Tetley, "Attachment, The *Mareva* Injunction and *Saisie Conservatoire*" [1985] Lloyd's Mar. & Comm. L.Q. 58 at 78-79; Law Reform Commission (Australia), *Civil Admiralty Jurisdiction*, Report No. 33 (Canberra, 1986) at 195-98.

[48] *Newfoundland Processing Ltd.* v. *The South Angela*, [1989] 3 F.C. 398 at 400 (F.C.T.D. (distinguishing *in rem* from *in personam* action); *The Atlantic Star*, [1974] A.C. 436 at 454, (H.L.); *The Banco*, [1971] 1 Lloyd's Rep. 49. Of course, this means that the *res* must be within the territorial jurisdiction of the court: there can be no service *ex juris* on the *res*: *"Mesis" (The)* v. *Louis Wolfe & Sons (Vancouver) Ltd.*, [1977] 1 F.C. 429 at 435 (Fed.C.A.). Nor can a warrant for the arrest of a foreign ship be issued unless it is within the territorial jurisdiction of the court: *Atlantic Lines & Navigation Co.* v. *The "Didymi"*, [1985] 1 F.C. 240 (F.C.T.D.), rev'd on other grounds, [1988] 1 F.C. 3 (Fed.C.A.); *The Ship "D.C. Whitney"* v. *The St. Clair Navigation Co.* (1907), 38 S.C.R. 303.

[49] *Kiku Fisheries Ltd.* v. *Canadian North Pacific Ocean Corp. ("The Limanskiy")*, [1997] F.C.J. No. 1291 at ¶ 55 (F.C.T.D.) ("The arrest procedure is particularly valuable in our jurisdiction, for Canada is not a nation with a foreign-going merchant marine and therefore must rely upon offshore carriers, often carriers in effectively judgment-proof jurisdictions."); *Canastrand Industries Ltd.* v. *Lara S (The)*, [1992] 3 F.C. 398 at 405 (F.C.T.D.).

[50] *Magnolia Ocean Shipping Corp.* v. *The "Soledad Maria"*, [1982] 1 F.C. 205 at 208 (F.C.T.D.).

in comparison with an *in personam* action accompanied by *Mareva* relief, once a crucial distinction, has narrowed in recent years, particularly in jurisdictions with liberal rules governing service *ex juris*.[51] This is so in Canada and England due to the recent development of the jurisdiction to award *Mareva* relief in aid of foreign proceedings, which enables courts to order *in personam* pre-judgment relief against persons outside the territorial jurisdiction of the court with respect to assets (including ships or cargo) within (and in some cases outside) the court's territorial jurisdiction.[52]

So far as pre-judgment remedies are concerned, it may once have been appropriate to distinguish maritime cases as a class from non-maritime cases.[53] Before the modern era, ships were more mobile than any other form of transportation, and generally speaking, were more likely to involve domestic courts in disputes with international elements, particularly those involving nonresident defendants, than would non-maritime cases as a class.[54] Neither proposition carries the same force any longer. Non-maritime assets now traverse jurisdictional boundaries more quickly than any ship ever could. Modern non-maritime commercial disputes are commonly transnational in nature, perhaps to the same degree as maritime cases. Given that maritime cases are no longer distinct from non-maritime cases by either measure, why should the pre-judgment procedures available to plaintiffs continue to differ so radically between the two classes?[55]

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[51] Also, the court may stay its proceedings even where it has jurisdiction over an action *in rem*. See *Atlantic Lines & Navigation* v. *The "Didymi"*, [1985] 1 F.C. 240 (F.C.T.D.), rev'd on other grounds, [1988] 1 F.C. 3 (Fed.C.A.); *The Vasso*, [1984] Q.B. 277, [1984] 1 Lloyd's Rep. 236 (C.A.).

[52] Overruling the restrictive view taken in *Siskina (Owners of Cargo Lately on Board)* v. *Distos Compania Naviera S.A., The Siskina*, [1978] 1 Lloyd's Rep. 1 (H.L.). See P. Michell, "The *Mareva* Injunction in Aid of Foreign Proceedings" (1996) 34 Osgoode Hall L.J. 741.

[53] Ironically, perhaps, early English admiralty jurisdiction was not always limited to maritime cases, but included commercial cases which did not necessarily have a maritime dimension. However, over time, incursions by statute and competition from the common law courts restricted the scope of admiralty jurisdiction. See F.K. Beutel, "The Development of Negotiable Instruments in Early English Law" (1938) 51 Harv. L. Rev. 813 at 834-37; T.F.T. Plucknett, *A Concise History of the Common Law*, 5th ed. (London, 1956) at 197-98, 661-64.

[54] *The St. Elefterio*, [1957] P. 179 at 186-87; *Atlantic Lines & Navigation* v. *The "Didymi"*, [1985] 1 F.C. 240 at 251 (F.C.T.D.) ("The whole development of *in rem* proceedings in admiralty flowed from the necessity of allowing a plaintiff to proceed against the defendant in the courts of the place where an award could be satisfied (because the *res* was there). Thus such suits were allowed regardless of whether there was any other connection between the place of suit and the claim being made."), rev'd on other grounds, [1988] 1 F.C. 3 (Fed.C.A.). See also *Canadian Imperial Bank of Commerce (CIBC)* v. *Ocean Harvest (The)*, [1984] F.C.J. No. 444 (Tax. Off.) ("The historical basis [for maritime arrest] was to guard against the only asset, capable of answering a just claim, departing the court's jurisdiction. The modern *Mareva* injunction is a somewhat kindred process.").

[55] G. Rutherglen, "The Federal Rules for Admiralty and Maritime Cases: A Verdict of Quiescent Years" (1996) 27 J. Mar. L. & Com. 581; G. Rutherglen, "The Contemporary Justification for Maritime Arrest and Attachment" (1989) 30 Wm. & Mary L. Rev. 541.

The availability of damages for wrongful arrest may arise only infrequently in practice. Once a ship or cargo has been arrested, the owner will almost invariably move quickly to enter an appearance to defend the proceedings on the merits, and post security in order to obtain the release of the *res*.[56] The alternative is to allow the action *in rem* to continue undefended, with the risk that the ship or cargo will be condemned for judicial sale. In posting security for the release of the ship or cargo, the owner is considered to have submitted to the jurisdiction of the arresting court. The action *in rem* will also continue *in personam*, and any damages occasioned by the arrest of the ship will cease to accrue. Nevertheless, an important question of principle is at stake, and as a practical matter, the issue may arise in cases in which the ship- or cargo-owner does not have the means to post security to obtain the release of the *res*, so that damages accrue until judgment.[57]

If damages could be awarded for wrongful arrest of a ship or cargo without the requirement of demonstrated fault or gross negligence, would plaintiffs be discouraged from bringing *bona fide* actions *in rem*?[58] The observation contains a grain of truth, as strict liability for wrongful arrest would provide a disincentive to initiate the arrest procedure. However, it misses the point that courts must balance the interests of plaintiffs against those of defendants, not simply maximize the opportunities for plaintiffs to bring claims. Although a defendant can minimize the damage stemming from an arrest by agreeing to post security, there should be no requirement that it do so. Indeed, posting security only reduces the quantum of damage suffered.

In any event, it should not be forgotten that in recognition of the need to enable plaintiffs to prevent ships from leaving the jurisdiction, the dice are already loaded in favour of applicants for maritime arrest. Plaintiffs seeking to arrest a ship or cargo need not, for example, satisfy the relatively strict requirements necessary to obtain a *Mareva* injunction, including: full and frank disclosure of all material matters; particulars of the underlying claim; grounds

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[56] As Dr. Lushington recognized in *The Volant* (1864), 167 E.R. 385 at 386. Posting a bond to secure the release of a ship or cargo amounts to submission to the court's jurisdiction: *Antares Shipping* v. *The Ship "Capricorn"*, [1977] 2 S.C.R. 422. The *in rem* action then becomes an action *in personam*, with the advantage to the plaintiff that the defendant's liability is no longer limited to the value of the *res* or the amount of security posted: *The "A.L. Smith" and "Chinook"* v. *Ontario Gravel Freighting Co.* (1915), 51 S.C.R. 39 at 56; *The Dunbar and Sullivan Dredging Co.* v. *The Ship "Milwaukee"* (1907), 11 Ex.C.R. 179 (Tor.Ad.Dist.). See also *The August 8*, [1983] 2 A.C. 450 at 456 (P.C.) (owner who enters an appearance in the action *in rem* is deemed to have submitted to the court's jurisdiction, so the action continues both *in rem* and *in personam*); *Republic of India* v. *India Steamship Co. Ltd. (No. 2)*, [1997] 3 W.L.R. 818 at 824-25 (H.L.(E.)); *The Gemma*, [1899] P. 285 at 291-291 (C.A.); *Key Marine Industries* v. *Ship Glen Coe* (1995), 92 F.T.R. 313 at 315-17 (F.C.T.D.). But see *Skagway Terminal Co.* v. *"Daphne" (The)* (1987), 42 D.L.R. (4th) 200 (F.C.T.D.) (provision of undertaking as security for release of ship does not constitute attornment).

[57] *The Kommunar (No. 3)*, [1997] 1 Lloyd's Rep. 22 at 33 (Q.B. (Adm. Ct.)).

[58] E.g., *Henderson* v. *Three Hundred Tons of Iron Ore; Marvel* v. *The Scandinavia*, 38 F. 36 at 41 (S.D.N.Y. 1889).

for believing that there is a risk of the assets being removed; and provision of an undertaking in damages. To the contrary, for practical purposes, maritime arrest is available as of right.[59] Whether this should be so is not at issue here; the point is advanced solely to demonstrate that even if an undertaking in damages requirement were to be imposed in maritime arrest cases, and the threshold for liability lowered to the regular injunction standard, plaintiffs in maritime arrest cases would still retain considerable procedural advantages in comparison to their non-maritime counterparts.

Although the Supreme Court of Canada could not have been expected to revise Canadian maritime law entirely by a single judgment on a relatively narrow point, a decisive move away from *The Evangelismos* would have ironed out an incongruous wrinkle, and created considerable momentum to smooth out similar anomalies. In its celebrated decision in *Morguard Investments Ltd.* v. *De Savoye*,[60] the Supreme Court did not hesitate to revise nineteenth century rules concerning the recognition and enforcement of foreign judgments to bring them into the late twentieth century. In so doing, the Supreme Court explicitly took account of technological and political developments and the increasing internationalization of commerce.[61] It is unfortunate that the Supreme Court shrank from making a similarly decisive move in the context of maritime arrest, where comparable developments suggest that it is warranted.

A further objection that might be made to eliminating the rule in *The Evangelismos* is that it would place Canada out of line with other maritime states which retain the rule. Commentators often emphasize the importance of looking to the international sphere when considering maritime law, so as to ensure that domestic legal developments do not diverge too greatly from applicable norms in other maritime states.[62] Though it is plainly advisable to consider the international context when change is contemplated, Canadian courts should not be inhibited in refashioning common law admiralty rules where appropriate. Modifying the threshold for an action for the wrongful arrest of a ship or cargo would not undermine Canada's place among maritime nations. Such a change would lead plaintiffs to act more carefully when arresting ships or cargo in

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[59] *Kiku Fisheries Ltd.* v. *Canadian North Pacific Ocean Corp. ("The Limanskiy")*, [1997] F.C.J. No. 1291 at ¶¶ 43-49 (F.C.T.D.); *North Saskatchewan Riverboat Co.* v. *573475 Alberta Ltd.* (1995), 96 F.T.R. 166 at 169 (F.C.T.D.). See also *The "Tjaskemolen" (No. 2)*, [1997] 2 Lloyd's Rep. 476 at 479 (Q.B. (Adm. Ct.)); *The Varna*, [1993] 2 Lloyd's Rep. 253 (C.A.). The court does possess a discretionary power to release the vessel or cargo, however. So, for example, the court may discharge an arrest in the event of an abuse of process: *The Vasso*, [1984] 1 Lloyd's Rep. 235 (Q.B. (Adm. Ct.)).

[60] [1990] 3 S.C.R. 1077. See also *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897.

[61] *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077 at 1098; *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 911.

[62] J. Crawford, "The Australian Admiralty Act: Project and Practice" [1997] Lloyd's Mar. & Comm. L.Q. 519 at 523-25; Hon. Gérard V. La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) Can. Yrbk. Int'l L. 89 at 91.

Canada, but it is not clear that the repercussions of such a change would be any greater than that. Australia has changed its rule by statute, and the sky has not fallen there.

Arrest of a ship or cargo is a powerful weapon in a plaintiff's armoury.[63] As the law presently stands, it is a weapon which plaintiffs may invoke with little regard for the damage it may cause. Only rarely are plaintiffs held liable for damages under the strict threshold prescribed by *The Evangelismos*. Consequently, defendants bear almost all of the risk of the plaintiff's decision to initiate a maritime arrest.[64] It might be thought that even if it is conceded that having to show malice or gross negligence on the part of the plaintiff is too extreme a standard, the adoption of an "unreasonableness" standard would be a preferable middle ground.[65] On such an approach, damages would be available only where it was demonstrated that the arresting party had acted unreasonably. Yet an unreasonableness standard, though obviously lower than the current standard, would commit courts to an expensive and drawn-out inquiry into the plaintiff's motives in initiating the arrest. The undertaking in damages requirement, and the imposition of liability upon plaintiffs who are unsuccessful at trial, regardless of their motives or the reasonableness of their actions, represent a clearer rule and would achieve a more appropriate balance between the interests of plaintiffs and defendants in maritime cases.

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[63] A view recently confirmed in *Amican Navigation Inc.* v. *Densan Shipping Co.*, [1997] F.C.J. No. 1366 at ¶ 9 (F.C.T.D.); *Gleason* v. *Ship Dawn Light* (1997), 130 F.T.R. 284 at 288 (F.C.T.D.), aff'd [1998] F.C.J. No. 138 (Fed.C.A.). See also *The "Polo II"*, [1977] 2 Lloyd's Rep. 115 at 199 (Q.B. (Adm. Ct.)) ("the power to arrest a ship is a very drastic power.").

[64] *The Kommunar (No. 3)*, [1997] 1 Lloyd's Rep. 22 at 33 (Q.B. (Adm. Ct.)).

[65] As under the Australian Admiralty Act 1988, No. 34 of 1988, s. 34(1)(a)(ii).

Bad Faith—Contexts of Employment—*Wallace* v. *United Grain Growers Ltd.*

Shannon Kathleen O'Byrne*

I. *Introduction*

In *Wallace* v. *United Grain Growers Ltd.*[1] the Supreme Court of Canada was asked to remedy the alleged bad faith by an employer, both for the *fact* of dismissing the plaintiff and for its *manner* of effecting the dismissal. This marks the first time that Canada's highest court has had to decide whether an indeterminate employment contract contains an implied term not to dismiss an employee, absent a good faith reason to do so, as well as whether a harsh manner of dismissal falling short of the standard articulated in *Vorvis* v. *Insurance Corp. of British Columbia*,[2] can nonetheless found a cause of action in contract or in tort.

In order to contextualize the Supreme Court of Canada's reasoning in *Wallace*, there are two preliminary points to be made.

First, good faith as an implied default standard in contractual performance has been gathering momentum in Canada since the leading decision of *Gateway Realty Ltd.* v. *Arton Holdings Ltd.*[3] In *Gateway*, at issue was the conduct of

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[1] *Wallace* v. *United Grain Growers Ltd.* (1997), 152 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Wallace* (S.C.C.)].

[2] *Vorvis* v. *Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 [hereinafter *Vorvis*]. For discussion of *Vorvis*, see *infra*.

[3] (1991), 106 N.S.R. (2d) 180 (S.C.); aff'd (1992), 112 N.S.R. (2d) 180 (C.A.). For a general discussion of the doctrine of good faith in Canadian law, see, for example, S. O'Byrne "Good Faith in Contractual Performance: Recent Developments" (1995) 74 Can. Bar. Rev. 70; D. Clark "Some Recent Developments in the Canadian Law of Contracts" (1993) 14 Advocates' Q. 435; E. Belobaba, "Good Faith in Canadian Contract Law" in *Commercial Law: Recent Developments and Emerging Trends (Special Lectures of the Law Society of Upper Canada*, 1985) (Don Mills: De Boo, 1985) 73; and B. Reiter, "Good Faith in Contracts" (1983) 17 Val. Univ. L.R. 705. For a discussion of good faith in the context of employment law — a matter squarely at issue in *Wallace*, *supra* note 1 — see the articles cited by S. Ball in her annotation for *Dunning* v. *Royal Bank of Canada* (1996), 23 C.C.E.L. (2d) 71 (Ont. Ct.(Gen. Div.)). They are: the annotation for *Ditchburn* v. *Landis & Gyr Powers Ltd.* (1995), 16 C.C.E.L. (2d) 3, 96 C.L.L.C. 210-002 (Ont. Gen. Div.); S.R. Ball, *Canadian Employment Law* (Aurora: Canada Law Book, 1996), at 20:110.1; Note, "Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate in Good Faith" (1980) 93 Harvard L. Rev. 1816; G. England, "Recent Developments In The Law of The Employment Contract" (1995) 20 Queen's L.J. 557 at 589; R. Schai, "Aggravated Damages and the Employment Contract" (1991) 55 Sask. L. Rev. 345; and S.R. Ball "Bad Faith Discharge" (1994) 39 McGill L.J. 568.

Arton (the assignee of a lease) in refusing to sublet its 60,000 square foot vacant space in a shopping mall. Though the Landlord, Gateway Realty Ltd., brought several prospective subtenants to Arton's attention, none could meet Arton's exacting and probably strategically high standards. Indeed, since Arton also owned a mall in the vicinity, it may not have been overly motivated to assist its competitor in finding a replacement for the anchor tenant.

Cognisant that having a very large portion of its mall therefore left 'dark' would jeopardize the financial health of its mall, Gateway brought an action in contract for breach, *inter alia*, of an implied covenant of good faith and fair dealing owed by Arton. In short, Gateway argued that Arton had a contractual obligation to make *bona fide* efforts to put a sub-tenant in place though the lease itself made no such express demand. The court agreed, stating:

> The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contact. "Good faith" conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in "bad faith"—a conduct that is contrary to community standards of honesty, reasonableness or fairness.[4]

Gateway has since been followed by numerous Canadian courts,[5] though reference to it is curiously absent from *Wallace*.

Second, though common law Canada has historically shared the English common law's deeply-seated distrust of implied good faith obligations in contract, England's traditional suspicions of the doctrine[6] appear to be waning.

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[4] Gateway (S.C.), *ibid.* at 191-92. It should be noted that Arton had also covenanted with Gateway to use its "best efforts" in order to find a sub-tenant. The court found that its conduct was in breach of this express obligation as well as of its implied, generalized duty of good faith, at 212.

[5] See, for example, *Granitile Inc.* v. *Canada*, [1998] O.J. No. 5028 (Ont. Ct. Jus. (Gen. Div.)); *1163133 Ontario Ltd.* v. *Owen Sound (1997)*, 43 M.P.L.R. (2d) 139 (Ont. Ct. (Gen. Div.)); *Pacific Destination Properties Inc.* v. *Granville West Capital Corp.*, [1998] B.C.J. No. 139 (B.C.S.C.); *Ken Toby Ltd.* v. *British Columbia Buildings Corp.*, [1997] 8 W.W.R. 721 (B.C.S.C.); *Kubota Canada Ltd.* v. *Merchant Private Ltd. (1997)*, 11 R.P.R. (3d) 89 (Ont. Ct. (Gen. Div.)); *Health Care Developers Inc.* v. *Newfoundland* (1996), 136 D.L.R. (4th) 609 (Nfld. C.A.); *Twin City Mechanical* v. *Bradsil* (1996), 31 C.L.R. (2d) 210 (Ont. Ct. (Gen. Div.)); *Canada Deposit Insurance Corp.* v. *Canadian Commercial Bank*, [1998] A.J. No. 1306; *Opron Construction* v. *Alberta* (1994), 151 A.R. 241 (Q.B.); *Mesa Operating Ltd. Partnership* v. *Amoco Canada Resources Ltd.* (1992), 129 A.R. 177 (Q.B.) affirmed on other grounds (1994), 19 Alta. L.R. (3d) 38 (C.A.); *MDS Health Group Ltd.* v. *King Street Medical Arts Centre Ltd.* (1994), 12 B.L.R. (2d) 209 (Ont. Ct. (Gen. Div.)); and *McKenna's Express Ltd.* v. *Air Canada* (1992), 102 Nfld. & P.E.I.R. 185 (S.C.T.D.). For a more restricted definition of good faith, see *Crawford* v. *New Brunswick (1997)* 184 N.B.R. (2d) 342 (Q.B.T.D.), affirmed (1997) 192 N.B.R. (2d) 68 (C.A.) and cases cited therein.

[6] As Bingham L.J. observes, with respect to the doctrine of good faith, in *Interfoto Picture Library Ltd.* v. *Stiletto Visual Programmes Ltd. (1987)*, [1989] 1 Q.B. 433 (C.A.) at 439 [hereinafter "*Interfoto*"]: "English Law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."

Not only has good faith been acknowledged as the source for several other English law doctrines impacting on contracts,[7] it has also come to be regarded as being the default standard for parties to an employment contract[8] — one of the very matters at issue in *Wallace*. While this important development is discussed in more detail later in this note, it is sufficient to observe, for now, that the majority of the court in *Wallace* regards the implied covenant of good faith with more suspicion and reluctance than one currently finds even in the House of Lords.

The classic English reluctance to articulate a broad doctrine of good faith is in marked contrast to American jurisdictions which, for example, have adopted the American Uniform Commercial Code (U.C.C.) Section 1-203 of the U.C.C. provides: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Section 1-201(19) defines good faith in the following terms: "Honesty in fact in the conduct or transaction concerned." For a recent appellate decision regarding the implied covenant of good faith and fair dealing see *Racine & Laramie* v. *Dept. of Parks*, 14 Cal. Rptr. 2d 335 (Call. Ap. Dist. 1992). For a recent discussion of the good faith doctrine in American employment law jurisprudence, see Stacey Ball, "Bad Faith Discharge" *supra* note 3 at 581-89.

[7] See Lord Bingham's pronouncement in *Interfoto*, *ibid.* at 445B that the English approach to exemption clauses, for example, "may yield a result not very different from the civil law principle of good faith, at any rate so far as the formation of the contract is concerned." Furthermore, in Bingham L.J.'s view, at 439, while English law does not have a general doctrine of good faith, it has developed tangible solutions to deal with unfairness:

> Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways. The well known cases of sufficiency of notice are in my view properly to be read in this context. At one level they are concerned with a question of pure contractual analysis, whether one party has done enough to give the other notice of the incorporation of a term in the contract. At another level they are concerned with a somewhat different question, whether it would in all the circumstances be fair (or reasonable) to hold a party bound by any conditions or by a particular condition of an unusual and stringent nature.

This passage has recently been quoted with approval by Lord Justice Brooks, in a minority decision in *Laceys Footwear* v. *Bowler* (18 April 1997), NLC 297046102 (C.A.). According to Brooks L.J., at para. 103 "there is nothing particularly revolutionary about the principle [of good faith] identified by Bingham L.J., even if it would be imprudent for a common law judge to extend the application of the principle into previously uncharted waters without the utmost circumspection."

For discussion of how the doctrine of good faith finds play under a variety of other English law rubrics , see J.F. O'Connor, *Good Faith in English Law* (Aldershot: Dartmouth, 1990) at 17-49 and R. Harrison, *Good Faith in Sales* (London: Sweet & Maxwell, 1997), as well as the examples provided by Sir Johan Steyn (as he then was) in his 1991 Royal Bank of Scotland Lecture "The Role of Good Faith in Contract Law: A Hairshirt Philosophy?" See too R. Brownsword, "Two Concepts of Good Faith" (1994) 7 Journal of Contract Law 197 and R. Brownsword "'Good Faith in Contracts'" Revisited" (1996) 49 Current Legal Problems 111. For an analysis of the role of good faith in British law as a result of Britain's membership in the European Union, see G. Teubner. "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences" (1998) 61 M.L.R. 11.

[8] As will be discussed in greater depth later in the paper, the House of Lords has recently held that the following covenant is present in all employment contracts absent a term to the contrary: the employer shall not "without reasonable and proper cause, conduct

II. *The Wallace decision*

In 1972, the respondent United Grain Growers Ltd. (hereinafter "UGG") hired Wallace as a salesman, having assured him that if he performed as expected, he would be entitled to maintain his employment with UGG until retirement. For his part, Wallace proved to be an outstanding employee, earning the position of top salesperson for each year from 1972 to 1986 at which point he was summarily dismissed. When the reason ultimately given for the dismissal by UGG was unsatisfactory performance, Wallace commenced an action for wrongful dismissal which claim UGG resisted. In fact UGG maintained for over two years that Wallace had been dismissed for cause, withdrawing its allegation only upon commencement of the trial on December 12, 1988. During this time, Wallace suffered emotional difficulties and sought psychiatric assistance because of the distress his former employer's allegations caused him. He was largely unsuccessful in his attempts to find new employment.[9]

Wallace sued, seeking, *inter alia*: (1) damages in contract or tort for the *fact* of the dismissal, that is for "bad faith discharge" by the employer; (2) contractual damages, including punitive damages, for mental distress as well as for loss of reputation and prestige, for the bad faith *manner* of the dismissal; and (3) damages in negligence, including punitive damages or, alternatively, aggravated damages for wilful or negligent infliction of harassment and oppression. Because this note focuses on the judicial treatment of contractual good faith, it does not analyze the third claim in any depth nor does it discuss the bankruptcy point which also required judicial determination.

As the following analysis discusses, Justice Iacobucci (writing for the majority) ruled that the first claim could not be sustained because it would constitute an enormous departure from the common law proposition that indeterminate contracts of employment can be ended by either party on notice.[10] Damages for an abusive *manner* of dismissal are recoverable, however, but only by extending the period of notice[11] — an approach strongly challenged in the judgment of McLachlin J., La Forest and L'Heureux-Dubé JJ., concurring, dissenting in part.[12] Justice Iacobucci declined to find a tort of bad faith discharge, noting that such a radical shift is better left to the legislatures.[13] In the end, Iacobucci J. restored the trial judge's award of 24 month's salary in lieu of notice[14] though for different reasons.

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itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee." See *Malik* v. *BCCI SA*, [1997] 3 All E.R. 1 at 15 per Lord Steyn, quoting with approval Brown-Wilkinson J. in *Woods* v. *WM Car Services (Peterborough) Ltd.*, [1981] ICR 666 at 670.

[9] *Wallace* (S.C.C.), *supra* note 1 at 8-9.

[10] *Ibid.* at 27-28.

[11] *Ibid.* at 33.

[12] *Ibid.* at 40 and following.

[13] *Ibid.* at 28.

[14] *Ibid.* at 38.

A. *Action in contract or tort for "bad faith" discharge: damages for the fact of dismissal*

Counsel for Wallace argued that his client had been fired in bad faith which sounded in both contract and in tort. That is, the employer's conduct amounted to breach of an implied term of "fair treatment"[15] that he would not be fired "except for cause or legitimate business reasons."[16] As well, a tort had been committed because the employer's "callous and insensitive treatment"[17] created "a reasonable risk of mental suffering."[18]

It should be noted that the exact articulation of these claims varies among the three judgments. At trial, Mr. Justice Lockwood found that "there was, in the assurance given to ...[Wallace], a guarantee of security, provided he gave the defendant no cause to dismiss him."[19] Though it is by no means certain, it appears that this same matter is regarded by the Court of Appeal as breach of an alleged term of fair treatment and by the Supreme Court of Canada as breach of an alleged term requiring "good faith" reasons for dismissal.[20]

1. *Trial level*

As alluded to above, and based on the circumstances surrounding Wallace's hiring — including assurances by the employer that his position would be secure until retirement — the trial judge determined that Wallace had been given a guarantee of job security. That he was nonetheless dismissed without cause or warning was therefore a breach of an implied term of the contract of employment.[21]

In order to assess damages for the breach of term, Mr. Justice Lockwood then looked to *Vorvis* v. *Insurance Corp. of British Columbia*.[22] In *Vorvis*, the Supreme Court of Canada, through Justice McIntyre confirmed that the principle established in the English decision of *Addis* v. *Gramophone Co.*[23] — as applied in *Peso Silver Mines Ltd.* v. *Cropper*[24] — remains the law. It will be recalled that, according to *Addis*, as either party to an indeterminate employment contract can terminate on reasonable notice, therefore "the only damage which could arise would result from a failure to give such notice."[25] The Court in

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[15] See *Wallace* v. *United Grain Growers Ltd.* (1995) 14 C.C.E.L. (2d) 41 at 74 (Man. C.A.) [hereinafter *Wallace* (C.A.)].

[16] See *Wallace* (S.C.C.), *supra* note 1 at 27.

[17] See *Wallace* (C.A.), *supra* note 15 at 74.

[18] As summarized by the Court of Appeal, *ibid.*

[19] See *Wallace* v. *United Grain Growers Ltd.*, [1993] 7 W.W.R. 525 at 540 (Man. Q.B.) [hereinafter *Wallace* (Q.B.)].

[20] *Wallace* (S.C.C.), *supra* note 1 at 28.

[21] *Wallace* (Q.B.), *supra* note 19 at 540.

[22] *Supra* note 2.

[23] *Addis* v. *Gramophone Co.*, [1909] A.C. 488 (H.L.).

[24] [1966] S.C.R. 673.

Vorvis did add, however, that further damages could be recoverable provided the plaintiff were able to show the existence of a "separate, actionable wrong."[26] Traditionally, this opening for additional damages is not particularly wide since the *fact* of termination would not count as a separate, legal wrong and second, any mental distress present on the facts would have to have been caused by the employer's failure to give requisite notice or pay in lieu.[27]

Justice Lockwood decided that it was in the reasonable contemplation of the parties that any dismissal without cause and without notice would give rise to mental distress[28] and accordingly, the test in *Vorvis* had been met. That is: (1) there was a breach of a contractual term which constituted a separate, actionable wrong and; (2) the resulting mental distress would have been in the reasonable contemplation of the parties. Justice Lockwood therefore awarded $15,000 in aggravated damages under this head.[29]

The trial judge did not consider the tort claim for reasons which cannot be determined from the judgment.

2. *Appellate level*

The Court of Appeal dealt with the contractual claim for bad faith dismissal in a particularly attenuated way. Chief Justice Scott simply rejected counsel's submission that the guarantee of job security found by the trial judge amounted to "a contract for a fixed term to the age of retirement."[30] Scott C.J.M. states: "in fact, no such finding was made by the trial judge."[31] Furthermore,

> the trial judge's conclusion that fair treatment was an implied term of the contract of employment cannot stand. Conduct that is not independently actionable in accordance with the test in *Vorvis* cannot be converted into one by simply calling it an implied term....[32]

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[25] *Ibid.* at 204-205.

[26] *Ibid.*

[27] See *ibid.* and I. Christie, G. England *et al*, *Employment Law in Canada,* 2d ed (Toronto: Butterworths, 1993) at 747. Christie notes that, doctrinally, this causation view is correct since "only those losses which flow from the breach are compensable and, in wrongful dismissal, the breach consists of the failure to give notice" at 747. Christie also notes that subsequent cases have awarded aggravated damages to those plaintiffs able to show that their mental distress was caused by many factors with the improper notice being at least one of them. According to Christie, "the failure to give due notice 'triggers' the other contributing factors and renders them compensable" at 748. Aggravated damages can them be used as a way of compensating the plaintiff. For a definition of aggravated damages, see K. Cooper-Stephenson and I. Saunders *Personal Injury Damages in Canada,* 2d ed. (Toronto: Carswell, 1996) at 94-97. The purpose of aggravated damages is to "soothe a plaintiff whose feelings have been wounded by the quality of the defendant's misbehavior," quoted in Christie at 748.

[28] *Wallace* (Q.B.), *supra* note 19 at 540.

[29] *Ibid.* at 550.

[30] See *Wallace* (C.A.), *supra* note 15 at 66.

[31] *Ibid.*

[32] *Ibid.* at 74.

With respect, this statement is a bare assertion which does not justify the conclusion it offers. Indeed, it appears that the only reason why the appellate judge overrules Justice Lockwood is that he believes the finding of an implied term is an illicit attempt to avoid the implications of *Vorvis*. But another way of regarding the matter is that if there is an implied term of fair treatment on the facts, and this term has been breached, then *Vorvis* has legitimate and mandatory application.

As to the claim in tort, the Court of Appeal correctly observed that no persuasive authority was provided for the existence of such a tort and so declined to find one.[33]

3. *Supreme Court of Canada*

Both the majority and dissenting judgments agreed that the employer owes no obligation of good faith in the *reason* for dismissal in an indeterminate contract of employment. According to Iacobucci J., for example: "[a] requirement of 'good faith' reasons for dismissal" would violate the long standing common law proposition that indefinite contracts can be determined on notice for no reason at all.[34] To impose, additionally, a good faith reason for dismissal "would deprive employers of the ability to determine the composition of their workforce" as well as "be over intrusive and inconsistent with established principles of employment law."[35] McLachlin J. articulated similar reasons against the presence of such a term.[36]

The court's conclusions on this point are entirely defensible as general propositions of law for several reasons. First, if an indeterminate contract can be ended for no reason at all, then presumably it can also be ended for questionable reasons which fall short of producing an independently actionable wrong. Second, even if employers were required to have a *bona fide* reason for dismissal, the measure of damages would have to be the same as if the only complaint were mere lack of notice. Again, this is because all indeterminate employment contracts can be terminated on notice or with pay in lieu thereof. This reality has to render moot the distinction between good faith and bad faith discharge. Third, employees already have the benefit of a good faith term regarding dismissal in the guise of the right to notice or pay in lieu thereof. In short, to superadd another level of good faith would result in the collapse of an important distinction between indeterminate and fixed term contracts.

As to the tort claim, the Supreme Court also declined to a find a tort of bad faith discharge.[37] According to Justice Iacobucci:

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[33] *Ibid.*

[34] *Wallace* (S.C.C.), *supra* note 1 at 28.

[35] *Ibid.*

[36] *Ibid.* at 39.

[37] *Ibid.* at 28.

> The Court of Appeal noted the absence of persuasive authority on this point and concluded that such a tort has not yet been recognized by Canadian courts. I agree with these findings. To create such a tort in this case would therefore constitute a radical shift in the law, again a step better left to be taken by the legislatures.
>
> For these reasons I conclude that the appellant is unable to sue in either tort or contract for "bad faith discharge.[38]

In short, the court refused to find that the *fact* of the firing was actionable.

B. *Action in contract for "bad faith" in the manner of dismissal*

As noted earlier, it was alleged by Wallace that his employment contract contained an implied term of fair treatment.[39] While it appears that this kind of allegation was used to bolster the argument that the employer could only fire the plaintiff if it had good faith reasons for doing so, it is also used to impeach the manner in which the plaintiff was fired.

a. *Trial level*

The trial judge agreed that the manner of Wallace's firing was a breach of an implied term of fair treatment which he treats concurrently with his analysis of the employer's alleged breach of a term not to dismiss Wallace absent cause. In short, since this breach constitutes a separately actionable wrong and since mental distress as a consequence was in the parties' reasonable contemplation, damages would lie.[40]

b. *Appellate level*

Counsel for Wallace argued that the findings of the trial judge, discussed above, "establish the existence of a unique contractual arrangement which included a host of 'umbrella' rights such as entitlement to fair, decent and honest treatment, and the right not to be dismissed without real cause being present."[41]

Chief Justice Scott dismissed this argument — as well as the case cited to support it — in short order and with an analysis identical to his treatment of a term based on breach of an implied term not to dismiss without legitimate business reasons present. In short, he insisted on the application of *Vorvis* and noted that harassing treatment is not enough. An independently actionable wrong must also be shown.[42] But by overruling the trial judge's finding of an implied contractual term restricting the manner of dismissal, the Court of Appeal ensured that Wallace's argument on this point would disintegrate.

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[38] *Ibid.*

[39] *Wallace* (Q.B.), *supra* note 19 at 540, as summarized by the Court of Appeal, *supra* note 15 at 74.

[40] For analysis of this point, see *infra*.

[41] See *Wallace* (C.A.), *supra* note 15 at 66.

[42] *Ibid.* at 73.

According to Chief Justice Scott, the trial judge erred in finding that there was a "separate actionable wrong" giving rise to damages for mental distress and for the same reason quoted earlier in this paper. That is, according to Scott C.J.M.:

> Conduct that is not independently actionable in accordance with the test in *Vorvis* cannot be converted into one by simply calling it an implied term of the contract reasoning that the parties must have contemplated some mental distress if the employee was dismissed in circumstances which, while not independently actionable, were nonetheless harsh.[43]

Though Justice Scott's strict interpretation of *Addis* and *Vorvis* is persuasively criticized in an annotation preceding the decision,[44] his Lordship's summation of these cases — with one important proviso — was affirmed by the majority on appeal to the Supreme Court of Canada.

c. *The Supreme Court of Canada*

(1) the majority decision of Iacobucci J. (Lamer C.J.C., Sopinka, Gonthier, Cory and Major JJ concurring)

Justice Iacobucci confirmed the Court of Appeal's ruling that *Vorvis* continues to state the law and further, he declined to interfere with that court's finding that no separate, actionable wrong had taken place.[45] The fact that mental distress is foreseeable or that its occurrence is contemplated does not, on its own, he said, generate an implied contractual term not to dismiss unless the plaintiff gave cause. Accordingly, no recovery for mental distress can be available though, according to his Lordship, certain cases will allow for a measure of recovery by a lengthening of the reasonable notice period.[46] But as argued earlier, foreseeability of mental distress was not the foundation for Wallace's argument — rather it was that the circumstances surrounding the contract justified a finding of an implied fairness term.

The majority decision also confirmed that the factors identified by courts as relevant to measuring the notice period in any particular case are not exhaustive. As McRuer C.J.H.C. in *Bardal* v. *Globe & Mail Ltd.* asserted:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant, and the availability of similar employment, having regard to the experience, training and qualifications of the servant.[47]

The majority in *Wallace* was therefore prepared to add bad faith conduct by the employer, in the manner of discharge, to the list of factors impacting on the

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[43] *Ibid.* at 74-75.

[44] See the editorial board's annotation at *supra* note 15 at 43-48.

[45] See *Wallace* (S.C.C.), *supra* note 1 at 27.

[46] *Ibid.*

[47] (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.), at 145, quoted with approval in *Wallace* (S.C.C.,) *ibid.* at 29.

relevant notice period. After noting that the obligation of good faith and fair dealing defies precise definition, his Lordship concluded:

> at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.[48]

This, says Iacobucci J. is "the obligation of good faith and fair dealing."[49]

It is curious that his Lordship does not simply classify this good faith obligation as an implied term the breach of which sounds in damages. Put another way, it is awkward to place violation of this obligation along side these traditional factors impacting on the notice period such as age of employee, length of service, and availability of similar employment. This is because traditional factors point to factual qualities which have the *direct* and predictable effect of either lengthening or shortening the notice period and are therefore relevant to an assessment of damages for breach of the covenant to give notice.

Even Justice Iacobucci acknowledges that *how* an employee is dismissed does not always impact on the time it takes an employee to find replacement work[50] yet he does not appear to detect any inconsistency in his own position on the damages point. Instead, he seeks to support his conclusion by relying on two lines of authority. The first is represented by cases such as *MacDonald* v. *Royal Canadian Legion*,[51] *Dunning* v. *Royal Bank*[52] and *Hudson* v. *Giant Yellowknife Mines Ltd.*[53] In these cases, the judge extended the notice period because the employer's manner of dismissal was objectionable though this manner did not, on the facts, contribute in any way to lengthening the time it would take to find replacement employment nor did it constitute a separate, actionable tort. As such, they are contrary to *Vorvis* and wrongly decided. The second line of authority relied upon by Justice Iacobucci contains cases which are correctly decided but do not support Iacobucci J.'s new proposition of law. In cases such as *Trask* v. *Terra Nova Motors Ltd.*[54] and *Deildal* v. *Tod Mountain Development Ltd.*[55] for example, it was found that the manner of dismissal did make it more difficult for the plaintiff to find replacement work and that an extension of the reasonable notice period was therefore an appropriate remedy.[56]

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[48] *Wallace* (S.C.C.), *supra* note 1 at 34.

[49] *Ibid.*

[50] *Ibid.* at 36.

[51] (1995), 12 C.C.E.L. (2d) 211 (N.S.S.C.).

[52] (1996), 23 C.C.E.L (2d) 71 (Ont. Ct.(Gen.Div.)).

[53] (1992), 44 C.C.E.L. 109 (N.W.T.S.C).

[54] (1995), 9 C.C.E.L.(2d) 157.

[55] [1997] 6 W.W.R. 239 (B.C.C.A.), leave to appeal to S.C.C. refused [1997] S.C.C.A. No. 338.

[56] In *Trask, supra* note 54, the plaintiff was dismissed for theft which allegation was false, as found by the trial judge. Additionally, the employer informed other prospective employers that this had been the ground of dismissal. In *Deildal, supra* note 55, the employer wrongfully told others that the plaintiff was terminated because he was both incompetent and a thief.

Indeed, the Court of Appeal in *Wallace* quite properly accounted for *Trask* in the following terms: the manner of dismissal could only be considered as going to the period of reasonable notice where "it impacts on the future employment prospects of the dismissed employee."[57] This is a correct statement of law in light of *Vorvis*.

Notwithstanding, Justice Iacobucci criticized this judicial summary of *Trask* as being overly strict. According to his Lordship:

> Often the intangible injuries caused by bad faith conduct or unfair dealing on dismissal will lead to difficulties in finding alternative employment, a tangible loss which the Court of Appeal rightly recognized as warranting an addition to the notice period. It is likely that the more unfair or in bad faith the manner of dismissal is the more this will have an effect on the ability of the dismissed employee to find new employment. **However, in my view the intangible injuries are sufficient to merit compensation in and of themselves. I recognize that bad faith conduct which affects employment prospects may be worthy of considerably more compensation than that which does not, but in both cases damage has resulted that should be compensable.**[58]

On this basis, he restored the trial judge's award of 24 month's salary in lieu of notice.[59]

While Iacobucci J.'s desire to compensate the plaintiff is consistent with increasing judicial recognition that labour is not a commodity,[60] that work is essential to one's self worth and emotional well being,[61] and that the manner in which employment is terminated is also of fundamental importance,[62] his analysis is problematic.[63] Matters as basic as whether the manner of dismissal sounds in contract, tort or both elude confirmation. Even Justice McLachlin is forced to conclude that the majority's approach fails to honour "the principle that damages must be grounded in a cause of action."[64]

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[57] *Wallace* (C.A.), *supra* note 15 at 68.

[58] *Wallace* (S.C.C.), *supra* note 1 at 36, [emphasis added].

[59] *Ibid.* at 38.

[60] *Slaight Communications Inc.* v. *Davidson* (1989), 26 C.C.E.L. 85 (S.C.C.) at 103-04. See too "Labour is Not a Commodity" in Reiter and Swan, eds. *Studies in Contract Law* (Toronto: Butterworths, 1980) as well as other academic commentary cited *supra* note 3. Finally, see Margaret Jane Radin "Market-Inalienability" (1987) 100 Harvard L.R. 1849 at 1918 where the author states:

> for many of us, work is not only the way we make our living, but also a part of ourselves. What we hope to derive from our work, and the personal importance we attach to it, are not understandable entirely in money terms, even though we demand and accept money. These ideals about work seem to be part of our conception of human flourishing, and thus the loss of this personal aspect of work would be considered inhumane [footnotes omitted].

[61] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 368.

[62] *Machtinger* v. *HOJ Industries Ltd.* (1992), 40 C.C.E.L. 1 at 7 (S.C.C).

[63] I am grateful for insights by Professors C.R.B. Dunlop and David Percy, Faculty of Law, University of Alberta for their comments on this portion of the paper.

[64] *Wallace* (S.C.C.), *supra* note 1 at 40.

Since Justice Iacobucci is ultimately adding to the length of the notice period as a means of addressing the employer's abusive conduct, one is driven to conclude, albeit speculatively, that the cause of action he has to have in mind is contractual. As Madam Justice McLachlin states:

> To assert the duty of good faith in dismissing employees as a proposition of law, as does my colleague [Mr. Justice Iacobucci] is tantamount to saying that it is an obligation implied by law into the contractual relationship between employer and employee. It other words, it is an implied term of the contract.[65]

This, in turn, pin-points one of the more serious missteps in his Lordship's judgment. It would seem that Justice Iacobucci is determined to compensate Wallace for his employer's outrageous and reprehensible conduct — the kind of conduct which leads judges to award aggravated or punitive damages in the first place — while simultaneously denying that Wallace's employer had a contractual obligation to treat Wallace with due regard in the manner of dismissal. Yet in the same breath, his Lordship compensates Wallace with the contractual remedy of lengthening the notice period. The approach is both inconsistent and circular.

Furthermore, Justice Iacobucci's methodology is inconsistent with the principles of causation and the assessment of damages. This is because he is taking the position that the notice period can be extended by a judge even where there is no connection between what the employer has done — firing the employee abusively — and how long it takes the employee to find a new job. As Madam Justice McLachlin states:

> the action for wrongful dismissal is an action for breach of an implied term in the contract of employment to give reasonable notice of termination. Reasonable notice, in turn, represents the time that may reasonably be required to find replacement employment. It follows that only factors relevant to the prospects of re-employment should be considered in determining the notice period. To include other factors is to consider matters unrelated to the breach of contract for which damages are ostensibly being awarded.[66]

Concomitantly, this lack of connection also leads to a problematic result for the plaintiff who immediately finds equivalent re-employment: such a plaintiff has successfully mitigated and therefore would be entitled to no damages even though Iacobucci J. himself agrees that bad faith and unfair dealing in the manner of dismissal "merit compensation in and of themselves."[67] To reiterate: it would have been much more consistent with contract law principles to have treated the employer's harsh and unfair conduct as a breach of an implied term of good faith and awarded damages on that basis.

This is precisely how the Justices who dissent in part handle the matter.

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[65] *Ibid.* at 45.

[66] *Ibid.* at 40.

[67] *Ibid.* at 36.

(2) the decision of McLachlin J. (La Forest and L'Heureux-Dubé JJ. concurring, dissenting in part)

For the reasons given above, McLachlin J. quite rightly objected to the shaky legal foundation supporting Iacobucci J.'s ruling to extend the notice period for employer misconduct. Instead, she took the more direct, conceptually sound, and timely step of determining that "the law has evolved to the point of recognition of an implied contractual obligation of good faith in the contract of employment to treat the employee with good faith in dismissing him or her."[68] She agreed with the trial judge that the defendant had acted in bad faith on two occasions: first, by terminating Wallace abruptly and second, in its decision to

> play hardball with Mr. Wallace by maintaining completely unfounded allegations of just cause up until the start of the trial which resulted in Mr. Wallace being essentially ostracized from the printing business. UGG thus breached the implied term of good faith and fair dealing by acting as it did at the time of dismissal.[69]

Her Ladyship went on to determine that damages for mental distress and loss of reputation were recoverable as flowing directly from UGG's breach of the implied term. Therefore, she would have upheld the trial judge's award of $15,000 as compensation for that breach.[70]

Clearly, Justice McLachlin's decision mandates a good faith duty in the method of terminating *all* indeterminate employment, absent a term to the contrary. It therefore goes much further than the obligation of fair treatment which the trial judge found to exist on the specific facts of the *Wallace* case.

Justice McLachlin's analysis far outstrips the majority decision in *Wallace* for lucidity and this for several reasons. First, it accords with and builds upon earlier pronouncements by the Supreme Court of Canada concerning the nature of the employment contract and in particular, the employee's vulnerability. See, for example, the Supreme Court of Canada's statement in *Machtinger* v. *HOJ Industries Ltd.*[71] that work is fundamental to an individual's identity and that

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[68] *Ibid.* at 48. For a similar approach see *Truong* v. *British Columbia* (1997), 32 C.C.E.L. (2d) 291 (B.C.S.C.) wherein the court quotes Braidwood J.A., in *Deildal* v. *Tod Mountain Ltd.*, *supra* note 55. In this latter decision, that court postulated that an employment contract contains an implied term that the parties would act reasonably in the event of termination, at 259:

> The contract under consideration here is not a simple commercial exchange in the marketplace of goods and services. A contract of employment is typically of longer term and more personal in nature than most contracts, and involves greater mutual dependence and trust, with a correspondingly greater opportunity for harm or abuse. It is quite logical to imply that the parties to such a contract would, if they turned their minds to the issue, mutually agree that they would take reasonable steps to protect each other from such harm, or at least would not deliberately and maliciously avail themselves of an opportunity to cause it.

[69] *Wallace* (S.C.C.), *supra* note 1 at 49.

[70] *Ibid.*

[71] [1992] 1 S.C.R. 986; 40 C.C.E.L. 1.

how employment can be terminated is also "fundamentally important."[72] Second, it is consistent with cases which have found a covenant of good faith and fair dealing to be the default standard in other types of commercial contracts.[73] Third, it complements the Supreme Court of Canada's ruling that all civil law contracts contain an implied term of good faith.[74] Fourth, and from the most elementary perspective, it is defensible for coinciding with the basic contract law principle that remedies do not exist in the air but must be tied to breach of an identified right or entitlement. Fifth, it links the contractual breach to its reasonably foreseeable consequences and extracts compensation from the defendant on that basis alone. Six, and finally, the approach presciently coincides with a strong analysis of the employment contract offered by the House of Lords in *Malik* which, while obviously not a binding source of law, has always been considered a valued one.

Indeed, the House of Lords has recently come down with a decision which goes even further than does McLachlin J.'s analysis in *Wallace*. In *Malik* v. *Bank of Credit and Commercial International SA*[75] — rendered just a few weeks after the Supreme Court heard argument in Wallace[76] — the court confirmed that the English common law now imposes an obligation that the employer shall not "without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"[77] which term "is apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."[78] Accordingly, the limits on recovery postulated in *Addis* v. *Gramophone co. Ltd.*[79] are overruled. The implied term of trust and confidence is the default standard in every employment contract; damages for its breach are simply calculated according to ordinary contract principles.[80] As Lord Steyn, in the majority judgment, expresses the matter:

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[72] *Ibid.* at 17 (cited to C.C.E.L.).

[73] See McLachlin's examples in *Wallace* (S.C.C.), *supra* note 1 at 48.

[74] *Houle* v. *Canadian National Bank*, [1990] 3 S.C.R. 122.

[75] *Supra* note 8.

[76] The judgment in *Malik, ibid.* came down on June 12, 1997; *Wallace* (S.C.C.), *supra* note 1, was heard on May 22, 1997.

[77] To reach this conclusion, Lord Steyn (writing for the majority in *Malik, ibid.*) referred, at 15, *inter alia*, to *Woods* v. *WM Car Services (Peterborough) Ltd.*, [1981] ICR 666 at 670.

[78] *Malik, ibid.* at 15-16.

[79] *Supra* note 23.

[80] *Supra* note 8 at 9. This is reminiscent of the approach taken by Mr. Justice Sanderman in *Lloyd* v. *Imperial Parking Ltd.*, [1997] 3 W.W.R. 697 at 709 that:

> A fundamental implied term of any employment relationship that the employer will treat the employee with civility, decency, respect and dignity....This appears to be part of the trend to establish a duty upon an employer to treat employees 'reasonably' in all aspects of the labour process.

> The evolution of the implied term of trust and confidence is a fact. It has not yet been indorsed by your Lordships' House. It has proved a workable principle in practice. It has not been the subject of adverse criticism in any decided cases and it has been welcomed in academic writings. I regard the emergence of the implied obligation of mutual trust and confidence as a sound development.[81]

It is significant to a discussion of *Wallace* that the implied obligation of mutual trust and confidence has been identified by Lord Steyn — in a lecture given prior to his judicial elevation — as being an example of how a covenant of good faith and fair dealing has found its way in the English common law, despite protestations to the contrary.[82] Indeed, and as Lord Steyn observed in this lecture, the correlation between good faith on the one hand, and mutual trust and confidence, on the other was recognized in the 1990 Chancery decision of *Imperial Group Pension Trust Ltd.* v. *Imperial Tobacco Ltd.*[83] According to Sir Nicolas Browne-Wilkinson in *Imperial:*

> In every contract of employment there is an implied term —
>
> > 'that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee...'
> >
> > (see *Woods* v. *WM Car Services (Peterborough) Ltd.*, [1981] I.C.R. 666 at 670, approved by the Court of Appeal in *Lewis* v. *Motorworld Garages Ltd.*, [1986] I.C.R. 157.) **I will call this implied term 'the implied obligation of good faith'.**[84]

Indeed, the House of Lords in Malik cites with approval the decisions in *Woods, Lewis,* and *Imperial* concerning this implied covenant.

It is to be concluded that, while the majority of the Supreme Court of Canada eschewed the doctrine of good faith in favour of a curiously circuitous and illogical route by which to compensate Wallace for poor treatment, the House of Lords was not nearly so squeamish.

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[81] *Supra* note 8 at 16. For a very helpful review of the development of this principle prior to the judgment in *Malik* at the House of Lords level, see D. Brodie "The Heart of the Matter: Mutual Trust and Confidence (1996) 25 Industrial Law Journal 121. After showing the development of the duty of mutual trust and confidence, he states: "[w]hile contract law does not possess a general principle of good faith, it has been suggested that there are indications of '...a gradual recognition of the doctrine or at least to parallel solutions by other means'" [footnote omitted.]

[82] In his 1991 Royal Bank of Scotland Lecture, entitled "The Role of Good Faith in Contract Law: A Hairshirt Philosophy?", *supra* note 7, Sir Johan Steyn (as he then was) illustrated that there are numerous instances of English judges importing the good faith standard through the backdoor. As an example of the phenomenon in the employment context, he cites *Imperial Group Pension Trust Limited* v. *Imperial Tobacco Ltd.*,[1991] 2 All E.R. 597 at 606 and *Woods* v. *WM Car Services (Peterborough) Ltd.*, *supra* note 77 at 670.

[83] *Imperial Group Pension Trust Limited, ibid.*

[84] *Ibid.* at 606, [emphasis added].

Conclusion

The foregoing discussion illustrates the manifest range of a good faith standard in contractual performance. The trial judge took a very fact specific approach, ruling that the *particular* employment contract in *Wallace* contained an implied term of good faith based on all the surrounding circumstances. Madam Justice McLachlin's tack was much more generic: all employment contracts contain an implied term that the employer show good faith in the *manner* of dismissing employees. An equally generic but puzzling articulation of an implied standard of good faith and fair dealing was offered by Justice Iacobucci: employers are minimally obligated to be "candid, reasonable, honest and forthright with their employees."[85] The most expansive approach of all is taken by the House of Lords in *Malik*. For this court, the employment contract contains an implied and *generalized* duty not to act in a way which is likely to "destroy or seriously damage the relationship of confidence and trust between employer and employee."[86] This contractual term would forbid a wide range of conduct, presumably including, but not being restricted to, dismissing the employee in an abusive manner.

It remains to be seen whether the House of Lord's broadly articulated approach to good faith in the employment contract will gain a foothold in Canada. Certainly, there is nothing in the ratio of *Wallace* to prevent such a development and this for two reasons. First, the leading good faith decision of *Gateway* v. *Arton Holdings*[87] is not even mentioned, let alone considered by the Supreme Court and second, the majority did — albeit in a confusing way — find that employers owe a duty not to act unfairly or in bad faith and ought to be candid reasonable.[88] To this extent, there is certainly a lack of hostility towards

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[85] *Wallace* (S.C.C.), *supra* note 1 at 34.

[86] *Supra* note 8 at 15.

[87] *Supra* note 3.

[88] *Wallace* (S.C.C.), *supra* note 1 at 34. Note that *Wallace* has been followed by a number of courts including: *Frank v. Federated Co-operatives Ltd.* (1998), 33 C.C.E.L. (2d) 243 (Alta. Q.B.); *Cassady v. Wyeth-Ayerst Canada Inc.* (1998), 163 D.L.R. (4th) 1 (B.C.C.A.);*Clendenning v. Lowndes Lambert (B.C.) Ltd.* [1998] B.C.J No. 2472 (B.C.S.C.).; *Stafford v. British Columbia Marketing Board* [1998] B.C.J. No. 2783 (B.C.S.C.); *Hamer-Jackson* v. *McCall Pontiac Buick Ltd.* [1998] B.C.J. No. 1868 (B.C.S.C.); *Hovath v. Nanaimo Credit* Union [1997] B.C.J. No 1906 (B.C.S.C.); *Martin v. International Maple Leaf Springs Water Company* [1998] B.C.J. No. 1663 (B.C.S.C.); *Birch v. Grinnell Fire Protection* [1998] B.C.J. No. 1602 (B.C.S.C.); *Boule v. Ericatel* Ltd. [1998] B.C.J. No. 1353 (B.C.S.C.); *Stolle v. Daishinpan (Canada) Inc.* (1998) 37 C.C.E.L. (2d) 18 (B.C.S.C.); *Robertson v. Red Robin Restaurants of Canada Ltd.* [1998] B.C.J. No. 884 (B.C. Prov. Ct..); *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.* (1998) 159 D.L.R. (4th) 15 (Man. C.A.); *Mrozowich v. Grandview Hospital District No. 3B* (1998) 36 C.C.E.L. (2d) 144 (Man. Q.B.); *Murrell Barns International Security Services Ltd.* (1997) 33 C.C.E.L. (2d) XX (Ont. C.A.); *Stolze v. Delcan Corp.* [1998] O.J. No. 4917 (Ont. Ct.(Gen. Div.)); *Nagy v. Metropolitan Toronto Convention Centre* (1998), 35 C.C.E.L. (2d) 209 (Ont. Ct. (Gen. Div.)); *Antonacci v. Great Atlantic & Pacific Co. of Canada* (1998), 35 C.C.E.L. (2d) 1 (Ont. Ct. (Gen. Div.)); *Chaddock v. Great Lakes Truck Centre Ltd.* (1998), 34 C.C.E.L. (2d) 195 (Ont. Ct. (Gen. Div.)); *Kroll v. 949486 Ontario*

good faith concepts. Nonetheless, the judicial suspicion which a *contractually* implied, good faith covenant appears to evoke in the majority of the Supreme Court of Canada justices, as well as its refusal to measure "breach" in accordance with ordinary contractual principles may stunt the development of the good faith term, at least temporarily. Since the majority in *Wallace* was able to do justice through invoking what it considered to be the less drastic means of simply extending the length of the notice period, it may even have decided to postpone a consideration of larger matters to another day, though this is not stated in the judgment. When faced with circumstances where the escape valve of lengthening the notice is not available, a future court may well find that a more generalized, implied *contractual* obligation of good faith and fair dealing is the default standard after all.

Had *Wallace* been decided by the House of Lords, however, there is little doubt that the abusive employer would have been ordered to pay damages for breach of an implied term of "confidence and trust" or "good faith" which enures as the default standard in English contracts of employment. This is eminently preferable to Justice Iacobucci's approach of ordering damages against the employer as an inchoate add-on to the notice period. The House of Lord's "confidence and trust" term permits a judge to assess a broad range of allegedly abusive conduct in an expressly contractual context and to measure damages according to traditional, contract law principles. Fortunately, Madam Justice McLachlin's dissent provides a strong nexus to the approach offered by the House of Lords, thereby opening up the possibility that *Malik* may yet find favour before Canada's highest court.

Inc. (1997), 34 C.C.E.L. (2d) 75 (Ont. Ct. (Gen. Div.)); *Duffield v. Alubec Industries Inc.* [1998] Q.J. No 1141 (Que. Superior Ct (Gen. Div.)); *Zimmerman v. Kindersly Transport Ltd.* [1998] S.J. No 415 (Sask. Prov. Ct.);

It is also significant to note that the Alberta Court of Queen's Bench has recently applied *Wallace* in a non-employment context, holding it to be relevant to the concept of good faith in the creditor-debtor relationship. See *Haggart Construction Ltd. v. Canadian Imperial Bank of Commerce* [1998] 5 W.W.R. 586 at para. 77 and following.

L'uniformisation du droit maritime canadien — Les cas de l'indemnisation d'une perte économique et de la négligence contributive — L'arrêt *Husky Oil Operations Ltd.* c. *Saint John Shipbuilding Ltd.*

André Braën*

I. *L'uniformisation du droit maritime canadien*

1. Le contenu du droit maritime canadien reste quelquefois difficile à identifier et la détermination des règles qui le composent a été liée à l'examen de l'attribution d'une compétence en amirauté à la Cour fédérale du Canada, chargée, entre autres, de l'appliquer[1]. Cette problématique, on le sait, a fait l'objet d'une jurisprudence fort abondante. D'abord, parce que ce tribunal a été constitué en vertu de l'article 101 de la Loi constitutionnelle de 1867 pour une meilleure administration des «lois du Canada»; puis, parce que le droit maritime canadien est composé en partie de règles écrites comme la loi et réglementation fédérales en matière maritime, et en partie de règles non écrites, telles celles découlant du droit maritime britannique; et finalement, parce qu'il renvoie souvent à des règles qui sont strictement de droit privé. Dans ce dernier cas et compte tenu du caractère fédéral du régime canadien et de l'existence de deux traditions juridiques, l'identification de ces règles de droit privé a posé problème.

2. Nous avons déjà eu l'occasion d'analyser et de commenter l'approche judiciaire dans ce domaine[2] et en particulier quelques décisions de la Cour suprême du Canada, qui a tenté d'y mettre bon ordre[3]. Cette approche, qui n'est pas à l'abri de toute critique au plan de son fondement juridique[4], peut être résumée en trois propositions principales.

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[1] *Loi sur la Cour fédérale*, L.R.C., 1985, c. F-7, art. 22. La même loi définit par ailleurs (à l'art. 2) le droit maritime canadien comme étant le «Droit — compte tenu des modifications y apportées par la présente loi ou par toute autre loi fédérale — dont l'application relevait de la Cour de l'Échiquier du Canada, en sa qualité de juridiction d'Amirauté, aux termes de la *Loi sur l'Amirauté*, chapitre A-1 des Statuts révisés du Canada de 1970, ou de toute autre loi, ou qui en aurait relevé si ce tribunal avait eu, en cette qualité, compétence illimitée en matière maritime et d'amirauté» (nos soulignés).

[2] A. Braën, *Le droit maritime au Québec*, Montréal, Wilson et Lafleur, 1992 aux pp. 86-165.

[3] On consultera en particulier les décisions suivantes: *ITO International Terminal Operators Ltd* c. *Miida Electronics Inc.*, [1986] 1 R.C.S. 752; *Chartwell Shipping Ltd.* c. *Q.N.S. Paper Co.*, [1989] 2 R.C.S. 683; *P.G Ontario* c. *Pembina Exploration*, [1989] 1 R.C.S. 206; *Whitbread* c. *Walley*, [1990] 3 R.C.S. 1273 et *Monk Corp.* c. *Island Fertilizers Ltd.*, [1991] 1 R.C.S. 779.

[4] Voir A. Braën, *op. cit.*, *supra* note 2 et «L'arrêt *ITO-International Terminal Operators* c. *Miida Electronics Inc.* ou comment écarter l'application du droit civil dans un litige maritime au Québec» (1987) 32 McGill L.R. 386. En particulier, nous avons souligné le caractère peu orthodoxe de la démarche judiciaire employée par la Cour

a) Lorsqu'un litige soulève une question maritime, l'interprétation judiciaire étant libérale dans ce domaine[5], sa solution puise nécessairement dans le droit maritime canadien, lequel relève de la compétence législative exclusive du Parlement canadien en matière de navigation et de marine marchande (art. 91 (10) de la *Loi constitutionnelle de 1867*).

b) Le droit maritime canadien est composé dans ses parties écrites des lois et règlements fédéraux en matière maritime (ce peut même être à la limite un chef de réclamation énuméré à l'art. 22(2) de la *Loi sur la Cour fédérale*[6] lequel «s'alimente» à même le droit maritime canadien). Dans ses parties non écrites, le droit maritime canadien est constitué de l'ensemble des règles de droit maritime empruntées à l'Angleterre et englobe à la fois les règles et principes spéciaux en matière d'amirauté[7] ainsi que les règles et

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suprême qui a utilisé l'attribution d'une compétence en amirauté prétendument «illimitée» à un tribunal par le Parlement canadien pour définir le contenu de la compétence législative que la constitution aurait conféré à ce dernier en matière maritime. Nous avons également mentionné l'application possible de l'article 94 de la *Loi constitutionnelle de 1867* en ce qui concerne l'uniformisation du droit privé dans ce domaine ainsi que le problème posé par l'article 133 de la même loi relatif au bilinguisme législatif face à l'incorporation de règles unilingues au sein de la législation fédérale.

[5] Dans l'arrêt *ITO*, *supra* note 3, le juge McIntyre affirme que le critère qui permet d'établir si une question examinée relève du droit maritime exige que cette question soit entièrement liée aux affaires maritimes au point de constituer légitimement du droit maritime canadien (pp. 774-76). Ainsi en est-il de la question de la responsabilité d'un entrepositaire du port de Montréal. La responsabilité qui découle de l'exécution d'un contrat de fourniture d'engrais et qui concerne une demande pour le paiement de l'excédent d'engrais transporté par bateau et livré, des surestaries et du prix de location d'une grue pour le décharger constitue une question maritime régie par le droit maritime canadien (arrêt *Monk Corp.*, *supra* note 3). Dans l'arrêt *Whitbread*, *supra* note 3, le juge La Forest a jugé que la responsabilité délictuelle découlant de la conduite d'un bateau de plaisance ainsi que de la limitation de responsabilité qui peut s'y rattacher constituent aussi des questions maritimes. Il faut noter dans l'arrêt *Monk Corp.*, précité, la dissidence du juge L'Heureux-Dubé (pp. 801 et ss.) qui déclare qu'en déterminant si une affaire donnée soulève une question maritime, la Cour doit éviter d'empiéter sur ce qui constitue «de par son caractère véritable», une matière relevant de la compétence exclusive d'une province et qu'il est important de démontrer que la question examinée est entièrement liée aux affaires maritimes au point de constituer légitimement du droit maritime canadien. Enfin, il est intéressant de souligner qu'en ce qui concerne une cargaison acheminée en vertu d'un connaissement direct et par voie de terre et par eau, la Cour fédérale a récemment décliné sa juridiction à l'égard de la responsabilité relative à la portion terrestre du transport. Voir *Marley Co.* c. *Last North America Inc. (1983)*, 94 F.T.R. 45 et *Matswan Machinery Corp.* c. *Hapag Lloyd A.G.*, (1908) F.T.R. 42.

[6] *Supra* note 1. Ainsi dans l'arrêt *Chartwell*, *supra* note 3, la Cour suprême a jugé que la question de la responsabilité d'un agent mandataire de deux affréteurs et qui avait requis en leur faveur les services d'une entreprise d'acconage est une question maritime prévue à l'art. 22(2)m) de la *Loi sur la Cour fédérale*. Dans l'arrêt *Pembina Exploration*, *supra* note 3, la question des dommages causés à un chalut par des installations gazifères situées en mer est prévue à l'art. 22(2)e) de la même loi et constitue donc une question maritime régie par le droit maritime canadien.

[7] Dans l'arrêt *Monk Corp.*, précité note 3, le juge Iacobucci affirme de plus que les termes «maritime» et «amirauté» doivent être interprétés dans le contexte moderne du commerce et des expéditions par eau et qu'ils ne sont pas statiques ou figés (p. 800).

principes puisés dans la common law et appliqués par les tribunaux britanniques aux affaires d'amirauté; ces règles et principes ont été et continuent d'être modifiés et élargis dans la jurisprudence canadienne[8].

c) Le droit maritime canadien est un droit fédéral uniforme et applicable tel quel partout au Canada. À ce titre, il fait partie intégrante du droit de chaque province et de chaque territoire. Parce que la Cour fédérale a été constituée pour une meilleure application des «lois du Canada», le droit maritime canadien ne comporte aucune règle de droit provincial, que ce soit de droit civil ou de common law. Puisque la compétence en amirauté de la Cour fédérale s'exerce de façon concurrente avec les tribunaux de droit commun des provinces, ces derniers, lorsqu'ils sont saisis d'un litige maritime, doivent également appliquer le droit maritime tel que défini ci-haut.

3. Cette démarche judiciaire qui est maintenant bien établie soulève donc la question de l'autonomie du droit maritime comme corps de règles et surtout celle de ses rapports avec le droit privé. Au plan de sa nature, le droit maritime s'entend des règles, usages et traditions qui étaient et qui sont appliqués par ces tribunaux spécialisés que sont les tribunaux d'amirauté. Compte tenu de ses sources historiques, le droit maritime peut donc être considéré comme étant en ce sens un droit relativement autonome[9]. Mais la réalité maritime et commerciale étant ce qu'elle est, en particulier dans un monde qui tend à la mondialisation des échanges, il n'est tout simplement pas possible d'accorder au droit maritime un caractère exclusif et autonome. Au contraire, ce droit apparaît être forcément incomplet et ses règles sont en interaction constante avec les règles de droit terrestre, en particulier avec les régimes de responsabilité contractuelle et extracontractuelle. En Angleterre par exemple, l'interpénétration des règles de common law et du droit maritime est devenu manifeste à un point tel que «in one sense maritime law is part of the common law and it has been referred to as such»[10]. Aussi et ne serait-ce qu'à titre supplétif, le recours au droit privé reste souvent, dans un litige maritime, inévitable sinon souhaitable. Par ailleurs, si cette approche judiciaire a permis de définir plus précisément ces aspects du droit privé relevant de la compétence législative fédérale en matière maritime, il faut noter que son application aura pour conséquence, entre autres, d'ajouter continuellement au contenu de cette compétence législative, qui deviendra vite, elle-même, illimitée (comme la compétence d'attribution judiciaire à la Cour fédérale qui est, prétendument[11], illimitée en matière maritime). Or, un tel raisonnement se conçoit fort mal dans un régime fédéral et dans un pays bi-juridique car cette approche s'est traduite par la mise à l'écart pure et simple du droit civil québécois (et de toute règle provinciale dans les autres provinces)

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[8] Voir l'arrêt *ITO*, *supra* note 3.

[9] Voir sur cette question, A. Braën, *Le droit maritime au Québec*, *supra* note 2 aux pp. 131-32.

[10] Halsbury's Laws of England, vol. 1, 4e éd., Londres, 1973, Butterworths, nº 303, n. 9. Voir aussi: *The Toju Maru* (1972), A.C. 242, p. 291 (C.L.).

[11] Voir la définition du droit maritime canadien, *supra* note 1.

dans toute affaire maritime et par son remplacement, à défaut de règle fédérale ou de droit maritime britannique, par la common law anglaise.

4. Cette approche judiciaire qui consiste à écarter l'application du droit privé provincial pour solutionner une affaire ayant une connexité maritime brise, à notre avis, l'unité du droit et sa stabilité. À titre d'exemples, l'on sait que la compétence législative du Parlement canadien s'entend aussi bien de la navigation commerciale que de plaisance[12]: puisque le droit maritime doit être uniforme et applicable tel quel partout au Canada, le contrat de vente d'une embarcation de plaisance ou la responsabilité civile du plaisancier devront être régis, en l'absence de législation fédérale spécifique, par les règles de common law appliquées en semblables matières par les tribunaux britanniques et sans égard à toute règle de droit provincial ou, dans le cas du Québec, de son droit civil. Par ailleurs, l'art. 4 de la *Loi sur l'assurance maritime*[13] fédérale prévoit que «les règles du droit maritime canadien continuent, sauf incompatibilité avec la présente loi, à s'appliquer aux contrats». On doit donc en conclure que les règles relatives aux conditions de formation d'un contrat d'assurance maritime, comme celles relatives à la capacité des parties, devront être déterminées par renvoi aux règles de la common law anglaise. Il devrait en être de même en ce qui concerne la détermination du régime applicable au courtier d'assurance maritime. Le contrat d'assurance maritime étant un contrat maritime[14] et la navigation de plaisance étant du ressort fédéral, l'assurance terrestre qui couvre aussi le cas des petites embarcations de plaisance devra obéir au même raisonnement. À moins, bien sûr! d'affirmer qu'il ne s'agit pas là de questions maritimes. Si jamais le Parlement canadien met en application la *Convention d'Athènes de 1974 relative au transport par mer de passagers et de leurs bagages* et son protocole de 1990, comme il se proposait de le faire[15], comment seront déterminées les notions de faute ou de négligence auxquelles renvoie la convention?[16]. Comment sera déterminée la responsabilité du transporteur dans le cas d'une traversée Québec/Lévis? Comment seront déterminées les garanties, autres que celles déjà prévues par le droit maritime canadien[17], affectant une cargaison? Aussi, ce n'est pas sans ironie qu'il faut rappeler que la législation fédérale elle-même renvoie dans quelques cas à l'application du droit provincial[18].

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[12] *Whitbread* c. *Walley*, *supra* note 3. Voir aussi: *Municipalité de St-Denis de Brompton* c. *Filteau* (1983), 6 D.L.R. (4d) 596 (C.S.Q.) et *Shelman (Guardian ad litem of)* c. *McCollum* (1991), 6 W.W.R. 470 (C.S.C.-B.) conf. par (1993), 7 W.W.R. 567 (C.A.C.-B.).

[13] L.C., 1993, c. 22.

[14] *Triglav* c. *Terrasses Jewellers Inc.*, [1983] 1 R.C.S. 283.

[15] Projet de loi C-59, 2e sess., 35e légis., 45 Eliz. II, 1996.

[16] Voir en particulier les articles 3 et 6.

[17] Le droit maritime canadien reconnaît plusieurs types de créances privilégiées (privilèges maritimes, de 1er rang, possessoires, légaux et l'hypothèque maritime). Voir à ce sujet: W. Tetley, *Maritime Liens and Claims*, Londres, 1985, Business Law Communications Ltd. et A. Braën, *Le droit maritime au Québec*, *supra* note 2 aux pp. 184-196.

[18] Voir la *Loi sur les connaissements*, L.R.C., 1985, c. B-5, art. 3 et la *Loi sur les océans*, L.C., 1996, c. 31, en particulier les arts 2 et 22(2) ainsi que l'art. 54 qui abroge la *Loi sur l'application extracôtière des lois canadiennes*, L.C., 1990, c. 44.

Quoi qu'il en soit, les cas particuliers de l'indemnisation de la perte économique et de la négligence contributive sont éloquents à cet égard.

II. *L'indemnisation de la perte économique*

5. La question de l'indemnisation de la perte économique («*economic loss*») soulève, on le sait, une vive controverse en common law[19]. Fondamentalement et en matière de responsabilité délictuelle, un individu qui, par sa négligence, cause un préjudice à autrui peut en être tenu responsable et l'obligation d'indemniser le préjudice s'étendra normalement à toute personne à laquelle l'auteur du délit pouvait, d'une manière prévisible, causer un préjudice[20]. La généralité de cette proposition soulève toutefois le spectre d'un régime de responsabilité illimitée ou du moins indéterminée. Aussi et très tôt en common law, l'indemnisation de la perte économique a été limitée au cas unique où le demandeur avait subi un préjudice physique (corporel ou matériel)[21]; puis son champ d'application a été graduellement élargi à de nouvelles catégories[22], en particulier dans le domaine maritime où l'existence d'entreprises coparticipation («*joint ventures*») est fréquente et où sont présents une multitude d'acteurs[23]. En 1978, dans l'arrêt *Anns*[24], Lord Wilberforce a voulu écarter cette approche judiciaire consistant à créer des catégories et soumettre l'indemnisation de la perte économique au test de l'existence d'un lien de prévisibilité entre le comportement négligent de l'auteur du délit et le préjudice subi par le demandeur. De plus, seule une considération d'ordre pratique, comme la crainte d'une avalanche de poursuites judiciaires, aurait permis de refuser l'indemnisation. Mais en 1991, dans l'arrêt *Murphy* c. *Brentwood District Council*[25], la Chambre des Lords revenait spectaculairement à la case départ en invoquant l'absence d'un mécanisme logique et cohérent d'indemnisation et en insistant sur le spectre d'un régime de responsabilité indéterminée.

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[19] Pour une discussion générale, voir: F. Feldthusen, *Economic Neligence: The Recovery of Pure Economic Loss*, 2e éd., Toronto, 1989, Carswell; P.S. Atiyan, «Negligence and Economic Loss» (1967) 83 L.Q. Rev. 248; J.A. Smillie, «Negligence and Economic Loss» (1982) 32 U.T.L.J. 231; W. Bishop, «Economic Loss in Tort» (1982) 2 Ox. J. Legal Studies, 1; J. Stapleton, «Duty of Care and Economic Loss: A Wide Agenda» (1991) 107 L.Q. Rev. 249; J. Herbots, «Le «duty of care» et le dommage purement financier en droit anglais» (1985) Rev. dr. int. et dr. comp. 7.

[20] Voir *Donoghue* c. *Stevenson* (1932), A.C. 562 (C.L.).

[21] *Cattle* c. *Stockton Waterworks Co.* (1875), L.R. 10.

[22] *Hedley Byrne & Co.* c. *Heller and Partnership Ltd.* (1964), A.C. 465; *Junior Books Ltd.* c. *Veitchi Co.* (1983), 1 A.C. 520.

[23] Voir: N.J. Gaskell, «Economic Loss in the Maritime Context» (1985) L.M.C.L.Q. 81 et aussi dans les «Conférences commémoratives Meredith 1986», fac. de droit, univ. McGill, 1986, Richard de Boo, les analyses de D.R. Owen, *Recovery for Economic Loss Under U.S. Maritime Law*, p. 1 et W.W. Spicer, *You Can't Always Get What You Want: Canadian Maritime Law and Economics Loss*, p. 21.

[24] *Anns* c. *Merton London Borough Council* (1978), A.C. 728 (C.L.).

[25] (1991), 1 A.C. 398.

6. Le monde juridique canadien n'a pas été insensible à cette discussion quoiqu'au Québec la question ne se posait pas véritablement puisqu'en droit civil toute perte, quelle qu'elle soit, peut donner lieu à une indemnisation si l'on prouve l'existence d'une faute, le préjudice subi par la victime et le lien causal direct et immédiat entre les deux[26]. Mais les juridictions canadiennes de common law ont été affectées par cette évolution du droit anglais et dans le domaine maritime, par exemple, l'indemnisation de la perte économique devint possible[27]. Dans l'arrêt *Cité de Kamloops* c. *Nielsen*[28], la Cour suprême du Canada fut d'avis, sans vouloir toutefois formuler une règle exhaustive, qu'une perte purement économique peut être indemnisée s'il existe un lien étroit entre le comportement négligent de l'auteur du délit et le préjudice subi par la victime, si ce préjudice était prévisible et, finalement, si l'extension de l'indemnisation est, selon le tribunal, souhaitable et ne risque pas de provoquer une avalanche de poursuites.

7. Dans l'arrêt *Norsk*[29] rendu en 1992, la Cour suprême a revu cette question à la lueur de l'évolution du droit anglais. Les faits en cause impliquaient un remorqueur qui, par négligence, avait heurté un pont ferroviaire appartenant à l'État mais loué au demandeur, le CN. Durant les réparations au pont, le CN avait dû détourner son trafic et il en avait résulté une augmentation des frais d'exploitation et une réduction du volume de marchandises transportées. Le CN, quoique non propriétaire du bien endommagé, invoquait donc la négligence des propriétaires du remorqueur et leur réclamait le remboursement des pertes occasionnées, y inclus les pertes de bénéfices. Nous avons déjà commenté cette très longue décision, vivement partagée entre les membres du tribunal[30]. Aux fins de notre propos, nous rappellerons simplement ce qui suit, d'abord quant au fond puis quant à la forme de cette décision.

8. *Quant au fond.* La majorité du tribunal s'est écartée de la position prise par la Chambre des Lords dans l'arrêt *Murphy*. L'indemnisation de la perte économique peut être possible même lorsqu'elle ne résulte pas d'un préjudice physique ou d'une relation de confiance. Mais pour éviter un régime de

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[26] Pour une analyse comparative, voir: W. Tetley, *Damages and Economic Loss in Marine Collision: Controlling the Floodgates*, (1991) 22 J.M.L. & C. 539; D. Jutras, «Civil Law and Pure Economic Loss: What Are We Missing?» (1986) 12 Can. Bus. L.J. 295; B.S. Markesinis, «La politique jurisprudentielle et la réparation du préjudice économique en Angleterre: une approche comparative» (1983) 35 Rev. Int. de droit comp. 31; E. Baudry, *Economic Loss in Maritime Law: Current Position in English Law and Quebec Civil Law* in «Conférences commémoratives Meredith 1986», *supra* note 23 à la p. 33.

[27] Voir: *Rivtow Marine Ltd.* c. *Washington Iron Works*, [1974] R.C.S. 1189; *Gypsum Carrier Inc.* c. *The Queen* (1977), 78 D.L.R. (3d) 175; *Bethlehem Steel Corp.* c. *The St. Lawrence Seaway Authority* (1977), 79 D.L.R. (3d) 522 et *Inter Ocean Shipping Co.* c. *The Ship M/V Atlantic Splendour*, [1984] 1 C.F. 391.

[28] [1984] 2 R.C.S. 2.

[29] *CN* c. *Norsk Pacific Steamship Co.*, [1992] 1 R.C.S. 1021.

[30] A. Braën, *L'indemnisation de la perte économique en droit maritime canadien*, (1997) XV Annuaire de droit océanique et maritime, 45.

responsabilité indéterminée, des limites doivent être appliquées en la matière. Deux critères s'appliquent alors. D'abord, il y aura droit à indemnisation en cas de négligence et si des pertes prévisibles s'ensuivent. C'est l'existence d'un lien étroit entre l'acte négligent et la perte subie qui est ici le facteur primordial et qui permet au tribunal de contrôler ce type de demandes. Puis, il faut se demander si, au plan pratique, il ne vaut pas mieux dans un cas donné imposer une limitation de responsabilité et à cet égard, la crainte d'une avalanche de poursuites peut constituer un facteur d'appréciation. La majorité a donc jugé que dans l'affaire en cause un lien étroit existait entre les pertes réclamées par le CN et la négligence du remorqueur et que l'indemnisation de ce type de perte était juste et raisonnable en permettant au demandeur de réclamer de l'auteur du délit ce que le véritable propriétaire du pont aurait pu recouvrer[31]. Le juge Stevenson, qui s'est rallié à la majorité, fut d'avis qu'il doit y avoir indemnisation des pertes économiques dans tous les cas où il n'y a pas lieu en principe de se préoccuper de la possibilité d'une responsabilité indéterminée. Ce danger n'existe pas quand un défendeur sait effectivement ou devrait savoir qu'une personne en particulier (par opposition à une catégorie générale ou indéterminée de personnes) est susceptible de subir une forme prévisible de perte du fait de sa négligence[32]. Les juges dissidents quant à eux se sont voulus plus pragmatiques. S'agissant d'une perte économique relationnelle découlant d'un contrat[33], l'état du droit dans ce domaine ne leur est pas paru satisfaisant et la solution à ce type de problèmes doit plutôt dépendre d'après-eux, des modalités du contrat liant, dans notre cas, le CN et le propriétaire du pont. Ce contrat confère-t-il un droit de possession au transporteur? Constate-t-il une entreprise en coparticipation assumée par les deux parties? Prévoit-il le paiement d'une indemnité par le propriétaire dans un tel cas? Il s'agit en somme de voir quelle est la partie la mieux en mesure de subir la perte. Aussi, et même si la règle de l'exclusion de responsabilité n'est pas attrayante en soi, les juges dissidents ont convenu de ne pas y toucher et de l'appliquer au cas sous étude[34].

9. Quant à la forme, il faut noter qu'au niveau de l'application du droit maritime canadien, aucun juge de la majorité ne souligne que l'affaire sous étude est une affaire maritime devant être résolue par le droit maritime canadien. On prend simplement pour acquis que c'est le cas et la problématique analysée est essentiellement dérivée de la common law. L'opinion dissidente mentionne

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[31] *Supra* note 29 aux pp. 1134-1166 (J. McLachlin).

[32] *Ibid.* aux pp. 1166-1184.

[33] *Ibid.* à la p. 1054. En matière délictuelle, le juge La Forest a distingué trois genres de pertes économiques. Il y a la perte économique indirecte quand la réclamation du demandeur vise la perte économique engendrée par une lésion corporelle ou un dommage matériel qu'il a subi. Puis, il existe la perte économique non relationnelle quand la réclamation du demandeur vise une perte purement économique non liée à une lésion corporelle ou un dommage matériel subi par le demandeur ou un tiers. Enfin, il y a la perte économique relationnelle quand la réclamation du demandeur est fondée sur la perte économique qu'il a subie en raison du dommage causé au bien d'autrui.

[34] *Ibid.* aux pp. 1037-1134 (J. La Forest).

toutefois qu'il s'agit d'une affaire de droit maritime, donc, à son avis, d'un système en grande partie international. Et à cet égard, l'on affirme que la règle de l'exclusion est appliquée par les grandes nations commerçantes, en l'occurrence la Grande-Bretagne et les États-Unis *(sic)* et que l'uniformisation des règles est souhaitable dans ce domaine[35]. Aussi et toujours au niveau de l'analyse, tous les juges se sont livrés à un exercice de droit comparé: droit anglais, australien, américain et droit civil français et québécois. La majorité a ainsi constaté qu'en droit civil, aucune distinction n'est tracée entre le préjudice physique et le préjudice économique et elle a constaté que cette approche n'a pas donné lieu à un régime de responsabilité illimitée[36]. Les juges dissidents ont jugé l'expérience civiliste non concluante à cet égard[37].

10. Dans une affaire très récente[38], la Cour suprême a jugé que les critères utilisés tant par les juges dissidents que par la majorité dans l'arrêt *Norsk* produiront les mêmes résultats au plan pratique. En matière maritime, la Cour supérieure du Québec s'est aussi penchée sur cette question de l'indemnisation d'une perte économique[39]. Un pont levant s'était brisé et avait immobilisé tout le trafic de la voie maritime du Saint-Laurent pendant 18 jours. Une multitude d'utilisateurs — des propriétaires de navires, des affréteurs à temps, des assureurs — avaient entrepris des poursuites judiciaires fondées sur la négligence de l'Administration de la voie maritime et des concepteurs et constructeurs du pont pour tenter de recouvrer leurs pertes financières. Le tribunal a statué qu'il s'agissait d'une question de droit maritime puisque les réclamations étaient intimement liées à des activités de navigation. À ce titre, les dispositions du Code civil québécois ne pouvaient être invoquées pour déterminer la responsabilité du défendeur. Puisqu'il fallait appliquer les règles et principes de common law en la matière, le juge a référé aux critères appliqués par la majorité dans l'arrêt *Norsk*. En particulier, le tribunal a rejeté les réclamations des usagers au motif que les accepter équivaudrait à déclencher une avalanche de poursuites. Cette démarche a été entérinée par la Cour d'appel du Québec d'une manière fort laconique et sans aucune interrogation sur les fondements de l'approche judiciaire dans ce domaine[40].

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[35] *Ibid.* aux pp. 1131-1132.

[36] *Ibid.* aux pp. 143-1144.

[37] *Ibid.* aux pp. 1078-1087.

[38] *D'Amato* c. *Badger*, [1996] 2 R.C.S 1071. Voir aussi: *London Drugs* c. *Kuehnet Nagel International*, [1992] 3 R.C.S. 299 et *Hercules Managements Ltd.* c. *Ernst & Young*, [1997] 2 R.C.S. 165.

[39] *Administration de la voie maritime du St-Laurent* c. *United Dominion Industries Ltd.*, [1993] R.R.A. 862.

[40] *Administration de la voie maritime du Saint-Laurent* c. *Canson Incorporated*, J.E. 97-140. Pour un commentaire, voir: G. Lefebvre, «L'uniformisation du droit maritime canadien aux dépens du droit civil québécois: lorsque l'infidélité se propage de la Cour suprême à la Cour d'appel du Québec» (1997) 31 R.J.T. 577.

III. *La négligence contributive*

11. On sait que le droit maritime canadien est en partie non écrit, en particulier en ce qui concerne ses aspects privés, et que, dans ce dernier cas, il faut recourir pour solutionner le litige aux règles appliquées par les tribunaux de common law d'Angleterre en semblables matières. Ce simple recours est-il suffisant pour résoudre tout litige maritime et ainsi assurer la stabilité du droit dans ce domaine? Le cas de la négligence contributive est à cet égard éloquent.

12. Au plan délictuel et en droit maritime canadien, le seul régime législatif de partage de responsabilité est actuellement celui qui est prévu aux arts 565-567 de la *Loi sur la marine marchande du Canada*[41]. En cas d'abordage, la responsabilité est partagée proportionnellement au degré de faute des bâtiments impliqués ou, s'il est impossible de le déterminer, la responsabilité est alors partagée de façon égale. Ce régime ne s'applique toutefois qu'aux seuls cas où les dommages à un ou plusieurs navires, à la cargaison, au fret ou aux biens à bord ont été causés «par la faute de deux ou plusieurs bâtiments»[42]. Dans tous les autres cas où la question du partage de la responsabilité peut être soulevée, l'on se demande donc quelle peut bien être la règle applicable. On peut penser ici au cas où des dommages seraient imputables à une collision entre un bâtiment dont la conduite est négligente et des installations portuaires mal conçues[43], au cas où un individu maladroit se blesse sur le pont d'un navire mal entretenu ou, en général, à toutes les créances qui peuvent résulter d'actes négligents commis en cours de navigation ou dans le cadre du commerce maritime.

13. En droit civil, une faute commune entraîne un partage de la responsabilité[44]. En common law, la négligence contributive a traditionnellement constitué un moyen de défense pour l'auteur d'un délit qui fait face à un demandeur responsable en partie du dommage subi. Ce moyen de défense permet de faire rejeter l'action[45]. Cette règle ancienne qui, combinée à d'autres règles comme celle interdisant aux co-auteurs d'un délit de recouvrer des dommages l'un de

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[41] L.R.C., 1985, c. S-9.

[42] *Ibid.* art. 565(1). Quant aux articles 566 et 567, ils concernent la responsabilité encourue par deux ou plusieurs bâtiments pour le préjudice corporel subi par une victime n'ayant commis aucune faute. L'article 566 (anciennement 639) a été jugé inapplicable pour procéder à une division des dommages entre une victime fautive et des bâtiments également fautifs. Voir l'arrêt *Stein* c. *Le «Kathy K»*, [1976] 2 R.C.S. 802.

[43] Voir *Ultramar Canada Inc.* c. *Ship «Czantoria»* (1994), 84 F.T.R. 241 (1ère instance). Curieusement, même s'il ne s'agissait pas d'une collision entre deux ou plusieurs bâtiments, le tribunal a procédé au partage de la responsabilité dans cette affaire.

[44] L'art. 1478 C.c.Q. se lit en effet comme suit:

«Lorsque le préjudice est causé par plusieurs personnes, la responsabilité se partage entre elles en proportion de la gravité de leur faute respective.

La faute de la victime, commune dans ses effets avec celle de l'auteur, entraîne également un tel partage.»

[45] *Butterfield* c. *Forrester* (1809), 103 E.R. 926 (B.R.).

l'autre[46], a, bien sûr!, été tempérée par les tribunaux[47]. Les injustices qu'elle est susceptible de créer sont évidents dans la mesure où, qu'importe le degré de faute commis par la victime, cette dernière ne peut recourir contre l'auteur du délit. Mais c'est surtout l'intervention du législateur (britannique et celui des provinces de comme law au Canada) qui a permis l'implantation d'un régime basé sur le partage de la responsabilité[48]. Or, le Parlement canadien n'a pas adopté de législation semblable. On le comprend aisément puisqu'il s'agit d'une question de droit privé relevant principalement de la compétence législative des provinces[49]. L'utilisation comme moyen de défense de la règle de la négligence contributive pose donc un problème en droit maritime canadien pour ces cas non couverts par les arts 565-567 de la *Loi sur la marine marchande du Canada*.

14. Ce régime qui met en application la *Loi sur les conventions maritimes de 1914*[50] ne modifie pas les règles traditionnelles de la common law si ce n'est dans le cas d'un abordage survenu entre deux ou plusieurs bâtiments. En cette matière, les tribunaux, y inclus la Cour suprême du Canada, ont suivi une démarche contradictoire. Dans certains cas, ils ont appliqué strictement les principes de common law pour, par exemple, refuser à des co-auteurs d'un délit le droit de se prévaloir des dispositions d'une législation provinciale sur la négligence contributive et se partager ainsi le paiement des dommages. On a considéré que les lois provinciales ne s'appliquent pas en matière maritime[51]. Dans d'autres cas, les tribunaux ont appliqué la solution inverse. Ainsi, dans l'arrêt *Stein* c. *Le navire «Kathy K»*[52] rendu 1976, le juge Ritchie affirma que la question du partage de responsabilité n'est rien d'autre que l'application du droit provincial à une affaire maritime quand il ne peut être trouvé aucun droit fédéral pouvant résoudre le litige. On sait que, depuis, le même tribunal a eu l'occasion à plusieurs reprises mais dans un contexte différent d'affirmer que le droit maritime canadien ne comporte aucune règle de droit provincial[53]. En particulier, la Cour déclarait en 1990 dans l'arrêt *Whitbread* que «la responsabilité délictuelle dont il est question dans un contexte maritime est régie par un ensemble de règles de droit maritime relevant de la compétence exclusive du

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[46] *Merryweather* c. *Nixan* (1799), 101 E.R. 1337 (B.R.).

[47] Lesquels ont introduit la théorie de la dernière chance manifeste («last clear oppotunity»). Voir: *Davies* c. *Mann* (1842), 152 Exc.; *Radley* c. *London & North Western Railway Co.* (1876), 1 App. Cas. 754 (C.L.).

[48] Voir à titre d'exemples le *Negligence Act*, R.S.O. 1990, c. N.1 et le *Contributory Negligence Act*, R.S.N. 1990, c., C-33.

[49] Art. 92(13) de la *Loi constitutionnelle de 1867* (propriété et droits civils).

[50] S.C., 1914, c. 13.

[51] *Sparrows Point* c. *Greater Vancouver Water District*, [1951] R.C.S. 396. Voir aussi: *Gartland Steamship Co.* c. *R.*, [1960] R.C.S. 315; *Algoma Central and Hudson Bay Ry* c. *Manitoba Pool Elevators Ltd.* (1964), R.C.E. 505; *Fraser River Harbour Commission* c. *Le navire Hiro Maru*, [1974] 1 C.F. 490. Voir aussi: *Peters* c. *A.B.C. Boat Charters Ltd.* (1992), 73 B.C.L.R. 389 (C. , C.-B.).

[52] *Supra* note 42.

[53] Voir *supra* note 3.

Parlement»[54]. Avec raison, un document de travail récent du ministère fédéral de la Justice déplorait l'absence de règles claires dans ce domaine[55].

IV. *L'arrêt Husky Oil Operations Ltd.*

A) *Le litige et les décisions des juridictions inférieures*

15. En avril 1987, un incendie endommagea une plate-forme de forage située au large des côtes de Terre-Neuve. Celle-ci fut mise hors service durant un certain temps. L'incendie avait été causé du fait d'un système de réchauffement défectueux. La plate-forme avait été construite à la demande des sociétés A et B. Mais avant le début des travaux de construction, celles-ci avaient créé à l'étranger la société C et lui avaient cédé la propriété de l'ouvrage et leurs droits découlant du contrat de construction. Elles avaient de plus loué ladite plate-forme de la société C. A la suite du sinistre, les trois sociétés ont poursuivi le constructeur pour violation de contrat et négligence ainsi que le fabricant du système de réchauffement pour négligence. La société C leur réclamait les coûts de réparation et les pertes de revenus découlant de la mise hors service de la plate-forme. Les sociétés A et B demandaient quant à elles à être indemnisées pour le taux journalier payable en vertu du contrat de location à la société C et alors que la plate-forme était hors-service ainsi que pour diverses dépenses d'approvisionnement.

16. En première instance, la Cour suprême de Terre-Neuve a reconnu la responsabilité contractuelle et délictuelle du constructeur parce que, entre autres, ce dernier avait manqué à son obligation de prévenir toutes les parties concernées de l'inflammabilité du système de réchauffement installé sur la plate-forme. Le fabricant ayant manqué quant à lui à son obligation de mise en garde, sa responsabilité fut aussi retenue. Mais, la cour a imputé la faute principale à l'origine du sinistre à la société C et a réparti la responsabilité à 60% à l'encontre de cette dernière et à 40% à l'encontre du constructeur et du fabricant. L'action fut toutefois rejetée. En effet, s'agissant d'une affaire résultant de négligence commise en mer, c'est le droit maritime canadien qui doit s'appliquer. Dans ce cas et en common law, la négligence contributive constitue une fin de non-recevoir à ce genre de demande et la législation provinciale en la matière[56] ne peut être invoquée[57]. La Cour d'appel a statué quant à elle que les pertes réclamées par les sociétés A et B étaient de nature économique et qu'elles ne donnaient pas lieu à une indemnisation. Mais même s'il s'agit d'une affaire maritime régie par le droit maritime canadien, la

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[54] [1990] 3 R.C.S. 1273, à la p. 1289 (J. La Forest).

[55] Canada. Ministère de la Justice, section de l'amirauté et du droit maritime, *Document de travail: Éliminer les moyens de défense démodés de la common law en matière de responsabilité délictuelle maritime.*

[56] *Contributory Negligence Act*, R.S.N., 1990, c. C-33.

[57] (1994), 118 Nfld & P.E.I.R. 271.

législation provinciale peut s'appliquer et, même en cas contraire, la cour a jugé qu'aujourd'hui, en common law, la négligence contributive ne constitue plus une fin de non-recevoir. En conséquence, la société C avait le droit d'être indemnisée jusqu'à concurrence de 40% de ses pertes par le constructeur et le fabricant[58].

B) *La décision de la Cour suprême*

17. Plusieurs questions ont été débattues devant la Cour suprême du Canada et qui ont d'ailleurs donné lieu à des opinions dissidentes[59]. Toutefois, tous les membres de la cour se rallièrent à l'opinion du juge McLachlin en ce qui concerne les règles applicables à l'indemnisation de la perte économique et à la négligence contributive. Aux fins de notre propos, nous nous limiterons à l'analyse de ces deux segments.

18. En ce qui concerne les pertes subies par les sociétés A et B du fait de la mise hors service de la plate-forme dont elles étaient les locataires, celles-ci sont qualifiées par le juge McLachlin de pertes économiques relationnelles découlant d'un contrat. Elle rappelle en citant le juge Major dans l'arrêt *D'Amato*[60] pourquoi ce type de pertes ne donne pas lieu traditionnellement à une indemnisation en common law. D'abord parce que les tribunaux n'ont pas considéré que les intérêts économiques méritent la même protection que l'intégrité physique ou celle d'un bien. Puis, la recevabilité de ce genre de demandes ferait apparaître le spectre d'un régime de responsabilité indéterminée. Par ailleurs, il paraît plus efficace de faire assumer le fardeau de ce genre de pertes par la victime, laquelle est peut-être mieux placée pour prévoir ce risque et s'en assurer. Enfin, limiter l'admissibilité de ce type de demandes décourage la multiplication des poursuites[61]. Le juge McLachlin rappelle ensuite qu'en Angleterre et depuis l'arrêt *Murphy*[62], la perte économique relationnelle ne donne pas lieu à une indemnisation et seuls les cas où des dommages matériels sont été causés aux biens du demandeur sont admissibles. Dans la tradition civiliste, ce problème ne se pose pas[63]. Mais dans les provinces canadiennes de common law, le droit évolue entre ces deux extrêmes. C'est pourquoi, selon le juge, il faut une règle claire dans ce domaine. Cette règle doit être défendable

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[58] (1995), 130 Nfld. & P.E.I.R. 92.

[59] Jugement du 18 décembre 1997. Au nom de la majorité, le juge Iacobbucci fut d'avis que la responsabilité du constructeur était expressément limitée en vertu d'une clause contractuelle au seul cas d'installation négligente et que cette clause écartait donc l'obligation de mise en garde. Seul le fabricant devait être tenu responsable de la part de 40% des dommages fixés par le juge de première instance. Quant aux juges McLachlin et La Forest, dissidents à cet égard, ils furent d'avis que le contrat ne traitait pas directement de la responsabilité fondée sur la négligence ni de l'obligation de mise en garde.

[60] *Supra* note 38.

[61] Voir les pp. 21-22 de son opinion.

[62] *Supra* note 25.

[63] *Supra* para. 9.

tant au plan moral qu'économique et on doit formuler un principe logique sur lequel les individus puissent fonder leur conduite et qui permette aux tribunaux de trancher les litiges. Or, cette règle n'a pas encore émergé compte tenu des différences marquant les opinions exprimées par les membres de la Cour suprême dans l'arrêt *Norsk*[64], en particulier entre son opinion et celle du juge La Forest[65].

19. C'est donc à ces différences que le juge McLachlin va s'attaquer pour, en bout de ligne, reprendre l'opinion du juge La Forest. Ainsi, l'indemnisation de la perte économique relationnelle doit faire l'objet d'une règle générale d'exclusion à l'exception de 3 catégories, à savoir: les cas où le demandeur a un droit de possession ou de propriété sur le bien endommagé; les cas d'avaries communes; et, les cas où le lien entre le demandeur et le propriétaire du bien est fondé sur une entreprise de coparticipation. Comme le juge La Forest dans l'arrêt *Norsk*, le juge McLachlin estime que cette liste d'exceptions à la règle générale de non-indemnisation de la perte économique relationnelle n'est pas exhaustive[66].

20. En fait, c'est l'approche de l'arrêt *Anns*[67] qui continuera de s'appliquer. Lorsque dans le cadre d'une action en responsabilité délictuelle l'indemnisation d'une perte économique relationnelle est réclamée (et lorsqu'elle n'entre pas dans les 3 catégories déjà mentionnées), les tribunaux doivent d'abord vérifier s'il existe une obligation de diligence *prima facie* à laquelle est assujettie le défendeur et, deuxièmement, en cas de réponse positive, vérifier s'il n'existe pas des considérations de principe qui annihilent cette obligation. L'obligation de diligence *prima facie* dont il est question ici se vérifie par l'existence d'un lien étroit qui, compte tenu des circonstances, permet d'affirmer que le défendeur est tenu de se soucier des intérêts légitimes du demandeur dans le cours de ses propres affaires. Dans les faits de l'espèce, le juge McLachlin fut d'avis que le constructeur et le fabricant avaient une obligation de mise en garde du caractère dangereux du système de réchauffement vis-à-vis aussi bien la propriétaire de la plate-forme (la société C) que ses locataires (les sociétés A et B). Les défendeurs connaissaient l'existence de ces 3 sociétés et savaient ou auraient dû savoir que ces dernières risquaient des pertes financières en cas d'incendie causé par le système de réchauffement. Toutefois, selon le juge, cette obligation est annihilée par des considérations de principe et, en particulier, par le problème de la responsabilité indéterminée qu'elle pose. En effet, s'il existe une obligation de mise en garde vis-à-vis des 3 sociétés, pourquoi cette obligation n'existerait-elle pas à l'égard de toutes autres personnes dont les pertes étaient prévisibles du fait de la mise hors service de la plate-forme, comme par exemple les investisseurs dans le projet? Même si, à titre de moyen de dissuasion contre la négligence, un tribunal peut tout de même accorder une indemnisation pour

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[64] *Supra* note 29.

[65] Voir les pp. 22-29 de son opinion.

[66] Voir les pp. 24-25 de son opinion.

[67] *Supra* note 24.

ce type de pertes, l'affaire sous étude ne le justifie pas. Même si en cas d'inégalité du pouvoir de négociation, c'est-à-dire lorsque la capacité du demandeur de faire assurer le risque par le propriétaire du bien est faible, un tribunal peut aussi accorder une indemnisation, l'affaire sous étude ne le justifie pas selon le juge McLachlin[68].

21. Par ailleurs, la négligence contributive de la demanderesse, la société C, fait-elle obstacle à son droit d'être indemnisée? Afin de déterminer le droit applicable, le juge McLachlin est d'abord d'avis qu'il s'agit là non pas d'une affaire qui, par son caractère véritable, est de nature locale, mettant en cause la propriété et les droits civils, mais plutôt d'une question qui relève intégralement du domaine maritime et qui doit être tranchée en vertu du droit maritime canadien. C'est en effet une question de responsabilité délictuelle dans un contexte maritime. La Cour d'appel de Terre-Neuve a considéré la plate-forme comme un bâtiment navigable, vulnérable aux dangers de la mer et de toute façon, selon le juge McLachlin, l'objet principal de la plate-forme est une activité se déroulant dans les eaux navigables[69].

22. Le droit maritime canadien exclut l'application de la législation provinciale comme celle de Terre-Neuve sur le partage de la responsabilité. Par ailleurs, et selon le juge McLachlin, puisque le droit maritime canadien fait partie intégrante du droit de Terre-Neuve, le droit de cette province commande l'application du droit maritime canadien (*sic*)[70]. L'application de lois provinciales nuirait à l'uniformité du droit maritime canadien et les différences dans le droit des provinces créeraient de l'incertitude. Aussi, c'est sans s'attarder davantage à cette question que le juge McLachlin écarte la décision de la Cour suprême dans l'arrêt *Stein* c. *Le navire «Kathy K.»*[71]. Même en l'absence de législation fédérale écrite et applicable à l'affaire sous étude, les principes de common law sont incorporés dans le droit maritime canadien et restent applicables. La véritable question est de savoir ce que dicte ce droit[72].

23. En common law, la règle de la négligence contributive comme fin de non-recevoir a été appliquée au Canada. Mais tous s'entendent pour affirmer que son application conduit à des iniquités. Le Parlement canadien a déjà modifié cette règle en ce qui concerne les dommages matériels imputables à une collision entre deux ou plusieurs bâtiments[73] et (au moment d'écrire ce jugement) il se prépare à faire de même en ce qui concerne les collisions entraînant un décès avec un projet de loi[74]. Le ministère de la Justice du Canada a même des ambitions plus vastes dans ce domaine[75]. La question qui se pose plutôt à la Cour

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[68] Voir les pp. 32-36 de son opinion.

[69] Voir les pp. 42-43 de son opinion.

[70] Voir p. 44 de son opinion.

[71] *Supra* note 42.

[72] Voir la p. 45 de son opinion.

[73] *Loi sur la marine marchande du Canada*, *supra* note 41, art. 565.

[74] Il s'agissait du projet de loi C-73, *Loi modifiant la Loi sur la marine marchande du Canada et d'autres lois en conséquence*, 2e sess., 35e lég., 1996.

[75] Voir *supra* note 55.

est de savoir si cette dernière peut de son propre chef réformer le droit à cet égard. À ce niveau, les tribunaux peuvent changer le droit en étendant les principes existants à de nouveaux domaines du droit d'abord quand le changement est clairement nécessaire pour que le droit suive l'évolution et le dynamisme de la société et, ensuite quand il n'est pas impossible d'évaluer les conséquences du changement. Mais à l'inverse, écrit le juge McLachlin, ils n'interviendront pas si les changements proposés auront des conséquences complexes et de grande portée, rendant ainsi le droit incertain et imprévisible[76].

24. À cet égard, selon le juge McLachlin, la règle de la négligence contributive comme fin de non-recevoir est incompatible avec une conception moderne de l'équité et de la justice. Le droit moderne de la responsabilité délictuelle vise à favoriser la diligence et la vigilance chez les individus. Et la règle de la fin de non-recevoir a été condamnée tant par les juges que par la doctrine. Aux États-Unis, la règle a été abolie. Il apparaît donc qu'un changement dans ce domaine est clairement nécessaire pour que le droit suive l'évolution et le dynamisme de la société. Puis, l'abolition de cette règle n'aura pas de conséquences imprévisibles. Le principe inverse du partage de la responsabilité en matière de délits non maritimes est accepté partout au Canada et est universel. L'Angleterre, l'Australie, les provinces canadiennes de common law et le Code civil du Québec (art. 1478) le reconnaissent et l'appliquent. Un changement de la règle traditionnelle de common law harmonisera donc le droit applicable non seulement avec les changements sociaux mais aussi avec le droit d'autres pays tels les États-Unis, l'Australie et l'Angleterre[77].

25. Finalement, les défendeurs soutenaient que la Cour ne pouvait de son propre chef modifier le droit si l'on est incapable de déterminer le type de régime qui sera alors applicable. Cette prétention soulève deux questions. D'abord, il faut déterminer si la responsabilité du défendeur est individuelle (à savoir limitée à sa part des dommages) ou encore, solidaire (à savoir tous les dommages du demandeur moins le pourcentage des dommages imputables à ce dernier). En ce qui concerne les cas auxquels il s'applique, l'article 565 de la *Loi sur la marine marchande du Canada* semble favoriser la responsabilité individuelle, alors qu'en ce qui concerne les lésions corporelles, l'article 566 pose clairement la règle de la solidarité. Sans statuer sur le sens véritable de l'art. 565, le juge McLachlin est d'avis que c'est la règle de la solidarité qui doit s'appliquer, d'autant plus que c'est la règle appliquée aux États-Unis et retenue par le Code civil du Québec (arts 1523 et 1526). En deuxième lieu, il faut se demander si l'auteur d'un délit qui verse plus que sa part de l'indemnité accordée au demandeur peut recouvrer auprès des co-auteurs la somme excédentaire qu'il a versée. Il est vrai que traditionnellement la common law ne le permet pas[78]. Mais là aussi, le juge McLachlin est d'avis que cette règle est

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[76] Voir la p. 47 de son opinion. Voir aussi *Watkins* c.*Olafson*, [1989] 2 R.C.S. 750 et *R.*c. *Salituro*, [1991] 3 R.C.S. 654.

[77] Voir les pp. 48-53 de son opinion.

[78] *Merryweather* c. *Nixan*, *supra* note 46.

devenue anachronique et inéquitable. Le Code civil du Québec (art. 1536) le permet, d'ailleurs. En conclusion, la négligence contributive peut réduire une indemnité et elle ne constitue plus aujourd'hui une fin de non-recevoir. Les défendeurs, le constructeur et le fabricant, sont donc solidairement responsables envers la société C de 40% de la perte subie par cette dernière sous réserve du droit de chaque co-défendeur de demander une contribution à l'autre[79].

C) *Commentaires*

26. Concernant l'*indemnisation de la perte économique* relationnelle découlant d'un contrat, la Cour suprême confirme donc, et d'une manière unanime cette fois, l'approche retenue antérieurement par la majorité dans l'arrêt *Norsk*. C'est donc la règle de l'exclusion qui doit être appliquée à ce type de demandes. Mais le principe reste perméable aux exceptions. D'abord, une demande d'indemnisation qui tombe dans l'une des 3 catégories d'exceptions déjà énumérées peut être recevable. Puis, au regard des autres types de demandes, plutôt que de créer de nouvelles catégories d'exceptions, c'est la démarche en deux temps de l'arrêt *Anns* qui constitue la règle applicable, ou encore le principe qui fait exception au principe général. Cette décision de la Cour suprême a donc le mérite de clarifier et de stabiliser le droit dans ce domaine. L'existence du lien étroit entre l'acte négligent et le préjudice subi ainsi que le caractère prévisible de ce dernier permettront au tribunal de décider au premier chef de la recevabilité de la demande. Comme dans l'arrêt *Norsk*, cette démarche doit être rapprochée de l'appréciation qui se fait en droit civil du lien de causalité entre la faute et le dommage ainsi que de son caractère immédiat et direct. En cas de réponse affirmative, le tribunal devra évaluer ensuite si des considérations d'ordre pratique s'opposent à la recevabilité de la demande. Le second élément d'appréciation comporte évidemment un aspect discrétionnaire et nul doute que les tribunaux en préciseront les paramètres. Mais l'on peut affirmer que plus l'obligation à la charge de l'auteur du délit possède un champ d'application large, plus les risques de rejeter la demande seront élevés. C'est ce second élément qui, en bout de ligne, constituera le rempart contre l'établissement d'un régime de responsabilité indéterminée.

27. On remarquera au plan de la forme que le caractère maritime de la question n'a pas été examiné (comme d'ailleurs dans l'arrêt *Norsk*) afin de déterminer si le droit maritime canadien droit s'appliquer. La question est essentiellement analysée sous l'angle exclusif de la common law. Et cela est d'autant plus nécessaire que, selon le juge McLachlin, le droit dans les juridictions de

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[79] Voir les pp. 53-54 de son opinion. Il faut noter que la majorité de la Cour s'est ralliée à l'opinion du juge Iacobucci en ce qui concerne l'impossibilité pour la société C de poursuivre le constructeur en invoquant son obligation de mise en garde en matière délictuelle puisque cette possibilité est écartée par une clause du contrat de construction. À ce niveau, la majorité a jugé que le constructeur est donc dégagé de toute responsabilité et que seul le fabricant doit être tenu responsable jusqu'à concurrence de 40% des pertes de la société C. Voir *supra* note 59.

common law au Canada est incertain dans ce domaine et qu'une clarification s'impose. Cette façon de faire fait ressortir, selon nous, le caractère unitaire de la common law qui s'accommode mal de distinctions artificielles, telle celle qui met en opposition «common law fédérale» et «common law provinciale»[80]. Le droit maritime canadien étant un droit fédéral uniforme et comportant des règles et principes de common law, l'on remarque que la clarification de certaines de ses règles, comme celles relatives à l'indemnisation de la perte économique, déborde du domaine maritime fédéral et vaut pour l'ensemble des juridictions de common law. Ironiquement, elle vaut aussi pour la province de tradition civiliste mais uniquement dans le cas des réclamations de nature maritime. Et ce même si, à l'origine, cette problématique de l'indemnisation d'une perte économique ne se posait pas en droit civil.

28. Concernant la *négligence contributive*, la Cour suprême a endossé ici son manteau de quasi-législateur pour déclarer désuète et inapplicable la règle traditionnelle de la fin de non-recevoir. Pour y arriver, elle applique l'approche qui est la sienne dans ce domaine à savoir premièrement vérifier si le changement est nécessaire pour que le droit suive l'évolution et le dynamisme de la société et deuxièmement vérifier si des conséquences imprévisibles peuvent survenir du fait du changement d'une règle. La même démarche a été appliquée par la Cour dans l'arrêt *Porto Seguro Companhia de Seguros Gerais* c. *Belcan S.A., Fednav Ltd. et al.* rendu au même moment[81]. Elle y a écarté la règle traditionnelle qui interdit le témoignage d'experts lorsque des assesseurs siègent avec le juge. Cette règle de procédure, qui origine d'une pratique anglaise et qui a été reçue dans la jurisprudence canadienne, fut jugée inéquitable et incompatible avec la règle *audi alteram partem*. Par contraste, il faut aussi noter que, quelques mois auparavant, dans l'arrêt *Armada Lines Ltd.* c. *Chaleur Fertilizers Ltd.*[82], le même tribunal constatait une disparité entre deux règles de droit maritime canadien. La première découlait de l'arrêt *The «Evangelimos»*[83] et voulait qu'une partie ne peut avoir droit à des dommages-intérêts à la suite d'une saisie illégale d'un navire ou d'une cargaison effectuée en vertu de la règle 1003 des *Règles de pratique de la Cour fédérale*[84] sauf dans le cas de mauvaise foi ou de négligence du requérant. La seconde a trait à la délivrance d'une injonction Mareva. Dans ce dernier cas, la personne qui réclame l'ordonnance doit s'engager à indemniser le défendeur en cas de préjudice subi par ce dernier si elle n'a pas gain de cause. Selon la Cour suprême, la première règle irait à

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[80] La distinction vient du juge Laskin dans les arrêts *Quebec North Shore Paper Co.* c. *Canadian Pacific Ltd.*, [1977] 2 R.C.S. 1054 et *McNamara Construction (Western) Ltd.* c. *R.*, [1977] 2 R.C.S. 654. Elle se fonde sur le fait que la Parlement peut modifier ou abroger expressément une règle de common law applicable dans un domaine du droit relevant de la compétence législative fédérale. Voir sur ce sujet: P.W. Hogg, «Constitutional Law — Limits of Federal Court Jurisdiction — Is There a Federal Common Law?» (1977) 55 R. du B. can. 550.

[81] Jugement rendu le 18 décembre 1997.

[82] Jugement rendu le 26 juin 1997.

[83] (1853), 12 Moo. P.C. 352, 14 E.R. 945.

[84] C.R.C., c. 663 (et amendements).

l'encontre de l'évolution moderne de la common law. Mais selon elle, et après une très courte discussion, c'est au législateur qu'il revient d'intervenir et de modifier le droit dans ce domaine[85]. Le droit maritime canadien, qui est un droit fédéral uniforme, comporte donc en lui-même des disparités et l'on constate dans cette affaire que l'harmonisation du droit constitue d'abord une question relevant au premier chef du Parlement et non des tribunaux.

29. Au plan de la forme, l'on note qu'en ce qui concerne la négligence contributive, la Cour qualifie d'abord cette dernière comme étant une question qui relève intégralement du domaine maritime et, donc, qui doit être résolue par le droit maritime canadien. Cette question est «maritime» parce qu'elle est liée à des activités qui se sont déroulées dans les eaux navigables. Cette approche très englobante est conforme à l'attitude de la Cour suprême dans ce domaine[86] mais va, selon nous, beaucoup trop loin. Ce n'est pas parce qu'une activité humaine se déroule sur l'eau qu'automatiquement elle doive tomber dans le champ de compétence du Parlement canadien en matière maritime. Parce qu'il n'existe pas de législation fédérale sur cette question précise, la Cour a été amenée à identifier les règles applicables. Le droit provincial des juridictions de common law au Canada ou celui du Québec ne font pas partie du droit maritime canadien. La diversité qui pourrait exister dans ce domaine est, selon le juge McLachlin[87], un facteur qui menace l'uniformité du droit maritime canadien. La décision dans l'arrêt *The «Kathy K.»*[88], où le même tribunal a appliqué le droit provincial pour résoudre un problème de négligence contributive, est jugée, sans discussion, inapplicable[89]. C'est plutôt la règle traditionnelle de la fin de non-recevoir telle qu'elle découle de la common law qui s'applique. Mais ceci étant et compte tenu du caractère évolutif de la common law, cette règle doit-elle être modifiée? Les États-Unis, la Grande-Bretagne et l'Australie l'ont abolie. Les juridictions canadiennes de common law également. En droit civil, le partage de la responsabilité est permis. En conséquence, cette règle doit être écartée comme celle qui interdit aux co-auteurs d'un délit de recourir l'un contre l'autre.

Il faut apprécier la démarche de la Cour qui, d'une part, écarte le droit provincial, jugé être un obstacle à l'existence d'un droit fédéral uniforme, et qui, d'autre part, réfère à ce même droit provincial pour justifier une modification de la règle ancienne. On peut dire ici que la Cour a modifié une règle de droit fédéral pour l'harmoniser avec le droit... des provinces. Finalement, l'on note une fois de plus le rôle dévolu au droit civil dans la résolution d'une affaire de droit maritime canadien; à savoir celui de support comparatif et au même titre que le droit étranger (américain, australien, anglais...). Par ce long détour, on appliquera aux litiges maritimes qui surviennent au Québec et qui soulèvent la même question, la même solution, dérivée d'une «common law évolutive», que celle préconisée par le droit civil.

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[85] Voir les pp. 10 et 11 du jugement (J. Iacobucci).

[86] Voir *supra* note 5.

[87] Voir p. 44 de son opinion.

[88] *Supra* note 42.

[89] Voir p. 45 de son opinion.

Conclusion

30. Cette décision est donc précieuse à un double titre. D'abord, elle clarifie le droit applicable à l'indemnisation d'une perte économique, quoiqu'à cet égard des paramètres ultérieurs devront être tracés en ce qui concerne l'application par les tribunaux du test des considérations pratiques. Puis, elle écarte la règle traditionnelle de la négligence contributive comme fin de non-recevoir et harmonise la «common law fédérale» applicable aux délits maritimes avec le droit des provinces. Mais cette décision nous offre aussi un riche enseignement en ce qui concerne l'uniformisation du droit maritime canadien et des conséquences qui en découlent. Le rejet systématique du droit provincial dans ce domaine obligera le Parlement canadien à légiférer en se fondant sur une compétence législative à toutes fins utiles illimitée, puisque celle-ci est définie par rapport à une compétence d'attribution judiciaire prétendument illimitée[90]. Cette démarche nous paraît fort singulière dans la pratique constitutionnelle canadienne. Et en cas d'absence de textes fédéraux, l'on constate que dorénavant au Canada, comme en Angleterre, le droit maritime est devenu «in one sense part of the common law...»[91] et est traité comme tel par la Cour suprême. Quant au civiliste, qu'il se console en constatant qu'en droit maritime canadien, sa tradition joue le même rôle que ... les traditions étrangères. Ce tour de force a été rendu possible par la négation à la fois du caractère fédéral du Canada et de son caractère bi-juridique.

[90] Voir *supra* para. 3.

[91] *Ibid.*

Business and Investment Income under Section 87 of the *Indian Act*: *Recalma* v. *Canada*.

Murray Marshall*

Introduction

With its recent decisions in *Canada* v. *Folster*,[1] *Southwind* v. *The Queen*[2] and *Recalma* v. *Canada*,[3] the Federal Court of Appeal has added to the rapidly developing body of jurisprudence interpreting the tax exemption provisions of paragraph 87(1)(b) of the *Indian Act*.[4] However, the approach taken by the Federal Court of Appeal in this series of cases does not bode well for Indian business persons and investors. An analysis of the approach taken by the court in these decisions suggests that, for the purposes of paragraph 87(1)(b), business and investment income earned by an Indian[5] person is less likely to be exempt from taxation than income earned from or related to employment.

The three cases to be discussed were rendered within a ten month period between May, 1997 and March, 1998. The reasons in each judgment were written by Mr. Justice Linden on behalf of a unanimous court. At the time this paper was written, leave to appeal to the Supreme Court of Canada had been sought in only one of the cases: *Recalma* v. *Canada*.[6]

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[1] [1997] 3 F.C. 269 (F.C.A.).

[2] [1998] 2 C.N.L.R. 233 (F.C.A.).

[3] [1998] 158 D.L.R. (4th) 59 (F.C.A.).

[4] R.S.C. 1985, c. I-5, as amended. Section 87 reads "87. (1) Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely:

(a) the interest of an Indian or a band in reserve or surrendered lands; and

(b) the personal property of an Indian or band situated on a reserve.

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any such property mentioned in paragraphs (a) or (b) or is otherwise subject to taxation in respect of any such property.

(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

[5] "Indian" is the term used by the *Indian Act*. In this paper, it will be used interchangeably with the terms "Native" and "Aboriginal".

[6] Application for leave to appeal was dismissed with costs 10.12.98: *Coram* Cory, Major and Binnie JJ.

Following the 1978 Federal Court of Canada's decision in *The Queen* v. *National Indian Brotherhood*[7] and the Supreme Court of Canada's 1983 judgment in *Nowegijick* v. *The Queen*,[8] paragraph 87(1)(b) has frequently been the focus of judicial interpretation. Until recently, the most frequent subject of attention has been employment income or employment related income. The 'residence of the debtor' test developed by the Federal Court of Canada in *National Indian Brotherhood,* confirmed by the Supreme Court in *Nowegijick,* related to wages earned by Indian persons. The 'connecting factors' test established by the Supreme Court in its 1992 decision in *Williams* v. *Canada*,[9] addressed the applicability of paragraph 87(1)(b) to unemployment insurance benefits.

However, prior to the 1998 decisions in *Southwind* and *Recalma,* no appellate court had been called upon to interpret and apply paragraph 87(1)(b) to business and investment income. These decisions are, accordingly, of significant interest to Indian entrepreneurs and investors. *Folster*, although it concerned employment income, was the first of the three cases in question and provides useful insight into the approach taken by the Federal Court of Appeal in *Southwind* and *Recalma.*

In these three cases, the Federal Court of Appeal has created a new, and in many ways worrisome, branch on the common law tree. In its approach to paragraph 87(1)(b), the court commits a number of significant errors, the cumulative effect of which is to make it difficult, if not impossible, for business and investment income earned by Indian persons to be exempted from taxation under this paragraph. First, and perhaps most importantly, the court misconstrues the purpose of paragraph 87(1)(b). As will be discussed, this error permeates the remainder of the court's reasons and results in conclusions that are untenable. Secondly, the court compounds its error by disregarding the principles of interpretation that are to be applied to statutes related to Indians and by incorrectly applying the *Williams* "connecting factors" test. Finally, the court relies on a "commercial mainstream" concept, extracted from the reasons of La Forest J. in *Mitchell* v. *Peguis Indian Band*,[10] as a means of reinforcing its conclusions that paragraph 87(1)(b) does not exempt the business and investment income in question from taxation. As will be discussed, the court's use of the "commercial mainstream" construct is confusing and unnecessary.

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[7] [1979] 1 F.C. 103 (F.C.T.D.).

[8] [1983] 1 S.C.R. 29.

[9] [1992] 1 S.C.R. 877.

[10] [1990] 2 S.C.R. 85.

The tax exemption in paragraph 87(1)(b)

There are four conditions necessary to engage the tax exemption in section 87(1)(b), namely: there must be personal property; it must be owned by an Indian;[11] the Indian must be taxed in respect of that property and the property must be situated on a Reserve.[12] *Nowegijick* established that income should be considered "personal property" for the purposes of section 87.[13]

The condition which is most frequently the subject of debate is whether the property in question is "situated on a Reserve".[14] The issue does not usually[15] arise in the case of a chose in possession — tangible property — the location of which is more easily ascertained. However, determining the *situs* of a chose in action, including income, is more difficult. The problem is neatly summarized by Linden, J.A. in *Folster:*

> "Over the years, Courts have tried to fashion a simple, bright-line rule for determining whether an Indian's personal property is "situated on a reserve". These efforts have proved less than satisfactory. Although this condition appears simple enough to apply, it is a difficult one to apply in the context of intangible property such as wages and other forms of income. The reason for the difficulty is that the application of a *situs* rule to an aspect of property which has no physical or local existence is bound to be notional and risks being arbitrary."[16]

In *National Indian Brotherhood*, Thurlow, A.C.J. formulated what has been referred to as the 'residence of the debtor' test for determining the location of employment income under paragraph 87(1)(b):

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[11] Defined in section 2 of the *Indian Act* as meaning: "...a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian".

[12] *Nowegijick* v. *The Queen*, *supra* note 8. "Reserve" is defined in section 2 of the *Indian Act* as follows: "(a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and (b) except in subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51 and 60 and the regulations made under any of those provisions, includes designated lands."

[13] *Supra* note 8 at 41: "With respect, I do not agree with Chief Justice Jackett that the effect of s. 87 of the *Indian Act* is only to exempt what can properly be classified as direct taxation on property. Section 87 provides that "the personal property of an Indian...on a reserve" is exempt from taxation; but it also provides that "no Indian...is...subject to taxation in respect of any such property". The earlier words certainly exempt certain property from taxation; but the latter words also exempt certain persons from taxation in respect of such property. [...]It does not matter then that the taxation of employment income may be characterized as a tax on persons, as opposed to a tax on property."

[14] *Williams* v. *Canada*, *supra* note 9.

[15] In *Union of New Brunswick Indians* v. *New Brunswick (Minister of Finance)*, [1998] 161 D.L.R. (4th) 193 (S.C.C.), the Supreme Court of Canada concluded that s. 87 of the *Indian Act* did not prohibit taxation (provincial retail sales tax) in respect of tangible personal property purchased off-reserve if destined for use on-reserve. The Court held that the "paramount location" test, which has been used to protect Indian property normally situated on the reserve from being taxed or seized while off-reserve, should not be applied to sales taxes on tangible goods.

[16] *Canada* v. *Folster*, *supra* note 1 at 277.

> "A chose in action such as the right to a salary in fact has no situs. But where for some purpose the law has found it necessary to attribute a situs, in the absence of anything in the contract or elsewhere to indicate the contrary, the situs of a simple contract debt has been held to be the residence or place where the debtor is found. See Cheshire, *Private International Law,* seventh edition, pp. 420 *et seq.*"[17]

This approach to determining *situs* for the purposes of section 87 was approved by the Supreme Court in *Nowegijick.*[18] However, with its 1992 decision in *Williams*, the Supreme Court changed the rules. In *Williams*, the Court reconsidered the 'residence of the debtor' test and decided that it was "...simply not apparent how the place where a debt may normally be enforced has any relevance to the question whether to tax the receipt of payment of that debt would amount to the erosion of the entitlements of an Indian *qua* Indian on a reserve."[19] Instead, the Court decided that a more purposive approach should be taken to applying section 87(1)(b):

> "The test for *situs* under the *Indian Act* must be constructed according to its purposes, not the purposes of the conflict of laws. Therefore, the position that the residence of the debtor exclusively determines the *situs* of benefits such as those paid in this case must be closely reexamined in light of the purposes of the *Indian Act.*"[20]

The Court then defined what has become known as the 'connecting factors test':

> "...The first step is to identify the various connecting factors which are potentially relevant. These factors should then be analyzed to determine what weight they should be given in identifying the location of the property, in light of three considerations: (1) the purpose of the exemption under the *Indian Act*; (2) the type of property in question; and (3) the nature of the taxation of that property. The question with regard to each connecting factor is therefore what weight should be given that factor in answering the question whether to tax that form of property in that manner would amount to the erosion of the entitlement of the Indian *qua* Indian on a reserve."[21]

At this point, it may be useful to provide a brief outline of the facts and issues of the three decisions to be discussed.

Canada v. *Folster*

Decided in May, 1997, *Folster* was the first of the three cases. The essential facts were as follows.

Mrs. Folster was status Indian who lived on the Norway House Indian Reserve and worked as a nurse at a hospital located adjacent to but not on the Reserve. The hospital had once been located on-reserve but had been re-located by the federal government. Most patients served by the hospital were from the Reserve. Her claim that her employment income was exempted under section

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[17] *Supra* note 7 at 109.

[18] *Nowegijick* v. *The Queen*, *supra* note 8 at 34.

[19] *Williams* v. *Canada*, *supra* note 9 at 891.

[20] *Ibid.*

[21] *Ibid.* at 892-93.

87(1)(b) was allowed by the Tax Court of Canada.[22]

The Crown's appeal was allowed by the Federal Court, Trial Division.[23] In deciding that the income was not protected by paragraph 87(1)(b), Mr. Justice Cullen commented:

> "Although the circumstances surrounding her employment at the hospital were strongly connected to the reserve, neither her employer nor the location where she performed the duties of her employment was located on the reserve. Although the denial of her tax exemption leads to an intuitively anomalous result, given the physical proximity of the hospital to the reserve and the population serviced by the hospital, I am hesitant to find that work for the benefit of Indians is sufficient to bring income arising from that work into tax exempt status, absent other connecting factors."[24]

A further appeal to the Federal Court of Appeal reversed the lower courts' decisions. The Federal Court of Appeal held that Mrs. Folster's employment was "intimately connected"[25] to the Reserve and gave little weight to the fact that her employer was 'technically'[26] located off-reserve. In his reasons, Mr. Justice Linden expressed his view of the test that should be applied in a section 87 analysis:

> "In my respectful view, if the Trial Judge's result is, as he described it, "intuitively anomalous", this is a signal that the connecting factors test has not been applied properly. It must be recalled that the connecting factors test is simply a way for courts to apply the *situs* principle in a principled way, by bringing some structure to the inquiry. It is an inquiry which has, as its basic question: having regard for the legislative purpose for which the section 87 tax exemption was enacted, where does it make the most sense to locate the *situs* of the personal property at issue? The test is no more magic than that."[27]

This quotation affords a useful insight into the Federal Court of Appeal's approach to interpreting section 87 and will be discussed at more length later in this paper.

Southwind v. *The Queen*

Southwind was the second of the three Federal Court of Appeal cases under discussion and the first appellate court decision to address paragraph 87(1)(b) in the context of business income. The facts were as follows.

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[22] (1992), 92 D.T.C. 2267 (T.C.C.).

[23] [1995] 1 F.C. 561 (F.C.T.D.) This appeal was heard together with the appeal in a related matter: *Canada* v. *Poker*.

[24] *Ibid.* at 587.

[25] *Canada* v. *Folster*, *supra* note 1 at 291.

[26] *Ibid.* at 288: "technical relocation" is the term used by appellant and quoted by Justice Linden. However, in *Southwind* v. *The Queen*, *supra note* 2 at 235, Justice Linden refers to the facts of Folster as follows: "In that case, an Indian woman who had been working in a hospital which served primarily her Reserve community and which was adjacent to but not technically on the Indian Reserve was exempted pursuant to para. 87(1)(b) from paying tax on her employment income."

[27] *Ibid.* at 286.

Mr. Southwind was a status Indian who operated a logging business as a sole proprietorship from his home on the Sagamok Indian Reserve. For the taxation years in question, he provided services exclusively to a non-Indian company. The company was located and the services were provided off-reserve. Administrative work connected to Mr. Southwind's business, including telephone calls, bookkeeping and storage of receipts occurred on the reserve. Mr. Southwind owned the equipment used in his business and, when not in use, it was stored on-reserve. He was paid by cheques drawn on an off-reserve account and, in most but not all cases, delivered to his residence on reserve.

Mr. Southwind's position that his income for the 1990 taxation year was exempt under section 87(1)(b) was rejected by the Tax Court of Canada.[28] The judgment of McArthur, T.C.J. notes that counsel for the Crown took the position that:

> "...the correct approach when determining the *situs* of the business income was to evaluate the degree to which the Appellant had participated in the commercial mainstream."[29]

The Tax Court decision was appealed to the Federal Court of Appeal where, in a decision rendered January 14, 1998, Mr. Justice Linden acknowledged the significance of the type of income under consideration:

> "In this case, the property for which the appellant seeks an exemption is business income, not employment income, so that the factor analysis becomes somewhat more complex, there being more of them to consider than in the employment income cases."[30]

After reviewing what he found to be relevant connecting factors, Justice Linden expresses doubts about the accuracy of the evaluation done by the Tax Court judge[31] but agreed with his conclusion. Mr. Southwind's appeal was rejected on the basis that:

> "While it is significant that the appellant lives on a Reserve, engages in some administrative work out of his home on the Reserve, and stores the business records and the business assets which he owns on the Reserve when they are not in use, the appellant, in my view, is engaged not in a business that is integral to the life of the Reserve, but in a business that is in the "commercial mainstream"."[32]

Recalma v. *Canada*

Judgment in this case was rendered by the Federal Court of Appeal in March, 1998, three months after its decision in *Southwind.*

This case involved three members of the Recalma family, all of whom are status Indians, members of the Qualicum Band and, at all material times, residents of the Qualicum Indian Reserve on Vancouver Island. The Recalmas

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[28] *Southwind* v. *Canada*, [1995] T.C.J. No. 788 (T.C.C.).

[29] *Ibid.* at para. 10.

[30] *Southwind* v. *The Queen*, *supra* note 2 at 236.

[31] *Ibid.* at 237.

[32] *Ibid.* at 238.

were involved in several successful fishing businesses operated from their homes on the Reserve. The Recalma family is actively involved in its community, both culturally and economically. The Tax Court decision[33] finds as a fact that the monies earned on the investments in question were spent in large measure, although not entirely, on the Reserve for personal matters and to maintain traditional ways of living, Reserve artefacts and values.

In 1991, they invested a portion of the income earned from their fishing activities or the sale of fishing assets into Bankers' Acceptances and mutual funds purchased from a branch of the Bank of Montreal located on the Squamish Indian Reserve.

Bankers' Acceptances are short-term notes issued by a third party, payment of which is guaranteed by the bank selling the notes. They are sold at a discount and redeemed at face value. Upon receipt of payment, the monies are deposited directly into the client's account at the bank.

The mutual funds in question were the First Canadian Money Market Fund, which invests in short-term debts issued by Canadian governments and corporations, and the First Canadian Mortgage Fund, which invests in mortgages. Upon redemption, proceeds from these investments are deposited directly into client's accounts, or as directed.

Although the finding was disputed by the Crown, it appears from the judgment of the Tax Court[34] that the original monies on which the interest was earned, was itself exempt from taxation pursuant to section 87. In any event, it was the interest earned on the capital, rather than the capital itself, which Revenue Canada assessed to be outside the scope of section 87 and therefore taxable. The Recalmas appealed this assessment to the Tax Court of Canada.

In a judgment issued on June 17, 1996, Hamlyn, T.C.J. held that the interest income earned by the Recalma family was not "situated on a Reserve" and was therefore taxable.

> "The act of buying the investment instruments in question is the act of making a choice to enter into an investment transaction with all its parameters. Thus, to earn an income stream from the economic mainstream from economic activities located, generated and structured off the reserve is the choice the Appellants made. The Appellants, by making the choice, chose to enter the main economic mainstream of normal business conducted off the reserve."[35]

The Recalmas' appeal to the Federal Court of Appeal was dismissed on the basis that:

> "Thus, in our view, taking a purposive approach, the investment income earned by these taxpayers cannot be said to be personal property "situated on a reserve" and, hence, is not exempt from income taxation."[36]

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[33] *Recalma* v. *Canada*, [1997] 4 C.N.L.R. 272 (T.C.C.).

[34] *Ibid.* at 274: "The source of the funds used for the purchase of the investment instruments came from the monies of the Appellants derived from employment income and the sale of assets. All monies were related by the Appellants to a situs on the Qualicam (sic) Beach Reserve."

[35] *Ibid.* at 279.

[36] *Recalma* v. *Canada*, *supra* note 3 at 64.

As indicated above, the Recalma family has sought leave to appeal to the Supreme Court of Canada.[37]

The purpose of section 87

It is apparent from the Supreme Court's reasons that the purpose of section 87 plays a paramount role in the application of the *Williams* test. The purpose of section 87 is the first of the three considerations against which potentially relevant connecting factors are to be weighed. If one is to apply the test correctly, therefore, it is essential to define the purpose of section 87 accurately. In *Williams*, the Supreme Court relies on the reasons of La Forest, J. in *Mitchell* v. *Peguis Indian Band*[38] for describing the nature and purpose of section 87:

> "The question of the purpose of ss. 87, 89 and 90 has been thoroughly addressed by La Forest J. in the case of *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85. La Forest J. expressed the view that the purpose of these sections was to preserve the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of the governments to tax, or creditors to seize. The corollary of this conclusion was that the purpose of the sections was not to confer a general economic benefit upon the Indians..."[39]

Gonthier, J. then cites with approval a lengthy excerpt from La Forest, J.'s reasons in *Mitchell*, including the following passage:

> "The exemptions from taxation and distraint have historically protected the ability of Indians to benefit from this property in two ways. First, they guard against the possibility that one branch of government, through the imposition of taxes, could erode the full measure of the benefits given by that branch of government entrusted with the supervision of Indian affairs. Secondly, the protection against attachment ensures that the enforcement of civil judgments by non-natives will not be allowed to hinder Indians in the untrammelled enjoyment of such advantages as they had retained or might acquire pursuant to the fulfilment by the Crown of its treaty obligations. In effect, these sections shield Indians from the imposition of the civil liabilities that could lead, albeit through an indirect route, to the alienation of the Indian land base through the medium of foreclosure sales and the like; see Brennan J.'s discussion of the purpose served by Indian tax immunities in the American context in *Bryan* v. *Itasca County*, 426 U.S. 373 (1976) at 391.
>
> In summary, the historical record makes it clear that ss. 87 and 89 of the *Indian Act*, the sections to which the deeming provision of s. 90 applies, constitute part of a legislative "package" which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. *From that time on, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold qua Indians, i.e., their land base and the chattels on that land base.*"[40] (emphasis added)

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[37] *Supra* note 6.

[38] *Supra* note 10.

[39] *Williams* v. *Canada*, *supra* note 9 at 885.

[40] *Ibid.* at 886.

It should be noted that despite the reliance that has been placed on La Forest, J's comments in subsequent decisions, *Mitchell* was not a case that directly concerned section 87 of the *Indian Act*. The facts involved certain monies that were to be paid as a sales tax rebate by the government of Manitoba to 54 Indian bands. These monies had been garnished before judgment by a non-Indian representative of the bands who had been involved in negotiating the rebate in question. The primary issue was whether the monies could be "deemed" to be situated on a Reserve pursuant to section 90 of the *Indian Act* and therefore protected from attachment under section 89 of the *Indian Act*.

Despite the definition of the purpose of section 87 given by the Supreme Court in *Mitchell* and *Williams*, the Federal Court of Appeal has added a new element of its own creation in describing the section's purpose. In *Folster*, Mr. Justice Linden described his understanding of the purpose of section 87 in the following terms:

> "La Forest J. characterized the purpose of the tax exemption provision as, in essence, *an effort to preserve the traditional way of life in Indian communities* by protecting property held by Indians *qua* Indians on a reserve."[41] (emphasis added)

In *Recalma*, after first referring to *Williams* and *Mitchell*, the court once again alludes to the purpose of section 87 in the following terms:

> "In evaluating the various factors the Court must decide where it "makes the most sense" to locate the personal property in issue in order to avoid the "erosion of property held by Indians *qua* Indians" *so as to protect the traditional Native way of life*."[42] (emphasis added)

This characterization of the purpose of section 87 incorrectly states the findings made by the Supreme Court of Canada in this regard. It is a critical error that colours the remainder of the court's reasons. There is no indication in *Mitchell* or *Williams* that the purpose of section 87 is to preserve a "traditional Native way of life". It is difficult to understand how the preservation of *property* equates to the protection of a *way of life*. By adding this modifier, the Federal Court of Appeal has created a presumption that only personal property that is consistent with or complementary to a "traditional Native way of life" will fall within the protection of section 87(1)(b). There is no support in the section itself or in *Mitchell* or *Williams* for such an interpretation.

In *Southwind*, the court seems to take their characterization of section 87 a step further:

> "All we can do is evaluate the factors and draw the lines, as best we can, between business income and employment income that is situated on the Reserve *and integral to community life*, and income that is primarily derived in the commercial mainstream, working for and dealing with off-reserve people."[43] (emphasis added)

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[41] *Canada* v. *Folster*, *supra* note 1 at 282.

[42] *Recalma* v. *Canada*, *supra* note 3 at 63.

[43] *Southwind* v. *The Queen*, *supra* note 2 at 239.

Although it may not have been the court's intention, this extract implies that income must not only be situated on a Reserve but must also be "integral to community life" before it will be exempted from taxation under section 87(1)(b): a remarkable departure from the plain wording of the section.

In addition to being a marked departure from *Mitchell* or *Williams*, the Federal Court's interpretation of the nature and purpose of section 87 raises a number of serious difficulties in application. First, there is the obvious difficulty of defining the characteristics of a "traditional Native way of life". It is simplistic and incorrect to imply that there is a single "way of life" common to all Aboriginal communities. The culture and traditions of Aboriginal groups vary greatly depending on the particular Nation, or community within a Nation. The "traditional Native way of life" of the Mohawks of Kahnawake is, for example, distinctly different from a Cree community in Northern Alberta or a Mi'kmaq community in New Brunswick. Moreover, identifying the defining characteristics of a particular Nation's "traditions" is neither easy or straightforward and, when such questions are litigated, is frequently the subject of lengthy and complex expert evidence.[44] There is no indication that this sort of evidence was available to the Federal Court of Appeal in any of the cases under discussion.

Moreover, its use of the terms "traditional Native way of life" and 'integral part of Reserve life', suggest the Federal Court of Appeal has mistakenly incorporated into a section 87 analysis, elements from the test defined in the recent *Van der Peet*[45] trilogy of cases from the Supreme Court of Canada for the purpose of establishing an aboriginal right protected by section 35(1) of the *Constitution Act, 1982*.[46]

In *Van der Peet*, a member of the Sto:lo First Nation was charged under section 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, with the offence of selling ten salmon caught under the authority of an Indian food fish licence, contrary to the British Columbia Fishery (General) Regulations, SOR/84-248. Mrs. Van der Peet defended the charge on the basis that the restrictions imposed by the British Columbia Fishery Regulations infringed her existing aboriginal right to sell fish and were therefore invalid as a violation of section 35(1) of the *Constitution Act, 1982*.

In its decision, the Supreme Court of Canada takes a purposive approach in determining how an aboriginal right is to be defined.

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[44] For example, note the summaries of evidence called in *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010; *R.* v. *Adams*, [1996] 3 S.C.R. 101; *R.* v. *Coté*, [1996] 3 S.C.R. 139; *Mitchell* v. *MNR*, [1997] 4 C.N.L.R. 103 (F.C.T.D.).

[45] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507; *R.* v. *N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R.* v. *Gladstone*, [1996] 2 S.C.R. 723.

[46] "35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

> "In order to define the scope of aboriginal rights, it will be necessary first to articulate the purposes which underpin s. 35(1), specifically the reasons underlying its recognition and affirmation of the unique constitutional status of aboriginal peoples in Canada. Until it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is possible..."[47]

As noted above, the Supreme Court of Canada also uses a purposive approach to interpreting section 87 of the *Indian Act*. However, this similarity in the interpretive principles employed by the Court does not imply that the purpose underlying section 87 of the *Indian Act* has any relation to the purposes which "underpin" section 35(1) of the *Constitution Act, 1982*. Moreover, given their distinctly different nature, it would be inappropriate to apply the test that has been developed to define an aboriginal right to a right defined by the *Indian Act*.

Section 87 is a statutory provision developed by the Parliament of Canada and encoded into federal legislation. Although the right set out in this section is tremendously important to Indian individuals and communities, it is, like any other federal legislation, subject to amendment or repeal as the Crown sees fit. Section 35(1) is the constitutional entrenchment of rights which are unique to aboriginal peoples. Short of an amendment to the Canadian constitution, these rights cannot be extinguished and can only be regulated in a way that is consistent with the justificatory test set out in the *R.* v. *Sparrow*.[48]

Unfortunately, it appears the Federal Court of Appeal uses the findings made in *Van der Peet* to define both the purpose of section 87 and the appropriate test to be applied. This is apparent when one considers the following extracts from *Van der Peet* in which, Lamer, C.J. writing for the majority, defines the rationale for section 35(1) in the following terms:

> "In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status."[49] (underlining in the original)

Building on this rationale, and the Court's finding that the aboriginal rights protected in section 35(1) must be reconciled with the sovereignty of the Crown, Lamer, C.J. describes the appropriate test for defining an aboriginal right:

> "In light of the suggestion of *Sparrow*, *supra*, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[50]

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[47] *Van der Peet*, *supra* note 45 at 527.

[48] [1990] 1 S.C.R. 1075.

[49] *Van der Peet*, *supra* note 45 at 538-39.

[50] *Ibid.* at 549.

It seems that, in insisting that the tax exemption will only apply in circumstances where the activity is consistent with a 'traditional Native way of life' or is 'integral to Reserve life', the Federal Court of Appeal has relied on the *Van der Peet* analysis of an aboriginal right for the purpose of characterizing the statutory right under section 87.

Unfortunately, this faulty reasoning has been adopted in at least one recent decision of the Tax Court of Canada. In *L.J. Meier Co.* v. *Canada*,[51] decided August 4, 1998, the appellant was a sales agent on behalf of manufacturers of leather goods, including two unincorporated Indian manufacturers located on different Reserves. When it had issued its invoices to the Indian manufacturers, the appellant had not asked them to pay G.S.T. on the basis of its understanding that they were exempt from doing so. Revenue Canada assessed the appellant for the G.S.T. on commission revenue it had received from these manufacturers claiming that the appellant should have collected G.S.T. from them. The appellant appealed on the ground, *inter alia*, that the Indian manufacturers were exempted under section 87 from paying G.S.T. on the commissions in question and that it therefore had no obligation to collect this tax and remit it to Revenue Canada. After reviewing the facts of the case and the Federal Court of Appeal's reasons in *Folster, Southwind* and *Recalma*, Mogan, T.C.J. concludes:

> "I find that the Indian manufacturers represented by the Appellant are not engaged in a business that is integral to the life of the Reserve. They are engaged in a business which is in the commercial mainstream. Accordingly, they must do so on the same basis as all other Canadians with whom they compete."[52]

Clearly, it would be desirable to have the Supreme Court of Canada clarify whether it is appropriate to apply an 'integral to the life of the Reserve' test to a section 87 analysis.

As will be discussed, the Federal Court of Appeal's unique characterization of the purpose of section 87 is reflected in its selection of the relevant connecting factors considered in these cases and in its use of the "commercial mainstream" construct. It is also an indication that the court has not embraced a 'broad and liberal' approach to interpreting this provision.

"Broad and Liberal" Interpretation

In *Nowegijick,* Dickson J. (as he then was) provided clear guidance for the appropriate principles of construction to be used by a court in interpreting section 87:

> "It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical

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[51] [1998] T.C.J. No. 651.

[52] *Ibid.* at para. 19.

> construction which might be available to deny exemption. In *Jones* v. *Meehan*, 175 U.S. 1 (1899), it was held that Indian treaties 'must...be construed, not according to the technical meaning of [their] words...but in the sense in which they would naturally be understood by the Indians'"[53]

This principle, having been confirmed by numerous subsequent decisions of the Supreme Court,[54] is firmly entrenched in Canadian jurisprudence. In *Mitchell*, Chief Justice Dickson again commented further on the rationale for the 'broad and liberal' principle of interpretation defined in *Nowegijick*:

> "...The *Nowegijick* principles must be understood in the context of this Court's sensitivity to the historical and continuing status of aboriginal peoples in Canadian society. The above-quoted statement is clearly concerned with interpreting a statute or treaty with respect to the persons who are its subjects — Indians – not with interpreting a statute in favour of Indians simply because it is the State that is the other interested party. It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretive approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one. *Underlying Nowegijick is an appreciation of societal responsibility and a concern with remedying disadvantage*, if only in the somewhat marginal context of treaty and statutory interpretation."[55] (emphasis added – underlining in the original)

Folster is the only one of the three cases in which the Federal Court of Appeal refers to the *Nowegijick* principle. It does so in the following terms:

> "These findings were prompted, in part, by the principle expressed in that case that legislation which affects Indian persons, such as the tax exemption provisions, ought to be liberally rather than technically interpreted where there is ambiguity in the wording of the provision. Specifically, Dickson, J. stated that "[i]f the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption". Notwithstanding the importance of liberal construction of such legislation, however, Dickson J. made specific reference to the fact that section 87 does not operate as a blanket exemption. He stated:
>
> 'Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes of other Canadian citizens.'"[56]

It is apparent from the court's reasoning in these cases that interpreting section 87 'broadly and liberally' is not uppermost in its mind. Note, for example, the following comments in *Recalma*, which indicate the court's inclination to consider section 87 as just another potential tax 'loophole' to be examined in the same way as the court might examine, for example, a capital gains exemption under the *Income Tax Act:*

> "There is, of course, nothing wrong with Canadians arranging their affairs in order to minimize their tax burden. This is no less so for Natives than it is for other

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[53] *Nowegijick* v. *The Queen*, *supra* note 8 at 36.

[54] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075; *R.* v. *Sioui*, [1990] 1 S.C.R. 1025; *Mitchell* v. *Peguis Indian Band*, *supra* note 10; *Union of New Brunswick Indians* v. *New Brunswick (Minister of Finance)*, *supra* note 15.

[55] *Mitchell* v. *Peguis Indian Band*, *supra* note 10 at 99.

[56] *Canada* v. *Folster*, *supra* note 1 at 276.

> entrepreneurs who arrange mergers and offshore vehicles to reduce their tax burdens. Some efforts made to save taxes are successful and others are not. We must decide whether this one succeeded or whether it has failed. In our view, it has not succeeded."[57]

This approach completely disregards the unique rationale underlying section 87 described by Dickson, C.J. in *Mitchell*. There is no indication in these comments that, unlike "mergers and offshore vehicles" the tax protections in section 87 flow from the fact that, the Crown has "an obligation to native peoples which [it] has recognized at least since the signing of the *Royal Proclamation of 1763*" and that "...the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians, i.e., their land base and the chattels on that land base."[58]

Also of concern is Justice Linden's use of the modifier "so as to protect the traditional Native way of life" in describing the purpose of section 87. This phrase implies the application of a 'frozen rights' approach to interpreting this provision: that is, the exemption should only be applied in circumstances that are compatible with the history of an Indian community. This view is reinforced by Justice Linden's comments, after finding the property in question not to be exempt from taxation, that:

> "To hold otherwise would open the door to wealthy Natives living on reserves across Canada to place their holdings into banks or other financial institutions situated on reserves and through these agencies invest in stocks, bonds and mortgages across Canada and the world without attracting any income tax on their profits. *We cannot imagine that such a result was meant to be achieved by the drafters of section 87.*"[59] (emphasis added)

These remarks are not consistent with a bench that is committed to applying a 'broad and liberal' interpretation of section 87. Moreover, the court's gratuitous reference to "wealthy Natives" is an indication of its unfavourable mind set. There is nothing in section 87 to suggest that its application should be determined by an Indian person's net worth.

The Williams test

In each of the three decisions in question, the Federal Court of Appeal correctly describes and purports to apply the "connecting factors" test defined in *Williams*. However, the court appears to eschew the careful analysis required by the *Williams* test, in favour of a 'common sense' approach. Note the following comments in *Folster:*

> "...It must be recalled that the connecting factors test is simply a way for courts to apply the *situs* principle in a principled way, by bringing some structure to the inquiry. It is an inquiry which has, as its basic question: having regard for the

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[57] *Recalma* v. *Canada*, *supra* note 3 at 62.

[58] *Williams* v. *Canada*, *supra* note 9 at 886, quoting *Mitchell* v. *Peguis Indian Band*, *supra* note 10 at 131.

[59] *Recalma* v. *Canada*, *supra* note 3 at 64.

> legislative purpose for which the section 87 tax exemption was enacted, where does it make the most sense to locate the *situs* of the personal property at issue? The test is no more magic than that."[60]

In *Recalma*, Justice Linden reiterates that:

> "In evaluating the various factors the Court must decide where it "makes the most sense" to locate the personal property in issue..."[61]

It may be noted that this simplification of the *Williams* test is difficult to reconcile with the observation in *Southwind* that:

> "The process of determining the tax status of income earned by Natives on Reserves has become quite complex, depending on a sophisticated analysis of a series of factors."[62]

Reducing the *Williams* test to nothing more than what may be characterized as a "smell test", makes any further identification and weighing of connecting factors seem hollow at best, and result-driven at worst. Although it was designed to be flexible, it is difficult to believe the Supreme Court of Canada intended the *Williams* test to be applied in the manner suggested by the Federal Court of Appeal.

It is also worth noting that the assertion that the activity generating the income must be "intimately connected to" the Reserve and an "integral part" of Reserve life imposes a standard of connectedness that goes beyond anything to be found in *Williams*, which provided only that:

> "A connecting factor is only relevant in so much as it identifies the location of the property in question for the purposes of the *Indian Act*."[63]

The anomalies that result from the "what makes the most sense" approach are evident when one compares the reasons in *Folster* with those in *Southwind* or *Recalma*. It is apparent in reading *Folster* that the court had decided after reviewing the facts that it "made sense" to have the employment income in question exempted from taxation under section 87. To achieve this result, the court took some pains to diminish the importance of the fact that the employer was located off-reserve, describing it as a 'technicality'[64] Justice Linden dismisses as "unpersuasive"[65] the Trial Judge's concerns about a decision favourable to the appellant creating a 'slippery slope'.

The generous approach displayed in *Folster* contrasts sharply to the reasons in *Southwind* and *Recalma*. It is apparent from tone and content of these reasons that the court has decided that it does not 'make sense' for business and investment income to be exempted from taxation and crafts its selection and weighing of factors accordingly. Unlike *Folster* where the off-reserve location

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[60] *Canada* v. *Folster*, *supra* note 1 at 286.

[61] *Recalma* v. *Canada*, *supra* note 3 at 63.

[62] *Southwind* v. *The Queen*, *supra* note 2 at 239.

[63] *Williams* v. *Canada*, *supra* note 9 at 892.

[64] *Supra* note 26.

[65] *Canada* v. *Folster*, note 1 at 292.

of the employer was found to be a "technicality", in *Southwind* the court notes that:

> "True, as Mr. Nadjiwan argued, he could have been personally better off tax-wise if he had incorporated, assuming that *Nowegijick* is still good law in the post-*Williams* era, *when the place of work has become such an important factor in the analysis.*"[66] (emphasis added)

Similarly, in *Recalma,* the court finds that:

> "Where business income is involved, most weight was placed on where the work was done and where the source of income was situated. (See *Southwind* v. *The Queen*, January 14, 1998, Docket No. A-760-95 (F.C.A.) [reported 156 D.L.R. (4th) 87])"[67]

The 'slippery slope' argument, dismissed in *Folster*, is now a significant consideration in the denial of an exemption:

> "To hold otherwise would open the door to wealthy Natives living on reserves across Canada to place their holdings into banks or other financial institutions situated on reserves and through these agencies invest in stocks, bonds and mortgages across Canada and the world without attracting any income tax on their profits."[68]

The court's more restrictive approach to business and investment income seems to be driven by its characterization of the purpose of section 87 as 'protecting the traditional Native way of life'. Despite the Justice Linden's assertion in a footnote to his reasons in *Folster* that:

> "I use the term "commercial mainstream" in this context reluctantly as it seems to imply, incorrectly, that trade and commerce is somehow foreign to the First Nations."[69]

It is apparent from this series of cases in question that the Federal Court of Appeal has difficulty reconciling its rather hazy notion of the "traditional Native way of life" or "life on the Reserve" with income earned from business and investment. In fact, there is a pervasive intimation in Justice Linden's reasons that when aboriginal persons involve themselves in business or investment activities, it will give rise to a presumption that they are in the "commercial mainstream" and therefore outside the protection of section 87.

Although the court does not define its view of the "traditional Native way of life", it seems to consider it a collective, rather than an individual, way of living. For example, the court finds that one of the factors that must be considered in applying the *Williams* analysis, is whether the income in question benefited only the individual Indian person, a factor that weighs against inclusion in section 87, or whether it benefited his community as a whole, a factor in favour of inclusion. In *Southwind*, the court links this rationale to the definition it gives to the concept of "commercial mainstream".

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[66] *Southwind* v. *The Queen*, note 2 at 239.

[67] *Recalma* v. *Canada*, note 1 at 63.

[68] *Ibid.* at 64.

[69] *Canada* v. *Folster*, *supra* note 1 at 297, Justice Linden's *supra* note 27.

> "According to the Supreme Court in *Mitchell*, where an Indian enters into the "commercial mainstream", he must do so on the same terms as other Canadians with whom he competes. Although the precise meaning of this phrase is far from clear, it is clear that it seeks to differentiate those Native business activities that deal with people mainly off the Reserve, not on it. *It seeks to isolate those business activities that benefit the individual Native rather than his community as a whole, recognizing, of course [...] that a person benefits his or her community by earning a living for his family.*"[70] (emphasis added)

It is remarkable to suggest that an Indian entrepreneur cannot enjoy the protection of section 87 if his business activities benefit only himself. Such a requirement transcends any requirement to be found in the *Indian Act* or in any decided cases of which the author is aware. Indeed, if this condition were to be applied to income earned from investment, or for that matter employment, the protection of section 87 would rarely, if ever, be available.

Navigating the "commercial mainstream"

As we have seen, the three Federal Court of Appeal decisions are replete with references to the "commercial mainstream". It is difficult to understand the significance of this reference given the fact that the term itself is unclear and that the court tends to use it in different ways. In the context of the *Indian Act*, the term seems to have originated in the La Forest J.'s reasons in *Mitchell* where, after discussing the history of sections 87 and 89, he adds:

> "It is also important to underscore the corollary to the conclusion I have just drawn. The fact that the modern-day legislation, like its historical counterparts, is so careful to underline that exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens. An examination of the decisions bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use, deal with it on the same basis as all other Canadians."[71]

It is important to emphasize that *Mitchell* predated *Williams* by two years and that La Forest J.'s comments were only part of a general commentary of the history and purpose of sections 87 and 89. Although it referred to this passage from *Mitchell* under the heading "The Nature and Purpose of the Exemption from Taxation", the Supreme Court in *Williams* did not make the "commercial mainstream" an element of the connecting factors test nor did it attempt to define the concept of "commercial mainstream" except as follows:

> "La Forest, J. also noted that the protection from seizure is a mixed blessing, in that it removes the assets of an Indian on a reserve from the ordinary stream of commercial dealings [cite omitted].

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[70] *Southwind* v. *The Queen*, *supra* note 2 at 238.

[71] *Mitchell* v. *Peguis Indian Band*, *supra* note 10 at 131.

> Therefore, under the *Indian Act*, an Indian has a choice with regard to his personal property. The Indian may situate this property on the reserve, in which case it is within the protected area and free from seizure and taxation, or the Indian may situate this property off the reserve, in which case it is outside the protected area, and more fully available for ordinary commercial purposes in society. *Whether the Indian wishes to remain within the protected reserve system or integrate more fully into the larger commercial work is a choice left to the Indian.*"[72] (emphasis added)

Gonthier, J.'s suggestion that the Indian person must make "a choice" implies the Indian person's intentions for arranging his affairs in a particular way should be considered in a section 87 analysis. However, despite the fact that it was acknowledged in *Recalma* that the appellants had deliberately chosen to invest in a branch of the Bank of Montreal located on Reserve lands and that the purpose of using this branch was both to support Native economic advancement as well as to obtain certain tax advantages,[73] the Federal Court of Appeal gave no weight to this subjective factor.

Although they do not attempt to specifically define "commercial mainstream", the judgments in *Mitchell* and *Williams* suggest that the concept would apply when Indians acquire and deal in property outside Reserve lands. This, however, is somewhat circular reasoning that does little to advance our understanding of when and under what circumstances the concept will be applied to deny the tax exemption under section 87, *i.e.*, Question: when is property not "situated on the Reserve"? Answer: when it is in the "commercial mainstream". Question: when is it in the "commercial mainstream"? Answer: when it is not situated on the Reserve. Moreover, if it is only the location of the activity that defines whether one is operating in the "commercial mainstream" is this not perilously close to a return to the 'residence of the debtor' test?

To further muddy the waters, it may be observed that in *R.* v. *Johnson*,[74] the Nova Scotia Court of Appeal gives a different perspective on the definition of a "commercial mainstream" for the purposes of section 87 of the *Indian Act*. The case involved charges that had been laid under the *Tobacco Tax Act* (Nova Scotia) against an Indian retailer who sold tobacco products from shops located on Reserve lands to both aboriginal and non-aboriginal customers. The Indian retailer was charged and, at trial, convicted of various charges under the *Act*. One of the issues raised on appeal was whether section 87 exempted Mr. Johnson from the tax imposed by the *Tobacco Tax Act*. The Court of Appeal held that:

> "The evidence showed that sales from Mr. Johnson's stores were to natives and non-natives alike. *By selling in the commercial mainstream to non-Indian consumers, Mr. Johnson made himself liable to collect and remit the tax owed by those consumers under the Tobacco Tax Act.* [...] Therefore the convictions under appeal do not relate to a tax imposed on the personal property of an Indian on a reserve within the meaning and intent of s. 87(1)(b) of the *Indian Act*."[75] (emphasis added)

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[72] *Williams* v. *Canada*, *supra* note 9 at 886-87.

[73] *Recalma* v. *Canada*, *supra* note 3 at 61.

[74] [1997] 156 N.S.R. (2d) 71 (N.S.C.A.).

[75] *Ibid.* at 74.

In *Johnson*, of course, the issue was not whether an Indian should pay tax but rather whether he should collect and remit tax on sales made on Reserve to non-Indians. However, it is interesting to note that it is the type of *person* (non-Native) with whom the Indian transacts business, rather than the location of the activity, which the Court uses as the basis of its finding that the matter was within the "commercial mainstream".

Unfortunately, despite the fact that it uses the term in all three of the cases under consideration, the Federal Court of Appeal is not particularly helpful in advancing our understanding of the concept. In *Southwind*, the court offers this explanation:

> "According to the Supreme Court in *Mitchell*, where an Indian enters into the "commercial mainstream", he must do so on the same terms as other Canadians with whom he competes. *Although the precise meaning of this phrase is far from clear, it is clear that it seeks to differentiate those Native business activities that deal with people mainly off the Reserve, not on it...*"[76] (emphasis added)

In this case, the Federal Court of Appeal appears to be of the view that if a particular activity is found to be in the "commercial mainstream", it is a definitive bar to the application of section 87. However, using the concept in this fashion would render the careful analysis of discreet connecting factors – i.e. the application of the *Williams* test — unnecessary.

In *Recalma*, possibly realizing that it was straying too far from the *Williams* test, the court notes that:

> "...We should indicate that the concept of "commercial mainstream" is not a test for determining whether property is situated on a reserve; it is merely an aid to be used in evaluating the various factors being considered. It is by no means determinative. The primary reasoning exercise is to decide, looking at all the connecting factors and keeping in mind the purpose of the section, where the property is situated, that is, whether the income was "integral to the life of the Reserve", whether it was "intimately connected" to that life, and whether it should be protected to prevent the erosion of the property held by Natives *qua* Natives."[77]

This explanation does little to clarify the issue. Using the "commercial mainstream" concept as "an aid to be used in evaluating the various factors being considered" is unnecessary and confusing. As noted above, *Williams* provides three criteria for evaluating the weight of potentially relevant connecting factors: (1) the purpose of section 87; (2) the type of property; and (3) the nature of the taxation of that property. Nothing more is required for the exercise. In any event, given the court's acknowledgment in *Southwind* that "the precise meaning of this phrase is far from clear"[78] it is difficult to understand how it would be of much assistance to a careful analysis of the connecting factors.

In *Southwind*, the court finds yet another use for the uniquely flexible "commercial mainstream" concept. After reviewing the submissions made by

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[76] *Southwind* v. *The Queen*, *supra* note 2 at 238.

[77] *Recalma* v. *Canada*, *supra* note 3 at 63.

[78] *Southwind* v. *The Queen*, *supra* note 2 at 238.

Mr. Southwind's counsel on the question of the connecting factors to be considered by the court, Justice Linden comments as follows:

> "For the Crown, Mr. Bourgard rightly offered a more complex set of factors to consider in deciding whether business income is situated on the reserve. He suggested that we examine (1) the location of the business activities, (2) the location of the customers (debtors) of the business, (3) where decisions affecting the business are made, (4) the type of business and the nature of the work, (5) the place where the payment is made, (6) *the degree to which the business is in the commercial mainstream* (7) the location of a fixed place of business and the location of the books and records, and (8) the residence of the business' owner."[79] (emphasis added)

It is to be noted that the court appears to agree with the Crown's submission that the "commercial mainstream" concept is just another potential connecting factor. This is further confirmed in by the next sentence in the judgment:

> "As was found by the Tax Court Judge, *and having considered all of these factors*, I am of the view that the appellant's business income does not fit within para. 87(1)(b) because it is not property situated on a reserve..."[80] (emphasis added)

Considering the "commercial mainstream" concept as if it were a factor is distinctly different from using the concept as 'an aid to evaluating the factors'. Moreover, the generic nature of the "commercial mainstream" concept makes it distinctly different from the other factors enumerated by the Crown in *Southwind*.

In the same paragraph in which the court seems to accept its characterization as a "factor", the court in *Southwind* once again transforms the nature of the "commercial mainstream" concept, elevating it to the status of a definitive test.

> "While it is significant that the appellant lives on a Reserve, engages in some administrative work out of his home on the Reserve, and stores the business records and the business assets which he owns on the Reserve when they are not in use, the appellant, in my view, is engaged not in a business that is integral to the life of the Reserve, but in a business that is in the 'commercial mainstream'".[81]

When the Federal Court of Appeal has so much difficulty defining the meaning this concept and the role it should play in a section 87 analysis, pity the Aboriginal business person or investor who attempts to arrange his affairs in a way that will allow him to successfully navigate the treacherous waters of the "commercial mainstream".

Conclusion

In this series of cases, we find a disturbing trend being developed by the Federal Court of Appeal that significantly reduces the scope of the tax exemption in paragraph 87(1)(b). Given the increase in economic development activities within many aboriginal communities in the past few years, the court's treatment

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[79] *Ibid.* note 2 at 237-38.

[80] *Ibid.* at 238.

[81] *Ibid.*

of business and investment income is likely to have enormous negative consequences for a great many Aboriginal individuals and organizations many of which are of recent vintage and therefore particularly vulnerable to a 'tax hit'.

In the author's view, the Federal Court of Appeal has made a number of significant legal errors in these cases, the most important of which is its mischaracterization of the purpose of section 87. Moreover, its reliance of the ill-defined concept of a "commercial mainstream" is inappropriate and unnecessary.

Inappropriate because the vagueness of the term allows the court unlimited discretion in how and to what effect it will be used. This may fit nicely with the court's inclination to reduce the precision of the *Williams* test to nothing more than a 'what makes the most sense' approach, but it makes any meaningful planning for aboriginal business persons and investors impossible. How can anyone anticipate the findings of a court that employs a concept that it cannot define and which it uses inconsistently?

Unnecessary because the *Williams* test, imperfect though it may be, is at least clearly defined and rooted in Supreme Court of Canada jurisprudence. Until the Supreme Court modifies this test, it should be the test that is used.

Finally, as the court notes in *Southwind:*

> "These cases are sometimes not easy to reconcile because the Courts are struggling to make sense in our time of legislative language enacted long ago, even before income tax was ever collected in this country. It is to be hoped that some day soon Parliament will turn its attention to section 87 and devise an income tax scheme for Aboriginals that is more easily administered and more suited to our age."[82]

[82] *Ibid.* at 239.

Privilege: Watson & Au (1998) 77 Can. Bar Rev. 346: REJOINDER: "It's Elementary My Dear Watson".

J. Douglas Wilson*

This is a reply to the article by Garry D. Watson and Frank Au titled "Solicitor-Client Privilege and Litigation Privilege in Civil Litigation" (the "Watson article") published in this issue of this journal,[1] which in turn was in part a response to the article by J. Douglas Wilson titled "Privilege in Experts' Working Papers" published in the September-December 1997 issue of the journal[2] (the "Wilson article").

The Wilson article proposed that the working papers of experts (and other third parties) hired to assist lawyers in both litigious and non-litigious contexts be absolutely protected from disclosure by solicitor-client privilege unless it is waived. The current law in Canada is that such working papers are not privileged if created for a lawyer giving legal advice, but are protected by "litigation privilege" if created for a lawyer for purposes of litigation. Also, many authorities hold that this litigation privilege is not an absolute one and can be displaced by other policy interests in the adversary system. Both of these rules lead in a practical way to less than full and frank communications between lawyers and third parties that would otherwise be required to be able to provide complete legal advice to the client. This defeats the purpose of solicitor-client privilege and also is destructive to the adversary system.

The Wilson article proposed that litigation privilege should be treated as just another name for solicitor-client privilege in the litigation context, and both should provide an absolute privilege to communications with third parties for the purpose of giving legal advice in both litigious and non-litigious contexts. The article traced the problems of and confusion in the current law back to the English case of *Wheeler*[3] in 1881. It pointed to the Supreme Court of Canada decisions in *Solosky*[4] and *Descoteaux*[5] in 1980 and 1982 as proclaiming solicitor-client privilege to be a broad fundamental civil and legal right, (hence elementary), and suggested that the Court may have to set these problems straight.

The Watson article claims that there is a difference between solicitor-client privilege and litigation privilege in terms of the underlying purposes and the requisite conditions to invoke them, that extending solicitor-client privilege to third party communications would be dangerous and would impede the truth-finding process, and that solicitor-client privilege should be confined within narrow limits.

* J. Douglas Wilson, of Lang Michener, Toronto, Ontario.

[1] See above at 315.

[2] (1997) 76 Can. Bar Rev. 346.

[3] *Wheeler* v. *Le Marchant* (1881), 17 Ch. D. 675.

[4] *Solosky* v. *Canada*, [1980] 1 S.C.R. 821.

[5] *Descôteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860.

There are a number of problems with the approach taken in the Watson article:

1. Failure to give due weight to the **elementary** and fundamental right to "solicitor-client privilege" — the right to have one's solicitor receive full and frank communications in order to examine all aspects of legal advice, without fear of disclosure.
2. Giving undue weight to the admittedly desirable public policy of openness and "truth-finding" in litigation and as a result recommending further truncation of privilege.
3. Misconstruing and thereby narrowing the scope of *Solosky* and *Descoteaux*.
4. Allowing the unnecessary historical development of "litigation privilege" to cloud his view of the broad scope of solicitor-client privilege.
5. Asserting that a lawyer's communication with third parties such as experts ought not to be considered an integral part of the confidential solicitor-client relationship, in a non-litigious context (while not disputing that it **is** integral and therefore privileged in a litigious context).
6. Promoting the American model in which privilege in litigation is illusory and clients must fear disclosure of much of their lawyers efforts.

1. *Watson fails to give due weight to the elementary and fundamental right of solicitor-client privilege.*

Watson criticizes the Wilson article as barely touching the public interest[6] notwithstanding the detailed analysis given.[7]

On the other hand, Watson barely touches on the weight to be given to what the Supreme Court of Canada has referred to as "the fundamental right" to solicitor-client privilege.[8] He simply asserts that "it may shut out the truth".[9] Watson concludes that "it is unnecessary in the present context to explore" solicitor-client privilege other than to "acknowledge that it is based upon the public interest in having citizens able to obtain legal advice, without fear that their confidences may thereafter be disclosed to their detriment."[10]

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[6] *Supra* note 1 at 6.

[7] *Supra* note 2 at 356.

[8] *Supra* note 4 at 839. See also Paizes, *infra* note 11 at 115 "(The privilege) has recently come to be viewed as a necessary corollary of fundamental, constitutional or human rights ... necessary for the proper functioning of the legal system and not merely the proper conduct of individual litigation."

[9] *Supra* note 1 at 6.

[10] *Supra* note 1 at 7.

On the contrary, it is necessary to examine the details of what the full scope of a solicitor-client relationship involves and the benefits it provides:

(1) In order to provide full and untrammelled advice to the client, a solicitor must in many cases receive more than just communications from the client — there must also be communications from third persons. The client ought not to fear disclosure of any of it. It is in the public interest and in the interests of the proper administration of justice that clients be entitled to full legal representation without fear of disclosure. It is this value in Canadian society that the Supreme Court of Canada was referring to in *Solosky*.

(2) Although Watson refers to the article by Paizes,[11] he does not identify all of the benefits of privilege raised by Paizes, namely: promotion of accurate fact-finding;[12] acting as the champion of procedural justice and the agent of due process of law, and providing an expression of the mores and ethos of Western society and a bastion of human dignity;[13] providing the protection and preservation of the rights, dignity and equality of ordinary citizens under the law;[14] assisting in bringing relevant information before the court, and promoting knowledge of and adherence to the law by the client;[15] maintaining the integrity of an individual's legal personality;[16] and playing a central role in promoting a sense that our legal system is fair.[17]

(3) Watson says, without analysis, that the administration of justice may be undermined by solicitor-client privilege if the scope of privilege extends beyond necessity.[18] This is not only contrary to the thrust of the Supreme Court of Canada in *Solosky* and *Descoteaux*, referred to below, but also overlooks the fact that the administration of justice is undermined whenever a client is unable to instruct his lawyer to examine all of the facts relating to the legal advice he is to give,[19] e.g. including facts the lawyer should obtain from third parties for purposes of the legal advice.

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[11] A. Paizes, "*Towards a Broader Balancing of Interests: Exploring the Theoretical Foundations of Legal Professional Privilege*" (1989) 106 South African L.J. 109.

[12] *Ibid.* at 109.

[13] *Ibid.* at 110, 111.

[14] *Ibid.* at 112, quoting from the High Court of Australia in *O'Reilly* v. *The Commissioners of the State Bank of Victoria* (1983 57 A.L.J.R. 130).

[15] *Ibid.* at 118.

[16] *Ibid.* at 119.

[17] *Ibid.* at 121.

[18] *Supra* note 1 at 16.

[19] Paizes, *supra* note 11 at 121, states: "It is only by specious reasoning that one may claim that privilege ordinarily hinders the search for truth. For if the privilege was abolished, the majority of solicitor-client communications would not, in the first place, be made."

2. *Watson gives undue weight to the admittedly desirable public policy of openness and "truth-finding" in litigation and as a result recommends further truncation of privilege.*

Watson says that the Wilson article "argues that it is unnecessary to consider other competing interests" when considering the extent of truncation of solicitor-client privilege.[20] This is an erroneous interpretation of the submission in the Wilson article that "the fundamental right of an individual to a full and frank communication with his legal adviser **outweighs** such public policy considerations and justifies the absolutism of the privilege".[21] This does not mean that there will not be a **weighing** process. *Solosky* and *Descoteaux* are good examples. The Supreme Court of Canada stated that there is a "need for minimum derogation" from the right to solicitor-client privilege, but if giving the privilege resulted in a breach of safety and security of a penal institution or the facilitation of a crime, the line must be drawn. It is submitted that such considerations are not of the same nature as full disclosure in the litigation process.

Watson's analysis of public policy which led him to assert that privilege should be truncated in litigation centers on two points:

(1) He says that "making all the material evidence available through the discovery process to the other side (and the court)" is desirable (without further analysis).[22] While openness is admittedly desirable, no rationale is given as to why this should override a right which is "as fundamental as the right to counsel itself".[23] The Supreme Court of Canada has given a strong suggestion to the contrary in *Solosky* and *Descoteaux*. Similarly, the High Court of Australia held in *O'Reilly* that the principle that communications between lawyer and client should be confidential has been allowed to prevail over the principle that all relevant evidence should be disclosed, "because the operation of the adversary system, upon which we depend for the attainment of justice in our society, would otherwise be impaired",[24] and it held in *Maurice* that the privilege "is not to be sacrificed even to promote the search for justice or truth in the individual case"[25] and in *Waterford* that "privilege is itself the product of a balancing exercise between competing public interests ... the public interest in the perfect administration of justice ... is accorded paramountcy over the public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant documentary evidence. Given its application, no further balancing is required.".[26] The South African Court of Appeal stated "The conflict between the principle that all relevant evidence should be disclosed and the principle that communications between lawyer and client should be confidential has been resolved in favour of the confidentiality of those communications. It has been determined that in this way the public interest is better served because the operation of the adversary system, upon which we depend for the attainment of justice in our society would otherwise be impaired."[27]

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[20] *Supra* note 1 at 10.

[21] *Supra* note 2 at 370.

[22] *Supra* note 1 at 11.

[23] *Supra* note 5 at 880.

[24] *Supra* note 14 at 781.

[25] *AG (NT)* v. *Maurice* (1987) 61 A.L.J.R. 92 at 97.

[26] *Waterford* v. *The Commonwealth of Australia* (1987) 163 C.L.R. 54.

[27] *S.* v. *Safatsa* (1988) (1) S.A. 868 at 886.

(2) Watson says there should be a "limit to the potential abuse of the privilege.[28] He suggests, without analysis, that the impact on litigation arising from a corporate acquisition or securities transaction in which third party communications are privileged would be "enormous and startling". He suggests, without analysis, that lawyers could develop a "new product line" selling "confidentiality to clients"[29] and that solicitor-client privilege is "often a device for covering-up 'legally' dubious or dirty business".[30] This suggests, erroneously, that the courts could not deal appropriately with abuses, including claims for solicitor-client privilege not given for *bona fide* legal advice.

3. *Watson misconstrues the scope of Solosky and Descoteaux.*

Watson claims that the Wilson article erred in its reading of *Solosky* and *Descoteaux*.[31] He suggests that the Supreme Court of Canada did not consider litigation privilege at all.[32]

On the facts of both cases, the privilege in issue was not in a litigious context. However, it is instructive to examine the Court's discussion of "the privilege" in *Solosky*, which was adopted in *Descoteaux*:[33]

(1) In dealing with the history of "the privilege", the Court said: "It stemmed from respect of the 'oath and honour' of the lawyer ... restricted in operation to an exemption from testimonial compulsion. Thereafter, in stages, privilege was extended to include communications exchanged during other litigation, those made in contemplation of litigation, and finally, any consultation for legal advice, whether **litigious or not.** (emphasis added)".[34] The clear implication of the emphasized words is that there is one privilege, whether in a litigious context or not.

(2) The Court stated that "the classic statement of the policy grounding the privilege ... (is that it is in) the interests of justice ... and ... the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and ... judicial proceedings."[35] The Court is not limiting itself to the non-litigious context.

(3) Quoting from *Anderson* v. *Bank of British Columbia*,[36] the Court said that the rationale for "the privilege" is that "... litigation can only be properly conducted by professional men, (and) it is absolutely necessary that a man ... have resource to the assistance of professional lawyers ..."[37] The Supreme Court of Canada is confirming that the rationale for solicitor-client privilege is inextricably bound in with the litigation context.

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[28] *Supra* note 1 at 9.
[29] *Ibid.* at 8.
[30] *Ibid.* at 9.
[31] *Ibid.* at 12.
[32] *Ibid.* at 13.
[33] *Supra* note 5 at 870.
[34] *Supra* note 4 at 834.
[35] *Ibid.*
[36] (1876) 2 Ch. 644.
[37] *Supra* note 4 at 835.

It is submitted that the Court therefore **did** consider litigation privilege (i.e. privilege in a litigation context) as part of an all-embracing solicitor-client privilege.

4. *Watson allows the unnecessary historical development of litigation privilege to cloud his view of the broad scope of solicitor-client privilege.*

Watson acknowledges that the historical development of litigation privilege and its truncation "has proceeded without any clearly articulated underlying principle or rationale, other than fairness or the often vaguely expressed purpose of maintaining a reasonable balance between pretrial disclosure and privilege."[38]

The unnecessary development of litigation privilege, founded on the erroneous *Wheeler*[39] decision is discussed at length in the Wilson article.[40] It was concluded that litigation privilege is simply another name for solicitor-client privilege in a litigious context.

Watson attempts to distinguish solicitor-client privilege from litigation privilege in four ways:[41]

(1) He says that solicitor-client privilege protects a relationship (between lawyer and client) whereas litigation privilege facilitates a process (the adversary process).[42] This overlooks the fact that **both** are the privilege **of the client** and **both** are directed to the **same process** — the orderly administration of justice in which clients have a right to counsel and can rely on complete confidence in their lawyers without fear of disclosure.[43]

(2) He says that a crucial difference is that confidentiality is essential to invoke solicitor-client privilege but it "is not applicable to litigation privilege".[44] Using some of his words, this is a misguided attempt to remove the requirement of confidentiality from litigation privilege.[45] He overlooks the fact that assembling information, including non-confidential information, documents and communications are protected by litigation privilege because **the fact of the assembly** is itself confidential.[46] On this basis, witness statements and copies of unprivileged original documents "in gathered" for the purpose of litigation[47] would be privileged. That is, both types of privilege have the same basis - the requirement of confidentiality. If it is recognized that litigation privilege protects third party communications and otherwise non-confidential communications with lawyers **because** they are gathered in a confidential process as an extension

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[38] *Supra* note 1 at 33.

[39] *Supra* note 3.

[40] *Supra* note 2 at 368 et seq.

[41] He also relies heavily on the distinctions made by R.J. Sharpe, *infra* note 57 at 164. These were dealt with in the Wilson article, *supra* note 2 at 371.

[42] *Supra* note 1 at 20.

[43] *Supra* note 4 at 834.

[44] *Supra* note 1 at 20.

[45] *Ibid.* at 26.

[46] See R.D. Manes and M.P. Silver, Solicitor-Client Privilege in Canadian Law (Toronto: Butterworths, 1993) referred to in Watson, *supra* note 1 at 29, 30.

[47] Which were of concern to Watson, *ibid.* at 31, text and note 128.

of solicitor-client privilege, none of Watson's alleged "consequences of confusing the role of confidentiality"[48] arise.[49] Watson has confused the nature of the facts gathered, which may themselves be non-confidential, with the nature of the process of a solicitor gathering information on behalf of the client, the results of which are confidential.[50]

(3) He states that it is a "most important ... general principle ... that relevant facts contained in a document protected by litigation privilege (although not the document itself) are subject to disclosure on examination for discovery ... (whereas) the content of solicitor-client communications (e.g. the substance of legal advice received from a lawyer) is not required to be divulged as a rule".[51] This is not completely accurate. In fact, the principle in the authorities, including those cited by Watson[52] and by Wilson[53] is that if a fact is protected by litigation privilege it must be disclosed only if it is to be relied upon by the party in the litigation. That is, the privilege is waived when it is to be relied upon, just as solicitor-client privilege can be waived.[54] Again, there is no difference between the two privileges. Watson also points out that litigation privilege has been truncated by the rules of court.[55] In part, the rules reflect the principle of waiver of privilege with respect to those matters that a party to litigation intends to rely on. To the extent that a rule purports to go beyond that, question whether the government can truncate a fundamental right.

(4) He says that the policy which renders litigation privilege "'necessary' is the adversary character of trial in the common law system under which it is essential that both parties prepare and pursue the evidence vigorously".[56] However, this overlooks the right to receive legal advice in a non-litigious context after one's lawyer has prepared and pursued the evidence related to that advice vigorously. That is, this rationale does not provide a distinction between solicitor-client and litigation privilege. The "zone of privacy to facilitate adversarial preparation"[57] ought not to be any different from the zone of privacy to facilitate preparation for a legal opinion.

The circularity of some of Watson's arguments is illustrated when he says that many writers and courts have said that the two privileges are different and concludes that they are therefore different.[58] None of the cases cited are from the Supreme Court of Canada and Watson has pointed to none that examined the

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[48] *Ibid.* at 30.

[49] *Ibid.* at 26-28 referred to *Strass* v. *Goldsack*, [1975] 6 W.W.R. 155 (Alta C.A.), in which the communication with the other party could not be confidential vis a vis that party. However, communications with third party witnesses are and are privileged not because of any protection for the witness, but for the client, who should expect his lawyer to collect information confidentially.

[50] And see the reference to *Anderson*, *infra* note 63.

[51] *Supra* note 1 at 32.

[52] *Ibid.*

[53] *Supra* note 2 at 352.

[54] See Watson, *supra* note 1 at 32, note 134.

[55] *Ibid.* 1 at 33.

[56] *Ibid.* 1 at 17, 32.

[57] *Ibid.* 1 at 19, citing Sharpe "Claiming Privilege in the Discovery Process" (1984) L.S.U.C. Special Lectures 163 — Dealt with in Wilson, *supra* note 2 at 371.

[58] *Supra* note 1 at 19, 21.

rationale of the historical underpinnings of the distinction.[59] Watson notes that one of the highest authorities to consider the issue, the British Columbia Court of Appeal, is directly contrary to his position, but he dismisses it as "aberrant".[60] The Court held in *Hodgkinson* that while "privilege is usually subdivided ... into two species ... it is really one all-embracing privilege that permits the client to speak in confidence to the solicitor, for the solicitor to undertake such inquiries and **collect such material as he may require** properly to advise the client, and for the solicitor to **furnish legal services**, all free from any prying ..." (emphasis added).[61]

That it has been unnecessary to distinguish between solicitor-client and litigation privilege is demonstrated in the very case relied on by Watson[62] to define solicitor-client privilege, *Anderson*.[63] Jessel M. R. defined solicitor-client privilege in a litigation context.[64]

Watson acknowledges that it was *Susan Hosiery*[65] that articulated the distinction between the two privileges but says "the distinction is now well established".[66] *Susan Hosiery* was a 1969 case decided by a lower court. It is time that the underlying rationale be examined by the highest court.

5. *Watson asserts that a lawyer's communication with third parties, such as experts, ought not to be considered an integral part of the confidential solicitor-client relationship in a non-litigious context.*

Watson[67] cites Wigmore for the proposition that solicitor-client privilege is designed to protect only the client's confidences: "The privilege is designed to secure subjective freedom of mind for the client."[68] Accepting that, however, does not mean that lawyer's communications with third parties necessary for gathering the information needed to give legal advice should not be privileged. A client needs to know that he can deal with his lawyer in a full and frank manner and that his lawyer can in turn deal in a full and frank manner with others on his behalf. If a client knows that his lawyer's communications with others will be subject to disclosure, the client will **not** have any "subjective freedom of mind." Protection of those communications is integral to a **complete** solicitor-client relationship. One of the primary functions of solicitor-client privilege related to

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[59] *Ibid.* at 23.

[60] *Ibid.* at 25.

[61] *Hodgkinson* v. *Simms* (1988), 33 B.C.L.R. (2d) 129 (C.A.) at 136.

[62] *Supra* note 1 at 15.

[63] *Anderson* v. *Bank of British Columbia* (1876), 2 Ch. D. 644.

[64] Yet he made no mention, as Watson does that "this privilege must be kept within strict limits on account of its hindrance in the search for truth". *Supra* note 1 at 15.

[65] *Susan Hosiery* v. *M.N.R.* [1969] 2 Ex. C.R. 27.

[66] *Supra* note 1 at 23.

[67] *Ibid.* at 9.

[68] J.H. Wigmore, Evidence in Trials at Common Law, McNaughton Rev., vol. 8 (Boston: Little, Brown, 1961 at 619).

the giving of legal advice is to prevent disclosure in subsequent litigation. Watson is therefore in error when he asserts that third party communications scarcely touch on the state of mind of the client in consulting the lawyer.[69] He has not analyzed this aspect of his proposal. Rather, he boldly states that "communication with third parties may, on occasions, be helpful to facilitate the giving of legal advice, but they are far from being essential to the solicitor-client relationship."[70] This statement is at odds with some of the authorities relied on by Watson.,[71] and it is submitted that such communications are, in many cases, essential.

Watson suggests that there has been fuzzy thinking in that there should be a clear distinction between lawyer's communications with clients' agents and those with third parties. He states that "Wilson inherits this confusion when he argues, on the strength of *Anderson*, that the rationale of solicitor-client privilege had been the basis for extending privilege to third party communications. Wilson emphasizes the fact that 'the solicitor may employ his clerks or other agents to collect information for him, and upon the same principle it is equally protected'".[72] This last sentence is taken out of context. Watson fails to refer to earlier passages on the same page in the Wilson article which establishes that the court in *Anderson* extended privilege to documents obtained from third persons for the purpose of litigation using the same rationale as that used for solicitor-client privilege, i.e. "that it is 'absolutely necessary that a man ... be able to make a clean breast of it' to his solicitor"..[73] Accordingly, no other rationale was needed for a special "litigation privilege". The sentence in Wilson quoted by Watson simply shows that communications by a lawyer's clerks and agents are also privileged "upon the same principle".

A point of the Wilson article is that the courts should go beyond the question of agency and look squarely at the question of whether a third party communication with a solicitor for the purposes of obtaining facts or a report to assist the solicitor or client in the giving or receiving of professional legal advice in a non-litigious context.

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[69] *Supra* note 1 at 10.

[70] *Ibid.* at 16.

[71] R.G. Nath "Upjohn: a New Prescription for the Attorney-Client Privilege and Work Product Defenses in Administrative Investigations" (1981) 30 Buffalo L. Rev. 11 at 66: "Courts have recognized that lawyers need the help of specialists in order to do their job well. ... The privilege applies where the specialist's help is necessary, or at least highly useful, for the consultation the privilege is designed to permit." See also *Anderson*, *supra* note 63 at 649, wherein communications with third persons for litigation were said to be privileged on the same ground as communications between solicitor and client.

[72] *Supra* note 1 at 38.

[73] *Supra* note 2 at 362.

It is submitted that these communications should be privileged. *Wheeler* was wrong.[74] *General Accident*[75] (referred to in Watson)[76] had the correct result for the wrong reasons. The claims adjuster was a third party hired by a lawyer in the obtaining of legal advice for the insurer. Communications with him should be privileged as a necessary third party, rather than on the grounds of agency.

6. *Watson promotes the American model in which privilege in litigation is illusory and clients must fear disclosure of much of their lawyer's efforts.*

Watson lauds the American practice of providing privilege in the litigious context only to work product.[77] He favours the approach in *Hickman* when it held that solicitor-client privilege "does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation, ... (nor) the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting a client's case ... (nor) writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories."[78] As he acknowledges, "the United States doctrine is not concerned with **whether** certain information is discoverable, but with **how** it is to be obtained".[79] Upon a "showing of good cause production may be ordered of virtually any information other than the mental impressions of the opposing lawyer".[80]

He also points out the fear in the United States that discovery is being abused as a means of conducting trials "on wits borrowed from the adversary".[81] The result is that parties are not preparing vigorously for fear of having to turn their preparation over to their opponent, with the result that the adversary system could break down.

Yet Watson suggests that this U.S. model should be adopted and that virtually anything should be produced for good cause[82] i.e. where a "party is unable without undue hardship to obtain the substantial equivalent of the materials by other means".

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[74] For an old English case relating to third party communications, see *Walsham* v. *Stainton* (1863) 2 Hem & M 1. While the question arose in a litigation context, Vice-Chancellor Wood found that the accountant must be considered as acting as the clerk of the solicitor in preparing these documents ... and fall within the scope of the privilege. If this were not so, the client would have to tell his solicitor. "Here is a heavy matter of account to be investigated; you must take care to have no inferences from the books put upon paper, less they should become liable to production." That would not leave the means of free and unreserved communication, to which the client is entitled.

[75] *General Accident* v. *Chrusz* (1998), 37 O.R. (3d) 790 (Div. Ct.).

[76] *Supra* note 1 at 40-42.

[77] *Ibid.* at 28.

[78] *Ibid.* at 15-16 note 57; and see to the contrary *Hodgkinson*, *supra* note 61 at 133, cited in Wilson, *supra* note 2 at 365, 366.

[79] *Supra* note 1 at 33.

[80] *Ibid.* at 34.

[81] *Ibid.*

[82] *Ibid.* at 35-37.

This is wrong for Canada. It leads to a distortion of the solicitor-client relationship which, in Canada, is a fundamental right and leads to protracted, expensive and intrusive litigation. The privilege ought not to be "frittered away" in this fashion.[83]

Conclusion

The analysis of the Wilson article by Watson suffers from several flaws: failure to give due weight to the elementary and fundamental right to solicitor-client privilege, that is, the right to allow one's solicitor to examine all aspects of his legal advice in a full and frank manner (whether in a litigious context or not) without fear of disclosure; giving undue weight to policies related to openness in litigation; failure to give full scope to the *Solosky* and *Descoteaux* decisions; and grasping at the unnecessary historical development of litigation privilege to the detriment of the fundamental right to solicitor-client privilege. The flaws in Watson's analysis lead to the wrong proposal for Canadian law — that privilege be truncated further so that litigants could have access to any information and documents for good cause and that we adopt a United States model of privilege in which clients and lawyers alike stifle the collection of full and frank information and documents to assist lawyers in providing legal advice for fear of disclosure in litigation.

Watson's call for further truncation of privilege in the name of truth-finding is unwarranted and in the long run will lessen the quality of legal advice and trial preparation and increase the cost and invasiveness of litigation in Canada.

The need for a distinction between solicitor-client privilege and litigation privilege is not established in Watson's paper. The two are one, as the underpinning for both is the need for a client to have full and frank communication and investigation without fear of disclosure.

Watson fails to establish that communications by lawyers with third parties needed to allow preparation of legal advice in a non-litigious context should not be privileged. Such communications are often essential to the solicitor-client relationship and to the subjective freedom of mind of the client.

Watson relies on a number of trial and court of appeal decisions to support his position. It is submitted that it is time for the Supreme Court of Canada to confirm and define the scope of the fundamental right to solicitor-client privilege which it laid down in *Solosky* and *Descoteaux*.

Watson concludes his paper by referring to a statement from *Waugh* that "justice is better served by candour than by suppression." This highlights the two approaches in the articles; Watson would have these words apply to the litigation process and suggest that privilege be truncated in favour of disclosure in litigation.

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[83] *Supra* note 5 at 881.

But there is a different view, that is, justice is better served by clients (and by necessary extension, the third parties who must provide information for them) being fully candid with their lawyers than by suppression as a result of knowledge that such disclosures may find their way into an opposing party's brief. As Knight Bruce, V.C. stated: "Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much. And surely ... the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, [is] too great a price to pay for truth itself."[84]

Pearse v. *Pearse*, (1846) 63 E.R. 950, 957.

Directors & Officers Liability Insurance — Allocation of Loss: *Coronation Insurance Co.* v. *Clearly Canadian Beverage Corp.*

Richard W. Bird*

Multiparty contracts breed a variety of legal problems. Historically the third party beneficiary rule was at the centre of the legal difficulties. Today, the problem more often is to adequately define the legal relationships. Unless the rules are firmly established, understood and followed by all, there is bound to be trouble. Insurance contracts are no exception. In the latter case it does not seem to matter whether it is an automobile insurance policy where a driver claims under someone else's owner's policy,[1] it is a fire insurance policy where a tenant claims under the landlord's policy,[2] it is a construction policy where the contractor claims under the owner's policy,[3] or it is a directors' and officers' liability policy purchased by a corporation where a director or officer claims indemnity. The addition of insurance often leads courts to abandon the usual liability rules in favour of a new set. Often, it is part of an attempt to reach a deep pocket. In *Coronation Insurance Co.* v. *Clearly Canadian Beverage Corp*[4] the court reached the insurance company's deep pocket but not by using the traditional legal analysis of the rules of contribution where there was joint liability but by adopting a principle called the "larger settlement rule."

The case started out like any other purchase of directors' and officers' liability insurance. The directors and officers of Clearly Canadian Beverage Corp. wished to be indemnified for any liability that they might incur in the course of their duties (to the extent that the law permits indemnification) and, to that end, the corporation purchased a directors' and officers' liability policy with Coronation Insurance Co. in the amount of $5 million. The directors and the corporation were sued in California for alleged violations of American securities legislation. A settlement was reached in that action where, in the settlement it was agreed, all defendants were jointly liable to the plaintiffs. The corporation paid the costs of the defence and US$500,000 of the settlement. The insurer paid the balance of the settlement, US$2 million and reimbursed the corporation for $400,000 of the defence costs. The insurer, the corporation, and the directors and officers retained all rights of allocation of the settlement and

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[1] See *Commercial Union Assurance Co. of Canada* v. *Gore Mutual Insurance Co.*, [1989] I.L.R. 1-2510 (Alta Q.B.).

[2] See *T. Eaton Co.* v. *Smith* (1978), 92 D.L.R. (3d) 425 (S.C.C.).

[3] See *Commonwealth Construction Co. Ltd.* v. *Imperial Oil Ltd.* (1977), 69 D.L.R. (3d) 558 (S.C.C.).

[4] (1997), 33 B.C.L.R. (3d) 130 (B.C.C.A.).

[5] See *Edgeworth Construction Ltd.* v. *N. D. Lea & Associates Ltd.*,[1993] 3 S.C.R. 206.

defence costs. Complicating matters, the directors and the corporation were jointly represented.

Before examining the judgment, it is useful to review the rules regarding the relationships in the case. It is instructive in understanding the underlying problems of director's and officers' liability insurance.

Historically, a corporation and its agents have been held jointly and severally liable for the acts of its agents. The principle that the corporation is vicariously liable for the acts of its agents is firmly established in our law. A plaintiff had a choice to sue either the agent or the corporation or both. That proposition, however, is becoming increasingly doubtful. After *Edgeworth Construction Ltd.* v. *N.D. Lea & Associates Ltd.* no longer can one be sure that the agent will necessarily be liable to third parties.[5] Also on an historical note, *Lister* v. *Romford Ice and Cold Storage Co. Ltd.* established that where both the agent and the corporation were liable to a third party, as between the agent and the corporation, the corporation had a full right of contribution from the agent.[6] In the end, it was the agent who was liable to pay. Often, a corporation does not enforce its right of contribution.

Apart from a few statutory issues, directors and officers are in a similar position to agents. If similar reasoning were applied in *Coronation Insurance*, at common law the directors would be primarily liable, any amount that the corporation was liable to pay would be recoverable from the directors and officers. Where there is directors' and officers' liability insurance, the insurer would be obligated to indemnify the directors and officers, and the insurer would have to pay the full amount of the concurrent liability. On a tangential note, there has been a gradual broadening of strict liability on the part of corporations. Often, the corporation is held liable in cases where the agent is not.[7] However, when it comes to allocating settlement costs, traditionally, the courts looked to the equitable rules of contribution.

Directors and officers have feared the potential personal liability arising out of the performance of their duties. As a first step in alleviating this fear, the corporation often agrees to indemnify the officer from this liability. While the provisions of the Business Corporation statutes only speak in terms of indemnification, it is surely a corollary that the corporation has given up any rights of contribution that it might have against the directors and officers. It is clear that as between the directors and officers on the one hand, and the corporation on the other, that the corporation is to bear the loss. In *Coronation Insurance* the right to indemnification was provided for in the articles of incorporation of the company.

With this background, it is time to introduce an insurance policy that only purports to provide coverage for the directors and officers. The policy does not

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[6] See *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*, [1957] A.C. 555 (H.L.).

[7] *Ibid.*

insure the party that purchases the policy, the corporation, except to the extent that it is obligated to reimburse the directors and officers for liability that they have incurred. This is purely a matter of contract. The judgment quotes W. E. Knepper & D.A. Bailey, *Liability of Corporate Officers and Directors*:[8]

> A directors' and officers' liability insurance policy usually provides no coverage to the corporation, except reimbursement for its proper indemnification of its directors and officers.

At first blush, this seems to be an astonishing contractual arrangement for directors and officers to negotiate. The directors are legally responsible for the management of the corporation. They arrange to have the corporation to indemnify themselves for any liability that they might personally incur, then have the corporation purchase an insurance policy just in case the corporation cannot pay, but neglect to obtain coverage for the corporation, even though the acts of the directors and officers may make the corporation vicariously or independently liable. Someday, that should raise questions of both negligence and breach of fiduciary duty on the part of the directors and officers.

In *Coronation Insurance*, Clearly Canadian Beverage was a named insured. It appears that it was named an insured to make it clear that the insurer would not, after paying a claim, be subrogated to the directors' and officers' right of indemnification from the corporation. This may appear to be a minor point, but it becomes the central issue in a question of allocation of defence costs and settlement amounts. The traditional subrogation route that might have been available to the insurer to pass the burden of the defence costs and settlement amounts on to the corporation has been closed. Under this traditional legal analysis of insurance, it seems clear that, at least in the case where the corporation and the directors and officers are jointly liable, that the loss should be borne by the insurer.

Thus, it is surprising that unless the liability of the directors and officers and the corporation was not joint, that Coronation Insurance thought the corporation should have to pay a part of the settlement amount and defence costs. Expert evidence was introduced to show that the liability of the directors and the corporation under American law was not necessarily concurrent; that there was a possibility that the corporation might have been liable for damages for which the directors were not also liable. At the time the allocation questions had been put to the Court for determination, it had not been determined whether the liability of the directors and officers and the corporation was completely concurrent or whether there was some independent liability on the part of the corporation. It appears that the parties proceeded on the assumption that the liability of the parties was completely concurrent. The settlement of the United States action imposed a joint obligation on the directors and the corporation. The insurer having agreed to that settlement raises the interesting question as to

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[8] 5th ed. (Michigan: Charlottesville, 1993) at 243-44; see also McCarthy Tétrault, *Directors' and Officers' Duties and Liabilities in Canada*, (Toronto: Butterworths, 1997) at 302.

whether the insurer can now go behind that settlement and question the issue of joint liability. The directors and officers raised this defence in a slightly different fashion. The argument was summarily rejected.

The insurer's position, as stated by the trial judge, is subject to several interpretations. One is that even if liability between the directors and officers and the corporation were concurrent, some allocation was necessary because it only insured the directors and officers of the corporation and not the corporation itself. It seemed that the insurer thought it could ignore the fact that the corporation was a named insured. Therefore, the insurer argued, the corporation benefited from the settlement and the relative exposure to the consequences of a judgment had to be assessed to determine a fair allocation. This should be done by determining what each would have contributed to the settlement had there been no insurance. That determination is not difficult. The corporation was obligated to indemnify the directors and officers and to pay the total amount. But, unless one is going to argue the third party beneficiary rule, the naming of the corporation as an insured put an end to any argument that the insurance contract is to be ignored. And, it is difficult to argue the third party beneficiary rule against the corporation when it purchased the insurance.

It may be that the insurer was arguing that given the financial resources of the corporation as compared to that of the directors and officers, that the settlement was of greater benefit to the corporation and therefore it should be liable on some equitable principle. This position is also flawed. Since the corporation was bound to indemnify the directors and officers, as between the two of them, the entire settlement amount was primarily for the benefit of the corporation. But, as long as the policy insured the corporation for any amount that it was required to pay because of its obligation to indemnify the directors and officers, the insurer was liable to the corporation for that amount. Lowry, J. summarily rejected the insurer's argument, "I consider there is little in the contention that it is necessary to consider how the parties would have viewed settlement had there been no insurance."[9] The trial judge summed it all up in one short paragraph:

> The policy was purchased by the corporation which indemnified its directors and officers for liability they might incur in that capacity. The corporation sought to insure the activities of the individuals who it might have to indemnify for liability. The purpose of the insurance was then to transfer the entire risk of such liability to the insurer. Both the corporation and the directors and officers are named insureds. If the amount that was required to settle the claims made against the individuals was not recoverable in full, the corporation would be deprived of the full benefit of the policy it purchased: the coverage afforded for the corporation's indemnity would be reduced. It would not have received what it paid for and that would happen only because the insured claim made against the directors and officers was also made against the corporation....[10]

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[9] *Supra* note 4 at 143.

[10] *Ibid.* at 143.

This result is sometimes referred to as "the larger settlement principle." This principle is really no more than a moniker to describe the results of the shifting of one risk but not some other risk. Thus, where the liability of the directors and officers is not completely concurrent and the corporation may be independently liable, the corporation will be responsible for that independent portion because it is uninsured for that portion of the loss. The policy did not provide any wider coverage than that which existed for the directors and officers.

Since there were no Canadian cases directly on point, the court looked to the United States for guidance. The cases in the United States support the "larger settlement rule" for the allocation of settlement amounts and the "reasonably related rule" for defence costs. This means that the insurer must pay the entire settlement unless it was larger because of some other claim against the corporation. Similarly, the defence costs are to be paid by the insurer unless they cannot be said to be reasonably related to the defence of an insured interest. In other words, only where liability is not concurrent will the corporation have to pay.

One reason given in support of "the larger settlement principle" was that it "best effectuates the reasonable expectations of the parties."[11] This is in keeping with the Supreme Court of Canada in *Consolidated-Bathurst Export Ltd.* v. *Mutual Machinery Insurance Co.*[12] The *contra proferentem* rule was rejected in favour of an interpretation that promoted the intentions of the parties. It is doubtful that the reference to the reasonable expectations of the parties was necessary or added anything to the argument.

Today, some insurance companies also specifically insure the corporation.[13] It is referred to as an entity coverage provision. The policy insures the corporation but, at the same time usually avoids the result of the "larger settlement principle" by imposing a co-insurance clause whereby the corporation must pay some percentage of the defence costs and any settlement amount, say 20%.

In one of the few Canadian texts, *Directors' and Officers' Duties and Liabilities in Canada*, it is suggested that the corporation's liability may be covered under a comprehensive general liability policy.[14] It is doubtful that most comprehensive public liability policies were intended to cover the corporation for breaches of director's and officers' liabilities. Most comprehensive liability policies insure for personal injury and property damage and it is doubtful that this covers many of the economic losses and regulatory

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[11] *Ibid.* at 141-2.

[12] (1979), 112 D.L.R. (3d) 49 (S.C.C.).

[13] Monteleone, J.P., *Resolving Continuing Allocation Challenges in D&O Liability Coverage*, (1997), 563 PLI/Lit29 at 44.

[14] See *supra* note 8 at 302.

liabilities that might be incurred by directors and officers and that would be covered by a directors' and officers' liability policy.[15]

An argument existed in *Coronation Insurance* that the resolution of the allocation of the defence costs and the settlement amount might differ. The policy stipulated that the insurer was to pay defence costs "incurred in the right of and for the benefit of the Directors and Officers, as distinguished from any such other party" but said nothing about settlement amounts. The Court rejected this argument and held, "Allocation is an equitable necessity. It does not rest on contractual agreement *per se*."

In summary, the decision in the case is in line with traditional legal reasoning. Of greater concern is the wording of directors' and officers' liability policies that do not insure the corporation where the corporation is independently rather than jointly liable for the acts of its directors and officers. This appears to be an area of liability that is potentially increasing, especially in securities and environmental law.

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[15] See *Perry et al.* v. *General Security Insurance Co.* (1985), 7 C.C.L.I. 231 (Ont. C.A.); but see *Kallos* v. *Sask. Gov't. Ins.* (1984), 3 C.C.L.I. 65 (Q.B.); *Caisse Populaire de St.-Isidore Ltée* v. *Assoc. d'assurance des juristes Canadiens* (1992), 15 C.C.L.I. (2d) 294 (N.B.Q.B.).