NOVA SCOTIA COURT OF APPEAL

Citation: *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47

Date: 20150514
Docket: CA 420715
Registry: Halifax

Between:

National Bank Financial Ltd.

Appellant
Respondent by Cross-Appeal

v.

The Estate of the Late Michael Barthe, as represented by his Executrix Barbara Barthe

Respondent
Appellant by Cross-Appeal

Docket: CA 424848
Registry: Halifax

Between:

Craig Dunham, Lowell Weir and Blackwood Holdings Incorporated

Appellants
Respondents by Cross-Appeal

v.

National Bank Financial Limited

Respondent
Appellant by Cross-Appeal

Docket: CA 424527
Registry: Halifax

Between:

Calvin Wadden

Appellant

v.

National Bank Financial Limited,
National Bank of Canada, Lowell R. Weir,
Blackwood Holdings Incorporated, Carol McLaughlin-Weir,
Craig Anthony Dunham, The Estate of the Late Michael Barthe

Respondents

Judges:	MacDonald, C.J.N.S.; Saunders and Oland, JJ.A.
Appeals Heard:	September 26, 29 and 30, 2014, in Halifax, Nova Scotia
Held:	Appeals allowed in part per reasons for judgment of Saunders, J.A.; MacDonald, C.J.N.S. and Oland, J.A. concurring.
Counsel:	David G. Coles, Q.C. and Geoffrey J. Franklin for National Bank Financial Ltd. and National Bank of Canada W. Dale Dunlop and Ian M. Gray, for The Estate of the Late Michael Barthe, Craig Anthony Dunham, Lowell R. Weir, and Blackwood Holdings Incorporated Andrea Wadden, as agent for Calvin Wadden

INDEX

Paragraph No.

Reasons for judgment:

[1] There may come a time – in rare and exceptional circumstances – when a Court is satisfied that because of a party's egregious and unfair conduct during the course of litigation, it is obliged to intervene and say:

> Enough is enough. By your actions you have forfeited the right to participate and you will be held accountable for the harm and grief you have caused others.

This is such a case.

Overview

[2] The collapse of Knowledge House Inc. (KHI) in August, 2001, led to an avalanche of litigation, regulatory hearings, and criminal prosecutions. Included within that accumulation of proceedings was a series of lawsuits that arose out of claims and counterclaims between various investors, certain financial institutions, and so-called "insiders" of the defunct KHI. Those matters were judicially case managed, and ultimately three proceedings that had not been settled or otherwise concluded were jointly tried by Nova Scotia Supreme Court Justice Gregory M. Warner. Thus the three cases heard and decided by Warner, J. in the joint trial are identified in the style of cause of these reasons; written and released as a single judgment on appeal.

[3] Sixteen months after the trial ended Justice Warner released his 138-page written decision, 2013 NSSC 248, in which he allowed certain claims, dismissed others, and awarded damages to the successful litigants. In certain instances, joint and several liability was imposed. A year later, Warner J. considered the question of costs. His 41-page written decision on costs as they relate to that joint trial is reported at 2014 NSSC 264.

[4] For clarity and convenience I will refer to Justice Warner's 138-page decision wherein he addressed, in detail, the merits of the various claims and defences and went on to determine liability and damages as the "liability decision". I will identify his 41-page decision on costs as his "costs decision".

[5] Appeals were launched by various parties from both of those decisions and confirmatory orders. While the appeals of the liability decision were not consolidated, they were heard by the same panel of this Court on three consecutive

days. A fourth appeal involving the claim by Mr. and Mrs. Wadden and their numbered company against BMO was heard by this panel on November 17, 2014 and will be disposed of in separate reasons (2015 NSCA 48). A fifth appeal dealing with the judge's costs decision and involving some of the same parties was scheduled to be heard in April, 2015, and has now been re-scheduled for September 14, 2015.

[6] For reasons that will become apparent, I have decided it would be appropriate to file a single decision to dispose of all issues raised in all three appeals, as opposed to separate judgments for each case. My reasons for concluding that a single decision is the proper approach to take, will be explained in the section of this judgment dealing with certain discrete preliminary issues.

[7] In the Background section that follows I will provide enough detail to lend context for my subsequent consideration of the host of issues that arise from the trial judge's analysis and conclusions. At least initially, that can be done in general terms because of the common (or similar) overlap on many of the issues. Later, in my description of the historical record, when it becomes necessary to particularize the claims and counterclaims of the parties engaged in each appeal, I will make more detailed reference to the evidence and the circumstances surrounding certain parties and their relationships with one another, when it is instructive to do so.

[8] At this juncture, it is enough to say that National Bank's actions throughout these proceedings had proven to be so serious as to amount to an abuse of process, calling for extreme, unequivocal, and permanent sanctions. For more than 10 years the Bank maintained a position and asserted facts in its pleadings which it knew to be false. It deliberately set out on a path to hide the truth from the Court and opposing parties. In doing so it deprived the adjudicative process of highly relevant and critically important facts.

[9] It would be a mistake to characterize these appeals, and their disposition, as turning on a mere failure to disclose. While undoubtedly that dereliction is serious enough, the misconduct here also involved a deliberate and ongoing pattern of deception amounting to an intentional misleading of the Court, something so egregious as to strike at the very heart of the administration of justice.

[10] I wish to emphasize that this decision *only* deals with the matters which form the subject of these three appeals. Readers are cautioned that nothing in this judgment should be taken to reflect upon any other proceedings or settlements,

whether completed, abandoned, or ongoing, between or among parties who are not participants in these appeals.

Background

[11] I will start by briefly describing the spectacular growth and demise of KHI, the people or institutions who became ensnared in its collapse, and the litigation that unfolded as a result. All of this may be gleaned from the more fulsome chronicle provided by Justice Warner in his liability decision which is the focus of this appeal, as well as earlier decisions of this Court when appeals were taken from interlocutory rulings handed down during various stages of this prolonged litigation. In providing a brief history of KHI I will borrow heavily from the judge's helpful introduction.

[12] Knowledge House Inc. was incorporated as Knowledge Publishing House Limited in Nova Scotia in 1984. It provided computer-based programs and software related to medical and pharmaceutical education. In 1988 it was listed on the Montreal Exchange, thereafter trading publicly for more than a decade as a penny stock with annual sales under $700,000.

[13] Daniel F. Potter was described by the judge as a brilliant lawyer and entrepreneur who became a director of KHI in 1985. He had founded ITI Institute, a post-graduate education institution and served as Chair and CEO of ITI Education Corporation, its parent corporation, from 1991 to 1998. In 1998 Torstar Corporation invested $37,000,000 in ITI Education and became its major shareholder. With the rapid growth and later sale of ITI, Mr. Potter's reputation as a successful entrepreneur in the IT field, blossomed. When he stepped down as CEO and Chair of ITI in 1998 he became actively involved in KHI. By early 1999 he was its Chairman and CEO who, together with his wife, were the corporation's largest shareholders.

[14] Mr. Potter sought to establish KHI as a leading internet and IT-based education services provider. To add to its software business, KHI acquired three rapidly growing private technology businesses over a 6-month period in early 1999. By taking over these companies in exchange for shares, KHI's size and value (at least on paper), appeared to grow exponentially.

[15] One of the companies acquired through Mr. Potter's aggressive efforts was Micronet Information Systems Limited (Micronet). It had established itself as a successful provider of computer hardware, software and services to schools. At

the time of its acquisition, Micronet had successfully bid on a multi-million dollar, multi-year tender to provide computers and IT support services to the Nova Scotia public school system. As consideration for the acquisition of Micronet, its two principals, Calvin Wadden and Raymond Courtney, were issued 2.2 million KHI shares and were taken on as senior executives at KHI.

[16] Mr. Potter also acquired Innovative Systems Limited which had secured the rights to be Atlantic Canada's authorized distributor of Apple products and support services to the general public as well as the Nova Scotia public school system. As consideration, KHI gave Innovative's two principals, Craig Dunham and Steven Wilsack, 300,000 KHI shares, and contracts to continue running Innovative.

[17] In rapid succession KHI entered into partnerships with other major suppliers, most notably, IBM Canada Ltd.

[18] In December, 1999, KHI moved its public stock listing from the Montreal Exchange to the Toronto Stock Exchange. According to Warner, J.'s findings, the price of KHI shares soared from 9 cents per share in 1996 to a peak price of $9.85 per share in 2000 and then crashed to 4.5 cents per share in late August, 2001. In describing the zenith and collapse of KHI and its mastermind, as well as the actions of National Bank Financial Limited (NBFL) and its employee Bruce Clarke, the judge said:

> [3] … the entrepreneur [lawyer, Daniel F. Potter] behind the rise and fall, who took control of KHI in late 1998, …
>
> [4] With the help of other insiders, including some of those who had sold their companies to KHI for shares, a lawyer, [Blois Colpitts] and Bruce Clarke, a stock broker employed by NBFL, the President of KHI, kept KHI afloat until August 2001 by manipulative and artificial trading in KHI shares, while attempting to create a viable business and secure financing, deter existing shareholders from selling their shares, and entice wealthy individuals and institutions to invest.
>
> [5] The primary instrument of the artificial and manipulative trading in KHI shares was Bruce Clarke. The failure of NBFL to supervise Bruce Clarke facilitated that trading in a manner that was contrary to statutory and industry regulations, and NBFL's own rules.
>
> …
>
> [15] Based on the trading price, the shareholders' equity in KHI fell from 111.9 million dollars on March 29, 2000, to about 2.8 million dollars when it closed its doors on September 13, 2001.

[19] As would be expected, KHI's shocking demise prompted a flurry of litigation. Friendships were shattered. Longstanding business relationships were severed. The wealth and reputations of many individuals and institutions were damaged. Much of that checkered history which proved ruinous to so many is documented in a host of reported decisions. See for example, **National Bank Financial Ltd. v. Potter**, 2008 NSCA 92 and **National Bank Financial Ltd. v. Potter**, 2011 NSSC 407.

[20] For convenience, I will repeat the summary provided by Cromwell, J.A. (as he then was) in **Potter, supra**, at 2008 NSCA 92, where this Court upheld Justice Warner's decision (2008 NSSC 135) to reject NBFL's motion seeking leave to amend its pleadings to delete claims of wrongdoing against its broker, Bruce Clarke. I will be saying more about that matter later in this judgment. But this short extract offers a useful snapshot of the allegations that swirled around the main players:

> [7] The parties are involved in complex litigation concerning the collapse of Knowledge House Inc. (KHI) in August of 2001. NBFL started a number of actions against clients and former clients for unpaid margin debt arising from this collapse. Some of the defendants defended these claims by alleging that they had been the victims of a conspiracy involving NBFL's employee, Bruce Clarke, and others to manipulate KHI share prices.
>
> [8] NBFL responded by pleading two main allegations. First, it defended the conspiracy claims by denying there was any conspiracy and any vicarious liability for Mr. Clarke's actions. Second, in what is now known as the main action, NBFL issued a statement of claim against Messrs Potter, Clarke, Colpitts, his law firm and others alleging that they conspired to manipulate the price for KHI shares and that the conspiracy resulted in a fraud being committed against NBFL.
>
> [9] With respect to Mr. Clarke's alleged involvement, NBFL alleged that he acted on his own behalf and as the agent for an insider group of shareholders to conduct elements of the scheme, including trading in KHI shares in his numbered company account, his RRSP and other accounts in order to maintain the public market price of the shares, placing and carrying out orders of the other alleged conspirators, monitoring KHI's order book and trading activity on the TSE, maintaining buy orders for KHI shares in the TSE order book, soliciting NBFL clients to purchase shares of KHI and discouraging those clients from selling KHI shares.
>
> [10] NBFL maintained in sworn testimony that, before making these allegations, it had thoroughly investigated the matter and concluded that it "was never an issue [that] ... we were going to sue Bruce Clarke. ... We believed that we had more

> than sufficient evidence to name every person [including Mr. Clarke] in that claim ..." (AB 2828 - 2830).
>
> [11] Following the issuance of NBFL's statement of claim in the main action, several of the respondents started actions against NBFL in which they incorporated by reference, NBFL's allegations of conspiracy. In its various defences, NBFL, among other things, denied the conspiracy.

[21] The accumulation of lawsuits had grown to such an extent that in the words of Warner, J.:

> [18] By 2008, there were more than 54 groups of parties named in 11 actions under case management. At the commencement of trial on February 13, 2012, five actions involving six groups of parties remained.

These remaining actions involving six groups of parties were, by agreement, heard together in what Warner, J. characterized as the "joint trial" which commenced on February 13, 2012 and:

> [24] ended much earlier than scheduled, on April 17, 2012. …

[22] For convenience I will now present a very brief summary of the five remaining actions heard by Warner, J. in the joint trial, followed by an equally brief description of the judge's dispositions in each matter. Before doing so it is important to note that during the course of the trial, several specific (and by times different) agreements were placed on the record by the parties as to the admissibility of certain evidence in particular actions and whether there were any restrictions attached to admissibility (such as, for example, proof of authorship only; or an admission that the writing or thing existed, but <u>not</u> proof of the truth of contents). These stipulations with regard to testimony or documentary evidence are important and reference should be had to the trial judge's decision (at, for example, ¶27-31) to understand how these specific agreements relate to one or more of the actions dealt with in the joint trial.

[23] Here then are the five actions heard by Justice Warner, listed in the chronological order in which those lawsuits were initiated:

- **S.H. No. 174294** (the so-called "Debt" action) whereby NBFL sued Calvin Wadden; Craig Dunham; Lowell Weir; and Weir's corporation Blackwood Holdings Incorporated, for unpaid margin debt arising from the collapse of KHI. The defendants counterclaimed against NBFL for the actions of Bruce Clarke. NBFL third partied, among

others, Calvin Wadden, and the late investor Michael Barthe for any liability it might have in respect of the counterclaims.

- **S.H. No. 206439** (the so-called "Main" action) in which NBFL sued various KHI insiders for conspiring to manipulate the price of KHI shares resulting in a fraud against NBFL. By the time this case was tried by Warner, J., the only remaining defendant was Calvin Wadden.
- **S.H. No. 208293** (the so-called "Barthe" action) which was commenced by Michael Barthe and Lutz Ristow against NBFL for its failure to supervise Bruce Clarke, and the wrongdoing of Clarke as alleged by NBFL in the Main action. By the time of trial, the only remaining plaintiff was the Estate of Michael Barthe. In its pleadings NBFL denied liability and claimed that Mr. Barthe was part of the stock manipulation scheme. NBFL third partied Calvin Wadden in respect of any liability owed to Mr. Barthe.
- **S.H. No. 216059** (the so-called "Wadden" action) wherein Calvin Wadden, his wife, Andrea Wadden and a numbered company controlled by Calvin Wadden, sued BMO Nesbitt Burns alleging that BMO's handling of their accounts between March and August, 2000 was negligent and in breach of its contractual obligations to the plaintiffs. BMO denied liability.
- **S.H. No. 246337** (the so-called "NBC/Weir" action) wherein NBFL's parent company, the National Bank of Canada sued Lowell Weir and Carol McLaughlin-Weir on a promissory note given by the defendants to the Bank to secure a March, 2003 "loan". The Weirs claimed that the money was actually an advance on NBFL's intended settlement of Weirs' claims against NBFL and one that NBFL represented it would honour, after it had recovered from the other responsible parties in NBFL's litigation. The Weirs defended and counterclaimed against NBC, based on NBC's responsibility for NBFL and the conduct of Bruce Clarke.

[24] This judgment deals with the appeals taken with respect to certain findings made, or damages awarded, by the trial judge in three of those actions: the Barthe action; the Debt action; and the Main action described above. Further details of the grounds of appeal or cross-appeal advanced in each of those three cases will be discussed in a moment, but now, for ease of reference and identification purposes, it would be instructive to recall how the trial judge segregated the groups of

parties; his ruling with respect to the order in which the evidence was to be presented; and the agreements reached concerning the extent of the evidence and its application to particular claims (see for example, ¶18-31 of his decision).

[25] The trial judge referred to the largest group of parties as "The Dunlop Clients" as all were represented by the same lawyer, W. Dale Dunlop. This group comprised: Calvin Wadden, his wife Andrea Wadden and the numbered company 3019620 Nova Scotia Limited; Craig Dunham; Lowell Weir; Blackwood Holdings Incorporated (the Weirs' company); Carol McLaughlin-Weir; and the Estate of Michael Barthe. In his decision Warner, J. noted that these particular clients' interests were not identical. At some point during the trial in 2012 the trial judge found that Mr. Dunlop was in a conflict of interest with respect to Mr. and Mrs. Wadden, their numbered company, and his other clients. From that point forward Warner, J. ordered that Mr. and Mrs. Wadden ought to engage other counsel, or represent their own interests and those of the numbered company. As a result of that direction, the Waddens carried on as self-represented litigants. Mrs. Wadden and their numbered company are only parties to the Wadden action against BMO; neither made any claims against National Bank, nor did National Bank bring any claims against them. Therefore, Mrs. Wadden acted as agent for her husband with respect to the trilogy of appeals involving National Bank and acted on her own behalf and as agent for her husband and their company regarding their appeal of the Wadden action against BMO.

[26] The second group was National Bank Financial Limited (NBFL) and its parent, National Bank of Canada (NBC). In these reasons for judgment I will refer to NBFL and NBC collectively as "the Bank", unless the context otherwise requires.

[27] Justice Warner referred to the third group, being BMO Nesbitt Burns Inc. as "BMO". It was only a party in respect to the so-called Wadden action. In these reasons for judgment I will adopt the trial judge's reference to BMO as meaning BMO Nesbitt Burns Inc. and will repeat it here so as to clearly distinguish its actions and conduct from that of the Bank.

[28] At this point, before outlining the conclusions and damage awards pronounced by the trial judge which form the subject of this appeal, it would be helpful to repeat the judge's description of the agreements reached by the parties at trial, which are found at ¶27-31 of his decision:

[27] While the claims in the five remaining actions were, by agreement, heard together, BMO and the Dunlop Clients agreed, that the claims in the Wadden Action (216059) are more limited in substance, time line and events, than the claims between the Dunlop Clients and NBFL/NBC.

[28] It was agreed by all parties that some evidence was admissible only in the Wadden Action, some admissible only in the four actions involving NBFL and NBC, and some admissible in all five actions. Consequently, counsel for BMO did not attend at trial for all of the evidence.

[29] The evidence admitted in the Wadden Action consists of:

i) documentary evidence contained in Joint Exhibit Books tendered by agreement of BMO Nesbitt Burns and the Waddens, and identified as such, subject to the conditions of admissibility set out in the indexes to these joint exhibits, and other exhibits tendered by agreement;

ii) the oral evidence of Ms. Wadden, Brian MacLellan Q.C. ("MacLellan"), Harold Greenwood ("Greenwood"), Derek Banks ("Banks"), Wadden and Robert Lowe ("Lowe"); and

iii) other exhibits tendered through or referred to by these witnesses in their oral evidence.

[30] BMO and the Waddens specifically agreed that, despite the pleadings, no claim was being pursued by the Waddens of involvement by BMO or any of its employees or agents in the allegations of wrongful manipulation of the share price of KHI shares.

[31] The evidence admitted in the four actions between Dunlop Clients and NBFL / NBC, consists of:

i) documentary evidence contained in Joint Exhibit Books tendered by agreement between the Dunlop Clients and NBFL / NBC, subject to the agreed upon conditions of admissibility set out in the indexes, and other exhibits tendered by agreement;

ii) the oral evidence of Andrea Wadden, Brian MacLellan, Harold Greenwood, Calvin Wadden, Bruce Clarke, Derek Banks, Craig Dunham, Lowell Weir and Carol McLaughlin-Weir;

iii) other exhibits tendered through or referred to by these witnesses in their oral evidence;

iv) the settlement agreement between NBFL and a securities regulator, admitted pursuant to a decision of this Court reported as 2012 NSSC 76; and

> v) excerpts from the discovery examinations of Richard Rousseau, Barbara Barthe and Lutz Ristow as well as from the written responses to Interrogatories of Barbara Barthe and Lutz Ristow.

[29] To better understand the points in issue in the three appeals considered in this judgment, I wish to briefly describe the principal findings and/or awards made by the judge, followed by the grounds of appeal (or cross-appeal) listed with respect to them. It is important to emphasize that in the summaries that follow I am distilling the trial judge's principal findings, not my own.

[30] Here I will follow the sequence in which the three appeals were heard by the panel.

S.H. No. 208293 (the so-called "Barthe" action)

[31] This was the first appeal in the trilogy of appeals considered by this panel at an all-day hearing on Friday, September 26, 2014.

[32] Warner, J. found that the late Michael Barthe was a wealthy, successful German businessman who purchased property in Guysborough County, Nova Scotia where one of his neighbours happened to be an officer of KHI who introduced him to Daniel Potter. Mr. Barthe was impressed with what he heard. Through his own accountants and lawyer back in Germany he conducted his own due diligence of KHI and ultimately decided to become an investor in the company. In doing so he dealt with Bruce Clarke, later found to be the rogue broker at the Bank. Warner, J. said Bruce Clarke was simply an "order taker" of Mr. Barthe and that Barthe never sought advice from Clarke. According to the trial judge, the only potential liability of Clarke (and vicariously of the Bank) to Mr. Barthe would be if Clarke ought to have refused to become an agent for Barthe, or ought to have disclosed to Barthe the existing stock manipulation scheme, because of his ongoing duty of honesty and good faith as an agent.

[33] At trial the Bank portrayed Mr. Barthe as being a sophisticated investor. Warner, J. disagreed. He said he was not satisfied from the evidence that Mr. Barthe was a sophisticated investor. He was certainly a successful businessman but his prowess in investments had not been established by the evidence.

[34] Ultimately Barthe made a deal with Potter to buy 250,000 KHI shares for $1.7M on August 3, 2000. Bruce Clarke opened up a new account for Barthe at the Bank. Barthe's $1.7M was received by the Bank on August 28. Clarke began

immediately to purchase KHI shares. The purchase prices varied, as if the purchases were on a truly open market. However, unknown to Barthe, Bruce Clarke and other KHI insiders were manipulating the stock value through a series of deceptions (including buying and selling the shares among themselves). Warner, J. found there was no evidence that Mr. Barthe was aware of such a scheme. Among other things, Mr. Barthe was not aware that Clarke maintained his own personal account (the 540 account) whereby Clarke would buy (park and move) shares in KHI that he had acquired on his own behalf and for others, always doing it craftily so that his own margin account at the Bank did not go off-side, which would then likely have triggered inquiries by Bank officials.

[35] The trial judge found that nothing was said, written or occurred between August 2000 and January 19, 2001 which in fact (or ought to have) tipped off Barthe and/or Ristow as to the stock manipulation orchestrated by Clarke and other KHI insiders.

[36] The trial judge found that the only financial disclosure Ristow or Barthe ever received was the 2001 financial plan sent to them on January 4, 2001. That document caused the investors to become concerned and ask further questions of Potter. This prompted Potter to send to both Barthe and Ristow a copy of his confidential memorandum dated January 15 which outlined, for the first time, KHI's need for $3M in new equity. In the eyes of the trial judge, receipt of this memorandum by Barthe and Ristow on January 19, 2001 "was significant". In the judge's opinion this was the first indication the company was in desperate need of new equity to support the venture because of the downward pressure on KHI's market share price.

[37] Upon receipt of that letter the judge concluded that Barthe was faced with two choices. By that point he had already invested $1.7M in the first purchase of approximately 250,000 KHI shares. Barthe and Ristow were also "bound" to an agreement whereby Barthe would pay a further $1.625M, representing two remaining installments under a $3.325M Subscription Agreement for a private placement. The tone of Barthe's and Ristow's dealings with Potter changed dramatically. They either refused to talk with him or delayed any communication. But it was on this day – January 19, 2001, that the trial judge found "Barthe now knew that KHI insiders were manipulating the public stock price".

[38] Faced with such a dilemma the judge said Barthe could either refuse to advance the remaining installments of his promised $1.625M and risk being sued

both for the payment of that sum and possibly for any additional damages to KHI flowing from his refusal, or, he could pay and risk losing the full $3.325M that he and Ristow had committed to invest in KHI and hope that KHI would somehow survive.

[39] Evidently Barthe chose the latter. He decided to advance to KHI $1.625M "with knowledge of the stock manipulation scheme by KHI insiders" as found by Justice Warner. In the mind of the judge, this last payment of $1.625M amounted to acquiescence and ratification on the part of Barthe. On this basis Warner, J. found that Clarke (and vicariously the Bank) would be liable for Mr. Barthe's first loss of the $1.7M he invested in August 2000, but would not be liable for the $1.625M he invested after "learning" of the stock manipulation on January 19, 2001. Put simply, Mr. Barthe had only himself to blame for "losing" this $1.625M because – in the opinion of the trial judge – he paid it knowing full well that KHI was then a sham.

[40] When characterizing the nature of the relationship between Barthe and Clarke (and the duties owed as a result) the judge found that while Bruce Clarke was simply an "order taker" as far as Mr. Barthe was concerned, Clarke was nonetheless still obliged to be honest and to act in good faith toward his principal. Clarke's employer, the Bank, had an obligation to take reasonable steps to supervise Clarke and to identify any existing or potential conflicts of interest.

[41] The judge found that Clarke did not act honestly or in good faith in his dealings with Mr. Barthe. Clarke was part of a fraudulent scheme hatched by insiders to artificially prop up the KHI share price in the market place. The Bank was found liable, both vicariously for Clarke's actions, and by reason of the Bank's own negligence and breach of contract to Barthe in failing to properly supervise Clarke and competently deal with Mr. Barthe's account. The judge found that had the Bank properly supervised Clarke's activities, it would have discovered his 540 account and his use of his own margin debt to falsify the KHI share price. For all of these reasons the judge found that both Clarke and the Bank were liable for Barthe's first investment of $1.7M in August, 2000.

[42] The judge then turned to a consideration of the Bank's counterclaim against Barthe for what the Bank essentially alleged was Barthe's "failure" to blow the whistle on KHI after receiving financial information not generally available to the public as to KHI's true "health" on January 19, 2001. Warner, J. rejected the Bank's claim on the basis that there was no factual or jurisprudential authority to

sustain it. Barthe was never a director of KHI. He never attended any directors or shareholders meetings. Counsel for the Bank could point to no authority for the proposition that a mere shareholder who had been provided with some of the same information made available to directors had a "duty" to report to a third party like the Bank any "discovery" of a stock manipulation scheme in a company in which he was a shareholder. For these and other reasons the judge dismissed the Bank's claim against Barthe.

[43] Having found that Barthe had "ratified" KHI's conduct on and after January 19, 2001, and on that basis was barred from seeking recovery of the $1.625M invested after the "discovery", Warner, J. determined that the only compensable loss to the Barthe Estate was the money he had invested and lost in August, 2000 when first acquiring his KHI shares. The judge calculated the loss to be $1.7M less the amount recovered in the sale of those shares after the collapse of KHI.

[44] Lastly, the judge rejected the Bank's argument that Barthe had failed to mitigate his losses because he ought to have attempted to sell into the market his shares after the January 19, 2001 "discovery", thereby improving his position. The judge found that because Barthe had so many shares, any attempt on his part to sell them into the open market would have likely driven down the share price and caused an earlier collapse of KHI.

[45] Both the Bank and the Barthe Estate filed appeals from Justice Warner's decision. In simple terms, the Bank said the judge erred by failing to find that Barthe's actions throughout constituted ratification in law and that therefore the Bank ought not to have been found liable for *any* of Barthe's "losses" on his investments. The Barthe Estate defended and cross-appealed alleging error on the part of the judge in limiting his losses to a recovery of approximately one-half of his total investment and denying him recovery of any investment made after January 19, 2001. The Bank defended the Estate's cross-appeal.

[46] As often happens on appeal, the long list of alleged errors is reduced in this case to four principal issues. For the Bank's part it said the judge erred in valuing the shares without the assistance of expert evidence; and not appreciating the importance of an "admission" made by Mr. Dunlop on behalf of his clients at trial where it was said he had acknowledged that they had not produced evidence showing the conspiracy to manipulate the share price had in fact resulted in an artificial price; and failing to find that Barthe's "ratification" amounted to a complete defence insofar as <u>all</u> of his claims against the Bank were concerned. For

the Estate's part it said the judge erred in his application of the law with respect to ratification and that on the evidence he ought to have been entitled to recover all of his lost investments. Insofar as the Estate's cross-appeal against the Bank was concerned, the Bank's conduct throughout these proceedings was said to be so egregious as to constitute an abuse of process necessitating a striking of the pleadings, or a stay.

[47] This concludes my summary from the first appeal of the principal findings and conclusions of the trial judge, the factual basis for his analysis, and the context and focus of the main issues that arose on appeal.

[48] I will now provide a similar condensation of the judge's principal findings for the other two appeals we heard.

S.H. No. 174294 (the so-called "Debt" action)

[49] This was the second appeal of the "trilogy" heard by the panel at an all-day hearing on Monday, September 29, 2014.

[50] At trial the Bank sued Wadden, Dunham, Weir and Blackwood Holdings for unpaid margin debt arising from the collapse of KHI. The defendants counterclaimed against the Bank for the actions of its employee, Bruce Clarke. The Bank third partied, among others, Calvin Wadden and Michael Barthe for any liability it might have in respect of the counterclaims. Certain aspects of the so-called "NBC/Weir action" in S.H. No. 246337 were also engaged. In that case, the Bank had sued Mr. and Mrs. Weir on a promissory note given by the defendants to the Bank to secure a March, 2003 "loan". The Weirs said that the money was actually an advance by the Bank on an intended settlement of the Weirs' claims against the Bank, and that the Bank had represented that it would complete the settlement after it had recovered its losses from the other responsible parties in the Bank's ongoing litigation. The Weirs defended and counterclaimed against the Bank based on the Bank's responsibility for the conduct of its broker, Bruce Clarke.

[51] The trial judge found that Mr. Dunham and his partners sold their Apple-based technology business, Innovative, to KHI in July, 1999 in exchange for 300,000 KHI shares (150,000 shares going to each man) with contracts to continue running Innovative on behalf of KHI. Dunham had access to these shares at the rate of 30,000 shares per year (the rest to be held in escrow). The agreement resulted in certain adjustments. In the spring of 2000, Mr. Dunham was obliged to

pay KHI approximately $141,000 as his share of those adjustments. At the same time he was building a new home which he expected to finance with the proceeds of the sale of KHI shares. He had no money to do either. The then controller of KHI devised a scheme whereby KHI would advance to Dunham and his partner some of the shares being held in escrow, and that those shares would be placed in trust with Bruce Clarke at the Bank who would then sell them into the market on an orderly basis with the proceeds then being paid back to KHI to discharge the debt owed by Dunham and his business partner.

[52] At trial the judge rejected the Bank's submission that Dunham was a sophisticated investor. While he and his partner had undoubtedly established a very successful business before its sale to KHI, the judge found that Dunham had not conducted any independent due diligence in respect of the sale of his business but simply trusted KHI and its lawyer, Blois Colpitts, expecting them to act fairly and honestly.

[53] When Dunham became increasingly pressed for money in the construction of his home and facing ongoing financial debt with KHI, the judge found that Dunham trusted Bruce Clarke to follow his directions and sell shares on the open market to repay the indebtedness. Clarke ignored all of Dunham's directions. While the Bank acknowledged Clarke's failure to follow directions, it argued that Dunham failed to prove that Clarke's conduct actually caused Dunham's losses.

[54] The judge found that Dunham was a "naïve" novice with respect to the investment industry and that a fiduciary relationship existed between Clarke and Dunham. The judge found that Clarke breached his duties in contract and as a fiduciary, violated his duty of loyalty, ignored Dunham's explicit directions and failed to disclose that he was in a conflict of interest position or that he was manipulating the value of the stock. Warner, J. found that Clarke's misrepresentations were not negligent but in fact were intentional. He rejected the Bank's defence of ratification, finding that Mr. Dunham could not have "ratified" wrongful conduct of which he was unaware. He found that neither Dunham, nor Mr. and Mrs. Weir were aware of Clarke's fraudulent stock manipulation, which was enough to defeat the Bank's "defence" of ratification/acquiescence.

[55] The judge made a series of findings leading to his conclusion that Clarke was liable as agent for Dunham both for breach of contract and breach of fiduciary duties. Clarke took advantage of Dunham's vulnerability because of his conflicts of interest, which included his own investments in KHI and his participation in the

stock manipulation scheme. He ignored Dunham's specific instructions. He did not attempt to diversify Dunham's account. He acted fraudulently in ignoring Dunham's directions to sell his shares and provide professional advice. The judge found that the Bank breached its duty and standard of care owing both in contract, and in negligence, by failing to properly supervise Clarke and Clarke's secret 540 account. The judge found that the Bank failed to uncover Clarke's various conflicts of interest, and his ongoing fraud in his dealings with KHI shares. The judge found that the Bank was liable to Dunham on three fronts: first, vicariously on account of Clarke's own wrongdoing; second, for Dunham's losses by reason of the Bank's own negligence and breach of contract; and third, for punitive damages for the manner in which it continued to deal with Dunham throughout the litigation, notwithstanding the Bank's discovery years earlier that he was entirely blameless.

[56] As for Mr. and Mrs. Weir, the judge found that Mr. Weir was a "sophisticated investor" being the principal in a publicly traded company. Mrs. Weir ran her own consulting company and incorporated Blackwood as a vehicle to invest excess earnings from her own accounting practice. Blackwood had only two shareholders; Mr. and Mrs. Weir. The judge found them to be credible and reliable witnesses. He accepted their evidence. For the most part, their evidence was uncontradicted. Where it differed from the evidence of Clarke, the judge preferred their evidence over that of Clarke.

[57] The claim brought by Weir and Blackwood was based on their clear instructions to sell KHI shares which Clarke failed to honour because of his own secret trading through his hidden 540 account, and otherwise. They sued both Clarke and the Bank in negligence and breach of contract for Clarke's failure to follow instructions, and for the Bank's failure to properly supervise its employee. In his liability decision, Justice Warner gave many specific examples of Clarke's fraudulent misrepresentations in his dealings with Mr. Weir and Mrs. Weir (on behalf of Blackwood). Eventually Mr. and Mrs. Weir came to the belief that the Bank had misled them. Every time they called Clarke, Clarke made excuses. This led to friction between the Weirs, and Clarke, as well as the lawyer Blois Colpitts. The judge found that it was the clear intention of Clarke and other insiders to make it difficult for Weir and Blackwood to liquidate KHI shares. The Weirs were out of the country when KHI collapsed and they only learned about it in the newspapers upon their return to Canada. This prompted many acrimonious meetings between Weir and senior bank officials at its offices in Halifax and in Montreal, with those officials ultimately apologizing to the Weirs and entertaining settlement offers to

accommodate their claimed losses. Those efforts at settlement never bore fruit and ultimately Mr. and Mrs. Weir, Blackwood and the Bank were joined in serious, prolonged litigation.

[58] Dealing first with his calculation of the losses incurred by Dunham, Justice Warner concluded that it was likely that had Clarke acted properly, Dunham would have sold almost all (and possibly all) of his shares before the end of September, 2000. Therefore the judge calculated Dunham's loss as being the market value at which the KHI shares sold between June 30-September 30, 2000. That price fluctuated and the judge established the "median price" at $6.75 per share. The judge then excluded the first 30,000 shares which had been sold by Clarke to pay off Dunham's debt to KHI and were withdrawn for Dunham's own personal use. The judge calculated the loss to Dunham from Clarke's failure to sell the shares, based on 120,000 KHI shares at $6.75 per share, in other words a total "loss" of $810,000. From that loss, the judge then deducted the net proceeds from the sale of various shares in September, November and December. At trial the Bank argued that from the gross amount of Mr. Dunham's loss, there should be deducted the amount of his margin account debt with the Bank which came to approximately $353,000. Dunham resisted that submission, saying that by virtue of Clarke's fraud and breach of fiduciary duty, Dunham should not be liable for any margin debt with the Bank. The judge looked at the extent of the margin debt and concluded that of the approximately $353,000 worth of margin debt, $34,400 of that was interest charged monthly on the margin debt by the Bank. Ultimately, the judge concluded that it would be "inequitable" to oblige Mr. Dunham to be liable for the portion of the margin debt related to interest charged by the Bank on the debt (since both the Bank and its employee Clarke were found to be wrongdoers), but at the same time it would be unfair and inequitable to permit Mr. Dunham to recover the full value of his shares without first deducting from that value the portion of the margin debt which he had withdrawn periodically for his own personal use. Through a series of subsequent calculations the judge then arrived at a net loss recoverable by Mr. Dunham, which he was then awarded plus pre-judgment interest at the rate of 2.614%.

[59] Warner, J. then considered Mr. Dunham's claims for "consequential losses" such as lost income; loss of value of investments; professional fees incurred in relation to his filing for personal bankruptcy; interest paid on credit cards; interest paid on mortgages, etc. The judge dismissed those claims for consequential losses on the basis that Mr. Dunham had failed to establish the necessary causal link between Clarke's wrongdoing and such losses.

[60] Finally, Warner, J. awarded punitive damages in the amount of $200,000 to Mr. Dunham for the Bank's oppressive and vindictive conduct.

[61] The judge made separate, complicated calculations in valuing the extent of Weir and Blackwood's losses. I need not repeat the details of that analysis which can be found at ¶898 *ff.* of the trial judge's decision. Just as he had previously with Mr. Dunham's claim for damages, the judge deducted the principal portion of the margin debt owed by Weir and by Blackwood from their award for loss of the value of the shares. Similarly, he declined to deduct the interest charges because neither Clarke nor the Bank should "profit" by their own wrongdoing. As well, the judge refused to reduce the extent of Weir's award by the $100,000 "loan" from the Bank, after finding that this was really an advance to the Weirs by the Bank as part of the attempt to settle their lawsuit, and was never intended as a "set-off against the other damages awarded to Weir and Blackwood".

[62] When considering Weir and Blackwood's claims for punitive damages, the judge said this stood on a different footing than Mr. Dunham's claim. Dunham's claim was based on breach of contract and breach of fiduciary duty. The judge found that Clarke was not a fiduciary to Weir or Blackwood. Rather, his liability arose from his breach of contract with each of them, coupled with the Bank's own breach of duty in contract and in negligence. The judge used equally strong language in describing the outrageous conduct of the Bank when awarding Weir and Blackwood punitive damages of $200,000, jointly.

[63] This second appeal also involved an appeal brought by the claimants, and a cross-appeal by the Bank. I pause here to note that Mrs. Weir was only a party to this litigation with respect to the Weir action, the outcome of which was not appealed to this Court. Therefore, she is not a party to these appeals. For their part the claimants, Dunham, Weir, and Blackwood attack the Bank's actions as being a clear abuse of process, warranting significant punitive damages and a vitiating of all of their margin debts with the Bank. Further, they complained that the judge erred in awarding too little damages, or in refusing to award any damages, under certain heads. In terms of punitive damages the claimants said that the judge's award was woefully inadequate, and did not even begin to address the Bank's high-handed conduct throughout these proceedings. Collaterally, the claimants also said the judge erred in approving the rate of pre-judgment interest proposed by the Bank "in the absence of any evidence to support it".

[64] In terms of its cross-appeal, the Bank again relied upon "ratification" on the part of Dunham and Weir as disentitling them to any recovery of their "losses" and in any event said the judge erred in calculating the value of the loss sustained by each claimant.

[65] That concludes my synopsis from the second appeal of the judge's principal findings and conclusions which then became the focus of the main issues on appeal.

[66] I will now turn to the last case.

S.H. No. 206439 (the so-called "Main" action)

[67] This being the third appeal in the "trilogy" of cases, was considered by the panel during an all-day hearing on Tuesday, September 30, 2014.

[68] The case began as the Bank's claim against KHI "insiders" for conspiring to manipulate the price of KHI shares resulting in a fraud against the Bank. By the time the matter was heard before Warner, J. the only remaining defendant was Calvin Wadden.

[69] The substance of this case is not to be confused with S.H. No. 216059 (the so-called "Wadden" action) which was a lawsuit commenced by Mr. and Mrs. Wadden and their numbered company against BMO alleging that BMO's handling of their accounts between March and August, 2000 was negligent and in breach of its contractual obligations to the plaintiffs. That latter case involving the Waddens and BMO was heard as a separate, fourth appeal by the panel on Monday, November 17, 2014 and will be dealt with in a separate judgment, distinct from this single judgment released by the panel which decides the three cases heard together as a "trilogy" of appeals.

[70] The synopsis of Justice Warner's decision, and the issues arising on appeal, in this so-called "Main" action may be summarized as follows.

[71] In simple terms the Bank accused Mr. Wadden, together with many other individual and corporate defendants, of being part of a secret conspiracy whose members conspired to manipulate the market price of KHI shares and fraudulently maintain that price above true market value so as to deceive the Bank into extending further credit to the defendants thus enabling them to acquire further shares and fund their margin accounts.

[72] According to the Bank's pleadings, when the market price corrected itself in August, 2001 many of the Bank's clients received margin calls and when repayment was not forthcoming the Bank initiated, or was joined, in multi-party collection litigation. The Bank claimed against Wadden and his fellow "co-conspirators" for damages as a result of their fraudulent activities; repayment of all debts owed the Bank in regard to loans purportedly secured by KHI shares (the margin accounts); indemnification to the Bank for any and all claims for which the Bank might be found liable; punitive damages; collateral expenses incurred for any legal, accounting and actuarial costs, as well as other heads of damages, and solicitor and client costs.

[73] In his reasons the judge found there was no dispute as to the dollar amount claimed by the Bank against the remaining defendants for their respective margin accounts. He said:

> [32] NBFL and NBC sued on margin accounts for liquidated sums. There is no real contest that, subject to counterclaims and set offs, debts were incurred in the amounts claimed in respect of the margin accounts. Dunham owed $353,021.96; Weir owed $60,177.68; Blackwood owed $10,403.74 and Wadden owed $1,086,072.00.

[74] As previously noted, by the time the trial started, the Bank's claims against all of the other defendants in the Main action had been settled, discontinued or otherwise terminated leaving Mr. Wadden's dispute as the only remaining case to be decided.

[75] The defence and counterclaim filed by Wadden (and others) is dated November 14, 2003. In simple terms, Wadden denied all of the allegations made against him by the Bank. He said the accusations that he participated in a fraudulent conspiracy were malicious and untrue and constituted an abuse of process. He accused the Bank of negligence and breach of contract and illegal actions such that the Bank was liable on its own part, as well as vicariously for the actions of Clarke. He counterclaimed for his pecuniary losses; punitive and other damages; solicitor and client costs; damages for harm to his reputation; and sought a declaration that the margin agreements between the Bank and himself were null and void.

[76] The judge found that Calvin Wadden was a well-educated businessman with extensive experience in banking and finance. He and his business partner Raymond Courtney founded a company called Micronet. Micronet purchased

100,000 shares; Wadden and Courtney split them 50-50 and Wadden placed his 50,000 shares in his numbered company, 3019620 Nova Scotia Limited, which then opened an investment account with Wadden's best friend and broker, Mr. Eric Richards, then employed at Financial Concepts Group (FCG).

[77] On June 30, 1999 Wadden and Courtney sold Micronet to KHI for 2.2 million shares (1.1 million each) as well as obtaining senior executive positions at KHI. The shares were to be held in escrow and released over a five year period. The shares were then valued at $2.65 each.

[78] Later in 1999, Wadden and his wife Andrea Wadden made further investments in KHI. Other than the shares obtained from the sale of Micronet, most of the purchases were financed by margin debt issued on the Waddens' accounts at FCG.

[79] In March, 2000 Mr. Richards left FCG and moved over to BMO. The Waddens decided to move their accounts with him. In the meantime, Wadden had opened a margin account at the Bank through Bruce Clarke, to access cash.

[80] By June 2000 the relationship between Wadden and Dan Potter had become strained, after Potter failed to find a buyer for Wadden's KHI shares. In early July, Wadden took steps to attempt to sell his KHI shares from his BMO account, but BMO refused to sanction the transaction because his margin account had gone offside. This led Wadden to retain a lawyer, Brian MacLellan, Q.C. on July 17, 2000.

[81] Mr. MacLellan continued to act for Wadden for a period of about six weeks until his professional services were terminated in late August.

[82] Wadden said the Bank was complicit in thwarting his efforts to sell KHI shares and knew or ought to have known of Clarke's wrongdoing in fraudulently manipulating the price of KHI shares and by using Wadden's own shares in Clarke's secret 540 account. Wadden alleged that Clarke, supported by KHI's lawyer, Blois Colpitts and its President, Daniel Potter worked in tandem to prevent him from executing his sell instructions. They said that when Mr. Wadden put the Bank on notice of Clarke's wrongful use of his KHI shares, the Bank accepted absurd explanations from Clarke, rather than investigate Clarke's conduct in respect of his 540 account.

[83] As explained earlier, the Bank sued the various claimants for liquidated sums based on the indebtedness owed on their margin accounts. The judge found that the amount outstanding on the Wadden's margin account was $1,086,072.

[84] In his counterclaim against the Bank, Wadden claimed damages of close to $3M based on the value of their 440,000 shares lodged with the Bank in March, 2000 when their market value was $6.80 per share.

[85] Of all of the claimants, the judge was least charitable with Mr. and Mrs. Wadden. He made several very strong adverse findings against the Waddens. In many parts of his decision he described their evidence as being incredible and unreliable. He found that at some point during their dealings with Potter et al. Wadden became an "insider" seeking to prop up the sham of KHI so as to protect their own financial holdings.

[86] Justice Warner found (Wadden's lawyer) Brian MacLellan, Q.C. to be a very reliable and credible witness, and whenever the Waddens' testimony or paperwork differed from what Mr. MacLellan had recorded in his notes or said under oath, the judge preferred and accepted the evidence given by Mr. MacLellan.

[87] At ¶632 Warner, J. found that "Wadden knew, by mid-June, 2000, that the account into which his KHI shares had been placed was the 540 account of Clarke's private company".

[88] The judge also noted that in Mr. MacLellan's testimony at trial, upon review of his notes, he confirmed that his (then) client, Calvin Wadden was aware and had advised him that the shares were in Clarke's numbered company account.

[89] The judge rejected Mr. Wadden's explanation that he had only "made peace" with Potter and gone along with the scheme hatched by Potter and Colpitts because he was under "duress" such that they would prevent him from selling any of his shares if he refused to co-operate. Rather, Justice Warner found that Wadden realized that his only hope was for Potter to find wealthy individuals or institutions to buy up shares and maintain an inflated market price.

[90] The judge found that on "or about" August 23, 2000 "Wadden had an epiphany" when he came to realize that there was no market for large quantities of KHI shares and that Potter could not find a buyer for those shares. As the judge saw it, Wadden then realized his only hope would be to join with Potter in finding substantial investors and the only way to make that work, would be to manipulate

the market price until unsuspecting investors could be found. Thus, the judge found that for the next year (from August, 2000 until the end of August, 2001 when KHI collapsed), Wadden joined with the other insiders including Potter, Colpitts and Clarke in manipulating the price of KHI shares while looking for new financing and investors. The judge was satisfied that Wadden knew the business of KHI was not being operated in accordance with applicable securities regulations and stock exchange rules.

[91] Justice Warner was blunt in his assessment of Wadden's role. He said:

> [670] I conclude that Wadden was actively involved with Potter, Colpitts, Clarke and others in artificially manipulating the stock of KHI shares, not for the purpose of facilitating an orderly market, but rather for the purpose of maintaining the price to protect their margin debts and the value of their shares, until such time as they could put together a business plan sufficient to attract wealthy investors.

[92] When he came to assessing damages, Warner, J. was satisfied that Clarke's wrongdoing more than likely caused the losses suffered by Dunham, Weir, Blackwood and Barthe and was prepared to award damages for those losses to those plaintiffs. Not so, for Wadden. The judge said:

> [705] The same cannot be said about Wadden. Wadden discovered the market manipulation and conspiracy. He was faced with a choice of losing everything and then suing to recover his losses or participating in the scheme with the hope that Potter would be able to find a buyer to allow him to sell his shares and exit the conspiracy. He chose the latter.
>
> [706] Wadden was certainly faced with a difficult choice, but it can hardly be said that "but for" the actions of Clarke, Wadden would not have suffered the losses he experienced. Wadden's losses occurred after he assumed the risk and responsibility of holding the second largest stake in the equity of KHI.
>
> [707] Wadden knew about the box account and that KHI was being manipulated by Clarke and others. He took a chance; it did not pay off. It was Clarke that pushed Wadden to the precipice, but it was Wadden who chose to remain there, and it is Wadden that must bear the responsibility for any damages that resulted from him falling off.

[93] Later at ¶717 of his reasons the judge declared:

> [717] With the exception of Wadden, none of the Dunlop Clients were aware of Clarke's market manipulation scheme in KHI and his fraudulent behaviour. Even though the Dunlop Clients did not advance a case for fraudulent misrepresentation, deceit, or conspiracy, I am satisfied that they did plead fraud.

[94] As noted earlier in this synopsis, there were three broad aspects to the litigation involving Mr. and Mrs. Wadden. The first concerned the Bank suing Mr. Wadden in the Main action, claiming that he was a manipulator, that he intentionally and knowingly participated in the fraudulent stock manipulation scheme and so should be liable to the other claimants for any losses they suffered, as well as providing indemnification to the Bank if it were found liable for any such losses. The second concerned the Bank suing Wadden for recovery of the $1,086,072.00 margin debt, and Wadden's defence and counterclaim to the Debt action. The third concerned the claims by Mr. and Mrs. Wadden and their numbered company in separate litigation brought against BMO for breach of contract and negligence. As I have said, the appeal by the Waddens from the judge's dismissal of their litigation against BMO was dealt with as a fourth separate appeal by the panel on November 17, 2014 and is not considered in this single judgment dealing with the "trilogy".

[95] Insofar as the Bank's claim against Wadden in this case, Warner, J. absolved Wadden of liability with respect to Craig Dunham's losses because the judge found that "Wadden's participation in the scheme after August 24, 2000, was not the cause of Dunham's loss". The judge found that Wadden would be jointly and severally liable to the Bank for the losses suffered by Weir and Blackwood for the value of their KHI shares, but only for that part of their claim that was based on the loss in value of the shares. The judge was very explicit in excluding from that liability the claim brought by Weir and Blackwood against the Bank for the manner in which the Bank treated them in the ongoing litigation. In other words, Wadden was "not liable to NBFL for that aspect of NBFL's liability to the Weirs and Blackwood".

[96] Lastly, the judge found Wadden also liable to the Bank, jointly and severally, for the Bank's liability to the Barthe Estate respecting the purchase of the 259,000 KHI shares, since, the judge had found that at the time of that transaction, Wadden was part of the "conspiracy".

[97] On appeal to this Court, Mr. Wadden was self-represented. He adopted the arguments made by Mr. Dunlop on behalf of his clients in the other two appeals in the trilogy, in particular, their submissions concerning the Bank's outrageous conduct as amounting to an abuse of process and justifying a striking of the pleadings and/or a stay, together with a claim for enhanced punitive damages and recovery of the losses he says he suffered at the hands of the Bank and its employee, Bruce Clarke. Wadden then challenged several of the factual

conclusions and adverse credibility findings made against him and his wife by the trial judge as being unsupported or clearly contradicted by the evidence. Further, Wadden complains that the judge failed to provide sufficient reasons for his conclusions, especially his finding that he was part of a conspiracy and his adverse credibility findings. Lastly, Wadden says the judge was wrong in choosing to file a single set of reasons to deal with all of the cases he heard, rather than a separate decision which would have properly explained the basis for his dismissal of his claims against the Bank and his imposition of liability and indemnification against him. By "lumping them in" with everyone else, Wadden protests that this Court was denied any opportunity for meaningful appellate review.

[98] For its part the Bank said that all of Wadden's complaints are factually driven and that he has failed to establish that any of the trial judge's conclusions were the result of palpable and overriding error.

[99] This concludes my synopsis from the third appeal, of the judge's findings and conclusions which became the focus of the main issues on appeal.

[100] Before turning to the merits of the various appeals, I will deal with two discrete preliminary issues.

Preliminary Issues

(i) One judgment to dispose of all three appeals.

(ii) Prior decisions and undisputed facts.

(i) One judgment to dispose of all three appeals.

[101] From my review of the case law it is clear that the decision to render one set of reasons for multiple appeals is discretionary. There is no established formal test directing judges in their consideration of whether it is appropriate to issue one or multiple sets of reasons. As I will explain, the jurisprudence establishes certain common factors which are often considered by courts when exercising their discretion to issue one set of reasons. These include: common underlying facts; similar issues; the same or similar parties; extensive intervention of the parties in the various respective trials or appeals; and jointly heard proceedings in the court below. The principal rationale for issuing one set of reasons when one or more of the above factors applies, is convenience. Preserving judicial resources is an important objective, so long as issuing one set of reasons is not prejudicial to the parties.

[102] Under the **Judicature Act**, R.S.N.S. 1989, c. 240, and the Nova Scotia **Civil Procedure Rules**, a judge is not prohibited from issuing one set of reasons for proceedings that were concomitantly heard. As stated, the decision to render a single set of reasons for more than one proceeding is discretionary. It generally occurs in situations where the facts and issues are similar.

[103] In **Chambers Estate v. Chambers**, 2013 ONCA 511, a single set of reasons disposed of two appeals that arose from the same set of facts.

[104] In **Reference Re: Remuneration of Judges of the Provincial Court of PEI**, [1997] 3 S.C.R. 3, the Supreme Court of Canada determined that it was appropriate to deal with four appeals in one set of reasons, since many of the parties had intervened in each other's cases.

[105] A single set of reasons may also be issued for inter-connected proceedings in order to facilitate judicial efficiency and convenience. See for example, **LaFond v. Ledoux**, 2008 FC 1369.

[106] **Imperial Oil v. Jacques**, 2014 SCC 66 is a recent decision where the Supreme Court of Canada issued one set of reasons to dismiss two appeals from separate judgments issued by the same panel of the Quebec Court of Appeal. While the Court did not address why the reasons for both appeals were written in one judgment, the appeals arose from the same set of facts and the same issue: whether a party to a civil proceeding could request the disclosure of recordings of private communications intercepted by the state in the course of a criminal investigation.

[107] Most recently the Court chose to issue one set of reasons in **R. v. Nur**, 2015 SCC 15 when disposing of two separate appeals that involved many of the same issues relating to the mandatory minimum sentences imposed on the appellants Nur and Charles pursuant to s. 95(2)(a) of the **Criminal Code**.

[108] In **Lundbeck Canada Inc. v. Canada (Minister of Health)**, 2010 FCA 320, the Federal Court of Appeal found that although it would have been preferable for the applications judge to have issued separate reasons for a selection of patent applications, one set of reasons was sufficient. In that case the applications had never been joined, but were heard consecutively. The applications judge's rationale in rendering one set of reasons included the fact that counsel for the appellants were invited to attend all three hearings; that memoranda

of fact and law in all three applications had been exchanged among the parties; and that the commonality of the applications greatly surpassed their distinctiveness.

[109] On appeal, one of the pharmaceutical companies argued that the judge's reasons were not sufficiently intelligible to provide a meaningful basis for appellate review in that they did not adequately distinguish between the three proceedings. The appellant also argued that the judge had relied on evidence in other proceedings and as such they had been prejudiced by the decision to render a single set of reasons.

[110] In response to these submissions Noël, J.A. (as he then was) wrote at ¶129:

> … Although it would have been preferable for the Applications Judge to issue separate reasons, if only because it would have avoided this last series of attack against his judgment, I am satisfied that he was mindful of the common and distinct points raised by the appellants throughout his review and that no injustice results from the fact that he issued a single set of reasons.

[111] In the context of immigration and refugee review proceedings, a single set of reasons is commonly seen. This is partly a result of statutory authorization which permits the Board to deal with multiple claimants in a single decision pursuant to Rule 49(1) of the *Refugee Protection Division Rules*, SOR/2002-228. In **Ramnauth v. Canada (Minister of Citizenship & Immigration)**, 2004 FC 233, O'Reilly, J. provided a helpful summary of the principles engaged on judicial review when considering the adequacy of a single set of reasons in the context of immigration law. He said at ¶9:

> Certainly, the Board can and often must deal with multiple claimants in a single decision … However, the reasons must disclose the basis on which the Board made its decision in respect of each claimant. The question is whether "the fact that the claims were joined has caused an injustice to either of the joined claims": *Zewedu v. Canada (Minister of Citizenship & Immigration)*, [2000] F.C.J. No. 1369 (Fed. T.D.), at para. 9. There is no injustice done when the Board fails to analyze a claim that is dependent on the success of a joined claim: *Tofan v. Canada (Minister of Citizenship & Immigration)*, [2001] F.C.J. No. 1379 (Fed. T.D.); *Boros v. Canada (Minister of Citizenship & Immigration)*, [2002] F.C.J. No. 892 (Fed. T.D.). However, if a claim raises distinct issues, it must be addressed separately: *Retnem v. Canada (Minister of Employment & Immigration)*, [1991] F.C.J. No. 428 (Fed. C.A.); *Csonka v. Canada (Minister of Employment & Immigration)*, [2001] F.C.J. No. 1294 (Fed. T.D.)

[112] In the criminal context, one set of reasons is often given for individuals charged under the same offence and in circumstances arising from the same set of facts. For example, in **R. v. Tran**, 1995 CarswellBC 1283 (C.A.), the individuals accused were charged with the same offence: theft over $1,000 in connection with the sale of stolen retail clothing. Wood, J.A., writing for the British Columbia Court of Appeal at ¶2 explained why one set of reasons would be given:

> These appeals were heard at the same time as those brought by the Crown from a variety of non-custodial sentences imposed upon [the five individuals accused], following their conviction for the same offence. As was the case with the five Crown appeals, it will be convenient to deliver one set of reasons in connection with these two appeals.
>
> [Underlining mine]

[113] In a related proceeding regarding sentencing, **R. v. Nguyen**, [1995] B.C.J. No. 2405 (C.A.),Wood, J.A. decided to render one set of reasons, although separate criminal proceedings at trial had been appealed separately. At ¶1 he wrote:

> The Crown seeks leave to appeal and, if leave is granted, appeals from sentences imposed by three trial judges in separate proceedings on a total of five individual respondents, each of whom was convicted, either by way of guilty plea or following a trial, of one count of possession of stolen property having a value in excess of $1000, contrary to s. 355 of the *Criminal Code*. While each sentence was appealed separately, the relationship between the cases is such that it will be convenient to deal with them in one set of reasons.
>
> [Underlining mine]

[114] There are many instances where the Federal Court of Appeal has issued one set of reasons for appeals from the Tax Court. Generally, the reasons cited, if any, include the fact that the issues and facts were similar and that the issues were tried jointly and heard on common evidence at the Tax Court. See for example, **1392644 Ontario Inc. v. Minister of National Revenue**, 2013 FCA 85 at ¶1; **Hunter v. Minister of National Revenue**, 2007 FCA 334 at ¶1.

[115] In a case involving a limitations action, **Zadworny v. Manitoba (Attorney General)**, 2011 MBCA 66, one set of reasons was given for two applications pursuant to Manitoba Court of Appeal Rule 35.1. At ¶2 Monnin, J.A. wrote:

> Although the appeals are in two different numbered suits, they both involve basically the same parties and arise out of the same set of underlying facts.

> Consequently, I will be issuing but one set of reasons and they will be applicable to both applications before me.
>
> [Underlining mine]

[116] In **Younis v. State Farm Mutual Automobile Insurance Co.**, 2012 ONCA 836, the Court used its discretion to issue separate reasons for one of five appeals heard together, and one set of reasons for the other four appeals on the basis that those four cases involved similar facts and circumstances. In all of the appeals the insurers had applied to stay or dismiss the proceedings as being barred by s. 281(2) of the Ontario *Insurance Act* which states that mediation must have first failed before applying to Court. In one case the respondent had brought a proceeding *before* the 60-day period for mediation had expired; whereas in the other four appeals the proceedings had been brought *after*. This difference in time resulted in a different outcome, which the Ontario Court of Appeal found sufficient to warrant separate reasons.

[117] It is not always necessary for a court to render separate reasons, due to the fact that there were different outcomes. **R. v. Cotroni**, [1977] O.J. No. 694 (C.A.) is an example of a criminal case where the Ontario Court of Appeal affirmed one conviction and quashed the other. At the Supreme Court of Canada, [1979] 2 S.C.R. 256, Pigeon, J. with Ritchie, J. concurring wrote at pp. 261-62:

> There was an appeal by each accused. The appeals of Swartz and Papalia were dismissed, those of Cotroni and Violi were allowed. Leave to appeal was granted by this court to Papalia and to the Crown, but due to Violi's death the Crown's appeal is now against Cotroni only. The Court of Appeal issued one set of reasons on all four appeals, and it will be convenient to do likewise on the two appeals to this court.
>
> [Underlining mine]

[118] From my review of these and other cases, I conclude that there is no definitive test to guide judges as to when it is appropriate to issue one set of reasons. It is helpful then to recall the general principles as to why reasons for judgment are given in the first place. Reasons must be adequate to assure the parties that there has been a fair and impartial trial of the issues: **Cojocaru v. British Columbia Women's Hospital and Health Centre**, 2013 SCC 30. The critical question is whether the reasons are sufficiently intelligible to permit a party to exercise its right of appeal and to enable the appellate court to perform its function: **F.H. v. McDougall**, 2008 SCC 53.

[119] Donald Brown's *Civil Appeals*, vol. 2, loose-leaf (Toronto: Carswell, 2009) ch. 13 at 13:4120 lists the underlying purposes for reasons:

- They provide tangible evidence that a judge (or panel of judges) was aware of and responsive to the parties' proofs and arguments;
- They are critical to a party's ability to decide whether or not to appeal;
- Reasons function as an aid, which provides a way of testing the validity of any tentative conclusion reached;
- Reasons are a form of public accountability.

[120] From these and similar authorities emerge the customary factors considered by judges when exercising their discretion to issue one set of reasons. These include: common underlying facts; similar issues; the same or similar parties; extensive involvement of the parties in the various respective trials or appeals; and jointly (or consecutively) heard proceedings in the court below. So long as issuing one set of reasons is not prejudicial to the parties, it is a convenient, efficient and acceptable use of judicial resources to do so.

[121] Applying those principles and factors to this case, I am satisfied that a single set of reasons is the proper approach to take in disposing of all three appeals. They all arise from the same set of facts. They all involve the same or similar parties and engage the same or similar issues. All matters were tried before the same judge who had also case managed the various proceedings which ultimately led to the "joint" trial. The three appeals were presented as a "trilogy" heard by the same panel, on consecutive days. There is nothing in the issuance of one set of reasons to dispose of all three appeals which would be prejudicial to any of the parties on appeal. Each will clearly understand the basis for our decision.

[122] Equally, Justice Warner was justified in deciding to issue a single judgment for all of the matters he considered at trial. No one was prejudiced by his approach. There is no reason to disturb Justice Warner's exercise of judicial discretion. I would therefore dismiss that particular ground of appeal relied upon by Mr. Wadden.

(ii) Prior decisions and undisputed facts

[123] Later, in the body of my reasons, I will canvass in detail the conduct of the Bank throughout these proceedings and why, in my opinion, such behaviour

amounts to an abuse of process so serious as to warrant a striking of the Bank's pleadings in their entirety, and granting a permanent stay of the Bank's claims, cross-claims, counterclaims, third party claims or defences seeking damages, indemnification or all other forms of relief. For present purposes, it will suffice to say that back in 2005, when faced with allegations from the Province's securities regulators, the Bank secretly admitted to serious wrongdoing for its part in this financial disaster only to, in these subsequent civil proceedings, boldly assert that it did absolutely nothing wrong. As a consequence of this clandestine arrangement, the Bank for seven years, forestalled a securities prosecution while forcing these parties, at enormous cost, to needlessly prove what the Bank had already secretly conceded.

[124] Before doing so I wish to address a second preliminary issue that occurs to me. That question is: can and should this Court take into account previous decisions of its own, or a lower court, or the Nova Scotia Securities Commission wherein the conduct of the Bank in these very same or similar proceedings was admonished and rebuked, and if so, on what basis? For reasons I will explain later, I have no hesitation in saying that in the circumstances of this case we can, should, and will take into account those prior decisions and the findings that were fundamental to those decisions, in our assessment of the Bank's conduct and the consequences that ought to result on account of it.

[125] The principal basis for my conclusion in this regard is that in these three cases there is no material dispute about the facts. Rather, the contest between the parties on appeal is how one ought to characterize the conduct based on those facts, and how does one then fashion a proper remedy which will do justice between the parties. When these three appeals were considered as a "trilogy" by the panel, all parties concerned clearly understood that the allegation of abuse of process was an issue that was front and centre, and would be decided by the Court. No challenge was ever brought seeking to contest our ability to fully examine the record (including the decisions to which I will refer) or suggesting that we were not entitled to consider and dispose of the complaint of abuse of process. On the contrary, counsel for the claimants, the self-represented claimants, and counsel for the Bank all presented us with copies of such previous decisions (or referred to them in the record) and made very comprehensive submissions, both in writing and at the hearing, with respect to them. These issues were the subject of repeated questioning by the panel during the hearings. Consequently, no one could be heard to say that they were prejudiced or taken by surprise in our having addressed the subject.

[126] Accordingly, I do not see this as a case where this Court needs to invoke the doctrine of judicial notice, and account for all of the steps that might entail. Rather, the prior decisions to which I will now refer and the factual findings upon which those prior decisions were based, were all either made part of the record before Justice Warner, or incorporated by reference in the appeals to this Court through the submissions of counsel and their handouts during argument.

[127] The parts of prior decisions in this proceeding which I consider to be especially relevant to our inquiry surrounding the Bank's alleged misconduct throughout the litigation would include:

(a) Passages from Justice Scanlan's 2005 decision on inconsistent pleadings (2005 NSSC 8), where he opts not to strike the Bank's pleadings, and this Court's November 2005 decision (2005 NSCA 139), upholding Justice Scanlan's 'inconsistent pleadings' decision, which was made five months after the Bank and the Nova Scotia Securities Commission had executed its secret settlement agreement;

(b) Passages from Justice Scanlan's 2005 decision (2005 NSSC 113) removing the Bank's counsel as solicitors of record for violating solicitor-client privilege;

(c) Passages from Justice Warner's 2008 decision (2008 NSSC 135), not permitting the Bank to amend its pleadings;

(d) Passages from Justice Hood's 2010 decision (2010 NSSC 214), dismissing the motions by seven parties to have the Bank's pleadings struck as an abuse of process;

(e) Passages from the decision of Commissioner Gruchy of the Nova Scotia Securities Commission, dated April 17, 2012 and amended September 30, 2012.

[128] To better appreciate the relevance of those earlier decisions to our present inquiry, it is helpful to recall the manner in which the shocking discovery of the secret settlement agreement came before Justice Warner.

[129] Following the conclusion of the trial in mid-April 2012, the trial judge reserved his decision. Justice Warner did not become aware of the existence of the settlement agreement until December, 2012, some eight months later. He agreed that the parties could make supplementary written submissions.

[130] In their supplementary submissions, the Dunlop clients specifically referred the trial judge to a number of previous decisions with respect to the settlement agreement. Justice Warner acknowledged these decisions in his trial decision as well as the use he makes of them:

> [156] …The Dunlop Clients tendered [t]he Settlement Agreement, the decision of the Nova Scotia Securities Commission ("Commission") dated December 4, 2012, approving the Settlement Agreement signed June 2005, together with the Nova Scotia Securities Commission decision dated April 17, 2012, amended September 30, 2012, and two decisions of the Nova Scotia Court of Appeal respecting the Settlement Agreement - the Court's decisions of January 31, 2012 (2012 NSCA 12) and September 21, 2012, (2012 NSCA 99).
>
> [157] These decisions discuss the process by which the Settlement Agreement was kept secret for seven years. They explain why the Dunlop Clients were unaware of the Settlement Agreement and agreed facts in the Statement of Allegations until shortly before the joint trial of these proceedings was commenced. The decisions also explain why the Dunlop Clients were prevented from introducing evidence in this litigation of the Settlement Agreement and the agreed Statement of Allegations until after the trial was completed and initial post-trial submissions in this proceeding were made.
>
> [158] They explain why it is appropriate that this Court, not having yet rendered a decision, entertains the request to admit into evidence, and consider, if admitted, the purpose, and how the Settlement Agreement approved by the Commission on December 4, 2012, should impact this proceeding.

[131] The Dunlop clients also referred the trial judge to other acts of 'bad faith' and misconduct they said the Bank committed during this litigation. In particular, they referred the trial judge to two decisions made by Scanlan J. (as he then was) in 2005. The trial judge quoted from both of these decisions in his judgment.

[132] Finally, the trial judge outlined the remedies sought by the Dunlop clients for the Bank's concealment of the settlement agreement, including the "striking of NBFL's pleadings, solicitor-client costs to all parties, and exemplary and punitive damages."

[133] Other than characterizing Mr. Dunlop's submissions as "an attempt to re-litigate a number of previous decisions of this Court" [referencing the Nova Scotia Supreme Court], the Bank did not object to Mr. Dunlop referring to and quoting from these prior decisions in his written submissions.

[134] From all of this it is clear that the following decisions were before Justice Warner:

- Justice Scanlan's 'inconsistent pleadings' decision (2005 NSSC 8);
- Justice Scanlan's 'privilege' decision (2005 NSSC 113);
- Two decisions of this Court regarding the settlement agreement (reported as 2012 NSCA 12 and 2012 NSCA 99);
- The decision of Commissioner Gruchy of the NSSC, dated April 17, 2012 and amended September 30, 2012;
- The decision of the NSSC dated December 4, 2012.

[135] In addition, during argument at the appeals to this Court, the parties referred us to Justice Warner's 2008 decision (2008 NSSC 135) wherein he refused to permit the Bank to amend its pleadings, and to Justice Hood's 2010 decision (2010 NSSC 214) where she dismissed the motions by seven parties to have the Bank's pleadings struck as an abuse of process.

[136] As well, there can be no doubt that the 2005 settlement agreement and the Escrow Agreement between the Securities Commission and the Bank form part of the record before Warner, J. and this Court.

[137] There is therefore no reason why we ought not to consider all these matters during our own deliberations, more particularly because the issue has been placed squarely before us, was fully argued, and the parties expect us to dispose of it.

[138] Accordingly, in my opinion, we are entitled to take into account a series of statements made by judges over the years as well as by Commissioner Gruchy to show the Bank's pattern of misconduct and the fact that the Bank had been admonished on several occasions for its actions. Such commentaries and severe rebukes are reflected in sources of indisputable accuracy – the text of the prior published decisions. The facts underlying those decisions were established after all parties had an opportunity to be heard and to make submissions before experienced decision-makers. The facts were proved to a civil standard on a balance of probabilities. Most importantly, those findings and the conclusions upon which they were based were not challenged on appeal to this Court. The question we were asked to decide was whether such conduct would – in the eyes of this Court – amount to an abuse of process, and if it did, how might that finding affect our disposition of all three appeals.

[139] In the alternative, if I am wrong in the approach I have taken, I would nonetheless take into account these prior decisions when assessing the Bank's conduct, on the basis of either the doctrine of judicial notice or the rules established by the Supreme Court of Canada in **British Columbia (Attorney General) v. Malik**, 2011 SCC 18.

[140] In simple terms, judicial notice refers to the device whereby a court will include as part of its deliberations a "fact" not introduced as evidence at trial, on the basis that it is so notorious as to be beyond doubt or controversy. Such an approach typically requires notice to the parties so that they will have the opportunity to be heard and challenge or contest the court's reliance. For example, in **Petrelli v. Lindell Beach Holiday Resort Ltd.**, 2011 BCCA 367, the issue was whether the trial judge could examine the court's own records to view the pleadings in a very similar case between a different plaintiff and the same corporate defendant. The British Columbia Court of Appeal agreed that the trial judge could have examined these pleadings without their being attached to affidavits and was entitled to take judicial notice of them, with notice to the parties. However, the Court of Appeal concluded that it could not take judicial notice of documents that "did not become evidence" in the lower court. Writing for the Court of Appeal, Groberman, J.A. stated:

> [44] In the case before us, neither party drew the judge's attention to the statement of defence in the Bahry action, nor did the judge indicate an intention to examine it. In the circumstances, I am of the view that it did not become evidence in this case. I do not agree with the defendant's assertion that this Court may take "judicial notice" of the pleadings in the Bahry action without some step (however informal) having been taken to make them part of the evidence in the court below.
>
> [Underlining mine]

[141] **Petrelli**, and cases like it, arose from a very different set of circumstances than we see here. As I have already explained, all parties had "notice" of the matters to be considered by Justice Warner and had full opportunity to address it in the post-trial written submissions he permitted the parties to file. So too in this Court where the subject formed one of the principal grounds of appeal and claims for relief in all three hearings dealt with in the "trilogy".

[142] Finally, the reasons of Justice Binnie for a unanimous Supreme Court of Canada in **Malik** are instructive. The facts are relatively straightforward. Mr. Malik was one of two individuals charged with multiple counts of murder following the bombing of an Air India flight in 1985. He sought bail in 2000,

relying upon a total net worth of over $11million. Less than a year later, he claimed he did not have sufficient assets to fund his own defence. The B.C. government entered into an interim funding agreement to advance public money to Malik on the basis of his representation that liquidating his assets into cash would take time. Malik subsequently indicated that he was insolvent and made a *Rowbotham* application. The chambers judge denied the application and made multiple findings of fact against the Malik family. Malik was acquitted in the criminal trial. British Columbia subsequently sought repayment of $5.2million that it paid to fund Malik's defence. The chambers judge granted an *Anton Piller* order to permit the province to conduct a private search of the business and residential premises of the Malik family. In making that determination, the chambers judge relied in part upon findings of fact made against the Malik family in the *Rowbotham* application. The British Columbia Court of Appeal set aside the *Anton Piller* order. The Supreme Court of Canada allowed the Province's appeal, finding that the chambers judge was entitled to rely on the previous *Rowbotham* findings.

[143] Binnie, J. states his ultimate conclusion at the outset of his analysis:

> [7] … [A] judgment in a prior civil or criminal case is admissible (if considered relevant by the chambers judge) as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. It will be for that judge to assess its weight. The prejudiced party or parties will have an opportunity to lead evidence to contradict it or lessen its weight (unless precluded from doing so by the doctrines of *res judicata*, issue estoppel or abuse of process).

[144] I acknowledge of course that **Malik** involved a consideration of a prior decision in an interlocutory proceeding whereas here we are considering not only Justice Warner's liability decision which is the subject of this appeal, but other prior decisions of other decision-makers. However, in my view, those distinctions are not material because: they all involve the same parties; they all arise from the same or similar factual circumstances; they were all made part of the record at trial through the written and oral submissions of counsel; there was no controversy or dispute as to their relevance, accuracy or admissibility; and they all were made part of the record we were asked to consider when dealing with these appeals.

[145] In his reasons Binnie, J. explained the basis for admitting prior judgments as evidence in subsequent proceedings:

> [7] … [A] judgment in a prior civil or criminal case is admissible (if considered relevant by the chambers judge) as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. …

[146] My reading of **Malik** suggests that admissibility of the prior judgments as proof of their findings and conclusions depends on three factors:

i) Relevance;

ii) Whether the parties are the same or were themselves participants in the prior proceedings on similar or related issues; and,

iii) The purpose for which the prior decision is put forward and the use sought to be made of its findings and conclusions.

[147] I have already explained in some detail why, in my opinion, the circumstances presented in these three appeals satisfy all three factors such that we are entitled to consider them, without restriction, when addressing the Bank's conduct during the course of our deliberations. Such an approach, in my respectful view, also satisfies other laudable policy objectives such as Justice Binnie's observation that the admissibility of prior judgments and the use that can be made of them "must be seen in the broader context of the need to promote efficiency in litigation and reduce its overall costs to the parties" (at ¶37) and avoiding the attendant costs and the waste of judicial and litigation resources associated with duplicative litigation (at ¶40 and ¶52). As Binnie, J. remarked:

> [52] More significantly in this case, for the reasons already discussed, I do not regard a prior judicial decision between the same or related parties or participants on the same or related issues as merely another controversy over hearsay or opinion evidence. The court's earlier decision was a judicial pronouncement after the contending parties had been heard. It had substantial effect on their legal rights. It would have been wasteful of litigation resources and potentially productive of mischief and inconsistent findings (as discussed in *Toronto (City) v. C.U.P.E., Local 79*) to have required the chambers judge to put aside Stromberg-Stein J.'s judgment and require the Province to litigate the *Rowbotham* facts *de novo* on an interlocutory motion. …

[148] The Supreme Court recently returned to this same theme in **Hryniak v. Mauldin**, 2014 SCC 7, to which I will make more particular reference later in these reasons.

[149] In conclusion on this important preliminary issue, I see nothing in the circumstances of this particular case which would oblige us to invoke the doctrine of judicial notice. Even if there were, or if the requirements established by the Supreme Court in **Malik** were triggered, I would have found that all factors had been satisfied and that our ability to take into account and rely upon the factual findings and conclusions from the prior judgments I have identified was well within our discretion to do so.

[150] Having now disposed of these two important preliminary issues I will carry on with a more detailed examination of the Bank's conduct throughout these proceedings; our view of that behaviour; and how it affects each of the three appeals. Before doing that I will briefly canvass the appropriate standard of review, about which there is little controversy.

Standard of Review

[151] In matters such as this, the appropriate standard of appellate review is settled law. A standard of correctness will be invoked when reviewing questions of law. A standard of palpable and overriding error will be applied to findings of fact, or inferences drawn from facts, or issues of mixed law and fact: **Housen v. Nikolaisen**, 2002 SCC 33; **Gwynne-Timothy v. McPhee**, 2005 NSCA 80. In matters requiring a trial judge's exercise of discretion, which would include such things as: awarding or declining to award damages; deciding costs; or making rulings intended to ensure the fair and efficient conduct of a trial, considerable deference is paid on appeal and we will not interfere unless we are convinced that the judge erred in principle or caused an obvious injustice: **Coady v. Burton Canada Co.**, 2013 NSCA 95 at ¶19. Appellate intervention with respect to the amount of punitive damages will only be warranted where there has been an error of law or a wholly erroneous assessment of the quantum: **Richard v. Time Inc.**, 2012 SCC 8, at ¶190.

[152] With great respect to the trial judge and his prodigious efforts to bring resolution to this complicated, multi-headed hydra of litigation, I find that he did err in certain material respects which require our intervention. Accordingly, I find that the appeal ought to be allowed in part, certain findings and awards set aside, and the outcome corrected in the manner we consider to be necessary and correct.

[153] Since, in my opinion, the outcome in this case principally turns on our finding that the Bank's conduct throughout this litigation has been so egregious as to amount to an abuse of process, I need not spend much time canvassing the

standard of review with respect to other collateral issues. Should that become necessary in any particular case I will address it then.

[154] Similarly, in view of my conclusion that the Bank's conduct deserves severe censure, I need not undertake a line by line review of each and every finding made by the trial judge which forms the basis of a ground of appeal or cross-appeal. It is enough to say that I have carefully considered the record and all of the arguments made by counsel on behalf of their respective parties, or by Mr. Wadden who is self-represented. Having done so, and unless otherwise expressly noted, I am not persuaded that the trial judge erred in failing to correctly apply the law to the issues before him, or that his factual and credibility findings were the product of palpable and overriding error. In those circumstances where I did find the judge incorrectly applied the law, or was seriously mistaken in his assessment of the facts, I will say so. Otherwise the parties may assume that their submissions were not persuasive as providing a reason to warrant appellate intervention.

[155] I will turn now to a discussion of the doctrine of abuse of process, first in broad strokes and later as it arises from the facts in this case. Before doing that I must consider this Court's authority to intervene. This is necessary because, as I will explain, it will be up to this Court to craft an appropriate remedy, in light of the judge's failure to do so.

The Court's Jurisdiction

The Judicature Act

[156] Our jurisdiction derives from three sources: the **Judicature Act**, R.S.N.S. 1989, c. 240; the **Civil Procedure Rules**; and the inherent jurisdiction of the Court. I will start with the **Judicature Act**.

[157] Section 2 defines "court" in the **Act** and the **Civil Procedure Rules** as "the Court of Appeal or the Supreme Court". Section 41(e) of the **Act** permits the Court of Appeal or the Supreme Court to grant a stay of proceedings. It provides:

> (e) no proceeding at any time pending in the Court shall be restrained by prohibition or injunction but every matter of equity on which an injunction against the prosecution of any such proceeding might have been obtained prior to the first day of October, 1884, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto provided always that nothing in this Act contained shall disable the Court from directing a stay of proceedings in any proceeding pending before the Court if it or he thinks fit, and any person, whether

> a party or not to any such proceeding who could have been entitled, prior to the first day of October, 1884, to apply to the Court to restrain the prosecution thereof, or who is entitled to enforce by attachment or otherwise any judgment, contrary to which all or any part of the proceedings have been taken, may apply to the Court thereof by motion in a summary way for a stay of proceedings in such proceeding either generally, or so far as is necessary for the purposes of justice and the Court shall thereupon make such order as shall be just;
>
> [Underlining mine]

[158] This Court has said that s. 41(e) of the **Judicature Act** cloaks this Court and the Nova Scotia Supreme Court with the "general authority" to grant a stay. See for example, **Reid v. Halifax Regional School Board**, 2006 NSCA 35; and **Vogler v. Szendroi**, 2011 NSCA 37.

[159] There is no specific provision in the **Judicature Act** with respect to striking pleadings. However, s. 41(g) of the **Judicature Act** gives this Court and the Supreme Court a broad power to grant all such remedies that either Court considers appropriate to address the dispute between the parties:

> (g) the Court, in the exercise of the jurisdiction vested in it in every proceeding pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to the Court seems just, all such remedies whatsoever as any of the parties thereto appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the proceeding so that as far as possible all matters so in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided;

[160] In addition, s. 45E of the **Judicature Act** preserves this Court's inherent jurisdiction to make an order in respect of an abuse of a process of the court. It states:

> 45E Nothing in Sections 45B to 45D limits the authority of a court to make an order in respect of an abuse of a process of the court, including an order for dismissal, a stay or indemnification or to strike a pleading. 2009, c. 17, s. 1.

[161] Court is defined in s. 45A of the **Judicature Act** as the Supreme Court or the Court of Appeal. While ss. 45A to 45E concern vexatious proceedings in Nova Scotia courts and these provisions are not directly relevant to this appeal, s. 45E is nevertheless important as it affirms that this Court's authority to act with respect to abuses of process is not limited by the **Judicature Act**, and that appropriate

remedies for abuse of process may include an order for dismissal, a stay, or a striking of the pleadings.

The Civil Procedure Rules

[162] Rule 90 of the Nova Scotia **Civil Procedure Rules** governs civil appeals to this Court. Rule 90 does not specifically provide for the striking of pleadings. Rule 90.41 governs the imposition of a stay of execution or a stay of proceedings pending appeal, but does not specifically mention a permanent or temporary stay of proceedings to dispose of an appeal.

[163] However, Rule 90.48 provides this Court with additional powers. It states:

> (1) Without restricting the generality of the jurisdiction, powers and authority conferred on the Court of Appeal by the *Judicature Act* or any other legislation the Court of Appeal may do all of the following:
>
> (a) amend, set aside, or discharge a judgment appealed from;
>
> (b) draw inferences of fact and give any judgment, allow any amendment, or make any order that might have been made by the court appealed from or that the appeal may require;
>
> …
>
> (e) make any order or give any judgment that the Court of Appeal considers necessary.
>
> (2) The Court of Appeal may set aside all or part of a judgment appealed from, although only part is under appeal, and it may grant an order in favour of a person who does not request the relief.
>
> [Underlining mine]

[164] Rule 90.48(1)(e) grants this Court broad powers to make "any order" or give "any judgment" that the Court "considers necessary". Applying settled interpretive principles, I find that the use of the word "any" necessarily includes the power to strike a party's pleadings, or stay proceedings, as long as this Court finds such remedies "necessary". Further, Rule 90.48(1)(b) directs that this Court may "give any judgment … or make any order that might have been made by the court appealed from". There is no dispute that Justice Warner had jurisdiction to strike the pleadings or stay proceedings.

[165] Rule 88 is dedicated to preventing an abuse of the court's processes. Rule 88.02(1) sets out potential remedies for an abuse of process although, as noted in Rule 88.01(2), these remedies are not exhaustive. The relevant provisions say:

> (1) A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including any of the following:
>
> (a) an order for dismissal or judgment;
>
> (b) a permanent stay of a proceeding, or of the prosecution of a claim in a proceeding;
>
> (c) a conditional stay of a proceeding, or of the prosecution of a claim in a proceeding;
>
> (d) an order to indemnify each other party for losses resulting from the abuse;
>
> (e) an order striking or amending a pleading;
>
> …
>
> (g) an injunction preventing a party from taking a step in a proceeding, such as making a motion for a stated kind of order, without permission of a judge;
>
> (h) any other injunction that tends to prevent further abuse.

[166] Rule 88.02 therefore grants broad discretionary powers to Supreme Court judges to determine an appropriate remedy once it is satisfied that the Court's process has been abused. This includes an order granting a permanent or temporary stay of proceedings or an order striking the pleadings.

[167] Rules 90 and 91 apply to the Court of Appeal. Unlike the Supreme Court, the Court of Appeal does not have an abuse of process rule under Rule 90 although Rule 90.44(1) does provide for a panel of the Court of Appeal to grant the ultimate remedy to dismiss an appeal:

> A party to an appeal may make a motion to the Court of Appeal at any time before or at the hearing of the appeal for an order setting aside the notice of appeal or dismissing the appeal on either of the two following grounds:
>
> (a) the appeal is frivolous, vexatious, or without merit;
>
> (b) the appellant has unduly delayed perfection of the appeal.

[168] Rule 90.44 does not specifically mention the term 'abuse of process'. However, in **Liu v. Composites Atlantics Ltd.**, 2014 NSCA 58 this Court affirmed that it would exercise its discretion to dismiss both appeals under Rule 90.44(1)(a) as they were "vexatious and an abuse of process."

[169] Rule 90.02(1) describes the scope of Rule 90. It states:

> (1) The *Civil Procedure Rules* that are not inconsistent with this Rule apply to proceedings in the Court of Appeal with necessary modifications as directed by the Court of Appeal or a judge of the Court of Appeal.

[170] Therefore, pursuant to Rule 90.02, if the **Civil Procedure Rules** made by the superior court judges of Nova Scotia are not inconsistent with Rule 90, this Court can apply those Rules to its proceedings.

[171] As I have shown, Rule 88 provides broader remedies than Rule 90.44. There is nothing within Rule 88 that is inconsistent with Rule 90, including Rule 90.44. Therefore, pursuant to Rule 90.02(1), I find that this Court may also apply Rule 88 to address an abuse of process.

[172] It must also be emphasized that in Nova Scotia our **Civil Procedure Rules** have the force of law. This was made clear in Chief Justice MacDonald's comprehensive review of this Court's inherent jurisdiction and the legislative effect of our **Rules** in **Central Halifax Community Association v. Halifax (Regional Municipality)**, 2007 NSCA 39. He said:

> [49] Let me begin my analysis by exploring the Nova Scotia Supreme Court's authority to enact rules of court. It derives from the *Judicature Act*. Here are the relevant provisions:
>
> > 46 ... the judges of the Supreme Court or a majority of them may make rules of court in respect of the Supreme Court for carrying this Act into effect and, in particular, ...
> >
> > (b) regulating the pleading, practice and procedure in the Court and the rules of law which are to prevail in relation to remedies in proceedings therein;
> >
> > …
>
> [50] I draw particular attention to s. 47(2), which declares these rules as having the "force of law".

[173] The Chief Justice continued:

> [51] Furthermore, these rules do not represent subordinate legislation as the appellant seems to suggest. While they may not be passed by the Legislature in the conventional sense, they are laid before the House of Assembly where they are subject to cancellation, should the Assembly so direct. A failure to do so implies their acceptance. Thus by these provisions, the *Civil Procedure Rules* generally, and Rule 56.06 specifically, embody the force of law. Here is the statutory process as set out in the *Judicature Act*:
>
> …

[174] The Chief Justice concluded:

> [59] In summary on this issue, the Nova Scotia Civil Procedure Rules have the force of law and short of any expressed statutory provision to the contrary, they are valid and enforceable. This includes Rule 56.06.

[175] From all of this we can see that our **Civil Procedure Rules** and the **Judicature Act** serve as a vehicle whereby this Court's inherent jurisdiction finds expression. Recalling the history of Nova Scotia's early and prominent place in what is now Canada, the inherent jurisdiction of this province's superior courts may be quite different than that claimed in other provinces. Our jurisprudence stands on its own unique footing and reliance upon precedents from other jurisdictions will prove to be misguided. I will now briefly refer to case law where such inherent jurisdiction has been exercised.

Inherent Jurisdiction – the case law

[176] As I have shown, s. 41 of the **Judicature Act** and **CPR**s 88 and 90 provide us with the clear authority to control an abuse of the Court's own process and strike pleadings or stay proceedings if the Court determines that a party's conduct constitutes an abuse of process.

[177] **Orlandello v. Nova Scotia (Attorney General)**, 2005 NSCA 98 and **Sezerman v. Youle** (1996), 150 N.S.R. (2d) 161 (C.A.) establish that this Court's inherent jurisdiction to grant a stay for abuse of process was preserved by s. 41(e) of the **Judicature Act**, and the concluding words of Rule 14.25(1) of the 'old' 1972 **Civil Procedure Rules**. Furthermore, as pointed out above, s. 45E of the **Judicature Act** confirms this jurisdiction.

[178] Likewise, the Supreme Court of Canada has confirmed in **United States of America v. Shulman**, 2001 SCC 21, ¶33 and **United States of America v. Cobb**, 2001 SCC 19, ¶37 that a Court of Appeal "has, like all courts, an implied, if not inherent, jurisdiction to control its own process, including through the application of the common law doctrine of abuse of process" [underlining mine]. In **R. v. Cunningham**, 2010 SCC 10, Justice Rothstein indicated at ¶18 that "[i]nherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner."

[179] Having established this Court's jurisdiction – grounded in statute, judge-made rules, and the common law – to strike pleadings and stay proceedings, I will now consider the circumstances in which a Court of Appeal should intervene and exercise such exceptional remedies.

[180] I begin the analysis by reviewing certain general principles about striking pleadings and staying proceedings. I will then turn to the concept of abuse of process which permeates the discussion of these remedies.

When should a Court of Appeal strike pleadings?

[181] Nova Scotia case law with respect to striking pleadings has arisen exclusively in the context of old Rule 14.25 where one party has argued that the pleadings disclose no reasonable cause of action or defence: see, for example, **National Bank Financial Ltd. v. Potter**, 2007 NSCA 113; **Tupper v. Nova Scotia (Attorney General)**, 2008 NSCA 44 and **Cook v. Nova Scotia (Attorney General)**, 2005 NSCA 23. The Table of Concordance for the new Rules suggests that motions brought under old Rule 14.25 would now be brought under Rule 88.02. This Court has not considered the remedy of striking pleadings in the context of abuse of process since the new Rules came into effect in 2009. It is therefore beneficial to examine how and when other courts strike pleadings.

[182] In **Grewal v. Nijjer**, 2011 BCCA 505 at ¶14, the British Columbia Court of Appeal stated that striking pleadings was a "severe remedy and the power to apply it should be measured and proportionate." Despite the exceptional nature of the remedy, the Court dismissed the defendants' appeal from an order striking their pleadings. The chambers judge had struck the pleadings on the basis that the defendants deliberately failed to comply with a consent order requiring them to produce documents and to provide particulars. The Court of Appeal found that,

although drastic, this remedy was within the judge's discretion, and it could not be said that the plaintiff was not seriously prejudiced by the defendants' conduct.

[183] In **Homer Estate v. Eurocopter S.A.**, 2003 BCCA 229 at ¶4, the British Columbia Court of Appeal described striking pleadings as a "Draconian remedy only to be invoked in the most egregious of cases because it deprives the litigants of a trial on the evidence." In that case, Southin, J.A. determined that the trial judge was correct in not striking out the Statement of Defence.

[184] In **Starland Contracting Inc. v. 1581518 Ontario Ltd.**, [2009] O.J. No. 2480 (Div. Ct.), the Ontario Divisional Court considered the law with respect to the power to strike out a party's defence at ¶24-26:

> The decision to strike a claim or defence is one of discretion, which must be exercised on proper principles.
>
> Gray J. in *Broniek-Harren v. Osborne*, [2008] O.J. No. 1690 (S.C.J.), describes the competing principles of a party's right to have its case determined on its merits, and the need for the orderly procedural progress of litigation. He states at paras. 28 to 31:
>
> > The policy underlying the *Rules of Civil Procedure* is twofold: to ensure that cases that are not settled are tried on their merits; and to ensure that cases are processed, and heard, in an orderly way. A civilized society must ensure that a credible system of justice is in place, and the *Rules of Civil Procedure*, made pursuant to the *Courts of Justice Act*, reflect the scheme created by the Province for the orderly handling of civil cases.
> >
> > The *Rules* reflect a balance. The litigant does not have an untrammelled right to have his or her case heard. In order to be heard, a case must be processed in accordance with the *Rules*. By the same token, adherence to the *Rules* must not be slavish in all circumstances. They are, after all, designed to ensure that cases are heard. Throughout the *Rules*, the principle is reflected that strict compliance may be dispensed with where the interests of justice require it: see, for example, *Rules* 1.04(1), 2.01, 2.03, 3.02, and 26.01. The difficult issue, in any particular case, is to determine when non-compliance reaches the point that it can no longer be excused. The Court, and society as a whole, have an interest in ensuring that the system remains viable. If the *Rules* can be ignored with impunity, they might as well not exist.
> >
> > In determining matters of this sort, Courts in this province have had to wrestle with these competing objectives: see, for example, *Cardoso v. Cardoso* (1998), 22 C.P.C. (4th) 134 (Ont.Gen.Div.); *Baksh v. Sun Media (Toronto) Corp.* (2003), 63 O.R. (3d) 51 (Master); *Provato v. Burgantin* (2003), 33 C.P.C. (5th) 385 (Master); *1066087 Ontario Inc. v. Church of*

> *the First Born Apostolic Inc.* (2004), 1 C.P.C. (6th) 199 (Ont.Div.Ct.); and *Vacca v. Banks* (2005), 6 C.P.C. (6th) 22 (Ont.Div.Ct.).
>
> The ability of the court to control the litigation process is particularly important in matters that are case managed, such as construction lien actions. The authority to dismiss proceedings for repeated failure to comply with court orders and flagrant disregard for the court process is an essential management tool. A case management judge or master who has a continuous connection with an action, the parties and their counsel is well-positioned to monitor the conduct of the participants throughout the proceedings, and to determine whether anyone is deliberately stalling, showing bad faith or abusing the process of the court when deadlines are missed and defaults occur under procedural orders. A decision to dismiss an action or strike a pleading because of such defaults is entitled to deference, unless that decision is shown to have been exercised on wrong principles or based upon a misapprehension of the evidence such that there is a palpable and overriding error.

[185] In **Bell ExpressVu Partnership v. Corkery**, 2009 ONCA 85, the Ontario Court of Appeal stressed at ¶35 that "[s]triking out a defence is a severe remedy, however, and … ought generally not to be a remedy of first resort in circumstances such as this, without at least providing the defaulting defendant with an opportunity to cure the default."

[186] The same court also dealt with striking pleadings in the context of family law proceedings in **Pucaru v. Pucaru**, 2010 ONCA 92 at ¶49-50:

> The adversarial system, through cross-examination and argument, functions to safeguard against injustice. For this reason, the adversarial structure of a proceeding should be maintained whenever possible. Accordingly, the objective of a sanction ought not to be the elimination of the adversary, but rather one that will persuade the adversary to comply with the orders of the court. As this court said at p. 23 of *Marcoccia v. Marcoccia* (2009), 60 R.F.L. (6th) 1 (Ont. C.A.), the remedy of striking pleadings is "a serious one and should only be used in unusual cases". The court also explained at p. 4 that the remedy imposed should not go "beyond that which is necessary to express the court's disapproval of the conduct in issue." This is because denying a party the right to participate at trial may lead to factual errors giving rise to an injustice, which will erode confidence in the justice system.
>
> Nonetheless, the decision to strike pleadings and to determine the parameters of trial participation is a discretionary one that is entitled to deference on appeal when exercised on proper principles. The exercise of discretion will be upheld where the motion or trial judge fashions a remedy that is appropriate for the conduct at issue. In *Sleiman v. Sleiman* (2002), 28 R.F.L. (5th) 447 at p. 448, a

> case involving a refusal to provide financial disclosure, this court upheld the motion judge's determination that the appellant had demonstrated a "blatant disregard for the process and the orders of the court" as well as her decision precluding the appellant from contesting his wife's financial claims. In *Vacca v. Banks* (2005), 6 C.P.C. (6th) 22 the plaintiff had repeatedly failed to comply with orders related to discovery and the progress of litigation. Ferrier J. for the Divisional Court, observed at p. 27 that the master's remedy of the dismissal of the action may be an appropriate sanction to recognize the court's "responsibility for the effective administration of justice".

[187] These cases and others like them confirm the discretionary and highly contextual nature of granting this remedy. As is obvious, they have occurred at the trial level. While this Court – as I have demonstrated – has the authority to strike pleadings using its power under s. 41(g) of the **Judicature Act**; **Civil Procedure Rule** 90.48(e); or following a finding of abuse of process under **Civil Procedure Rule** 88.02(1)(e), my review of the jurisprudence surrounding striking pleadings in this province and across Canada has not revealed any case where a Court of Appeal, hearing an appeal, has struck pleadings for any reason, including a party's conduct during litigation. The issue has gained attention recently in the United Kingdom.

[188] The UK Supreme Court confirmed in 2012 that courts have jurisdiction to strike out a statement of claim for abuse of process even after the trial of an action, but such a power to strike out a case would only be exercised in the rarest of circumstances. In **Summers v. Fairclough Homes Ltd.**, 2012 UKSC 26 at ¶36-37 and ¶42-43, Lord Clarke stated:

> As we see it, the present position is that, whether under the CPR or under its inherent jurisdiction, the court has power to strike out a statement of case at any stage on the ground that it is an abuse of process of the court, but it will only do so at the end of a trial in very exceptional circumstances. [….]
>
> The Court of Appeal referred extensively to the decision of the Court of Appeal in *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167 and held, at para 71, that it was authority for the proposition that, where a claimant is guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim, then the claim may be struck out for that reason. It noted that in the *Arrow* case, the misconduct lay in the petitioner's persistent and flagrant fraud whose object was to frustrate a fair trial. It held that the question whether it is appropriate to strike out a claim on this ground will depend on the particular circumstances of the case. It added that it was not necessary to express any view as to the kind of circumstances in which

> (even where the misconduct does not give rise to a real risk that a fair trial will not be possible) the power to strike out for such reasons should be exercised. […]
>
> * * *
>
> Under the CPR the court has a wide discretion as to how its powers should be exercised: see eg *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926 . So the position is that the court has the power to strike out a statement of case (sic) for abuse of process but at the same time has a wide discretion as to which of its many powers to exercise. The position is the same under the inherent jurisdiction of the court, so that in the future it is sufficient for applications to be made under the CPR. We can see no reason why the conclusion reached should be any different, whether the application is made under the CPR or the inherent jurisdiction of the court.
>
> We agree with the Court of Appeal in *Masood v Zahoor* at para 72 quoted above that, while the court has power to strike a claim out at the end of a trial, it would only do so if it were satisfied that the party's abuse of process was such that he had thereby forfeited the right to have his claim determined. The Court of Appeal said that this is a largely theoretical possibility because it must be a very rare case in which, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way. We agree and would add that the same is true where, as in this case, the court is able to assess both the liability of the defendant and the amount of that liability.

[189] In light of the paucity of jurisprudence in Canada at the Court of Appeal level regarding if and when it is appropriate to strike pleadings, I will turn now to a consideration of this Court's power to stay proceedings, as an option.

When should a Court of Appeal stay proceedings?

[190] As we shall see, a stay of proceedings can be sought in many different forms.

[191] In **Global Petroleum Corp. v. C.B.I. Industries Inc.**, 1997 NSCA 42, this Court reiterated that "the power to order a stay of proceedings is an exceptional power which should only be exercised in the clearest of cases."

[192] In **Canada (Attorney General) v. Marineserve.MG Inc.**, 2003 NSSC 26, Moir, J. provides a helpful review of the law respecting stays of proceedings in Nova Scotia. He correctly points out that one ought not to attempt to categorize when a stay of proceedings may be an appropriate remedy, a warning which is similar to the folly of trying to categorize or precisely define the abuse of process doctrine.

[193] In *Dispositions Without Trial*, 2nd ed., (Markham, ON: LexisNexis Canada, 2007), at p. 625, Robert van Kessel notes that in addition to the court's power to stay proceedings under the [Ontario] Rules, "there are two other classes of cases where a permanent stay of a proceeding is justified that deserve special treatment": cases involving egregious conduct by a plaintiff or that a province is not a convenient forum for the hearing."

[194] A stay of proceedings is a remedy sought more often in proceedings involving the state – such as criminal or immigration proceedings – rather than in a civil action between two parties. In **Canada (Minister of Citizenship and Immigration) v. Tobiass**, [1997] 3 S.C.R. 391, the Supreme Court of Canada established and reaffirmed several principles regarding stays of proceedings in these types of cases. In **Tobiass**, the Minister sought to revoke citizenship from several Canadians. The trial judge granted a stay of proceedings based on irreparable harm to judicial impartiality. The Supreme Court determined that a stay was not the appropriate remedy. The Court provided the following overview of the relevant principles (at ¶90-92, 96):

> If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:
>
> > (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
> >
> > (2) no other remedy is reasonably capable of removing that prejudice. (*O'Connor, supra*, at para. 75.)
>
> The first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective remedy. A stay of proceedings does not redress a wrong that has already been done. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future. See *O'Connor*, at para. 82. For this reason, the first criterion must be satisfied even in cases involving conduct that falls into the residual category. See *O'Connor*, at para. 75. The mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings. For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well -- society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional

> cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare.
>
> After considering these two requirements, the court may still find it necessary to consider a third factor. As L'Heureux-Dubé J. has written, "where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings": *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667. We take this statement to mean that there may be instances in which it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits.
>
> * * *
>
> … A stay is not a form of punishment. It is not a kind of retribution against the state and it is not a general deterrent. If it is appropriate to use punitive language at all, then probably the best way to describe a stay is as a specific deterrent a remedy aimed at preventing the perpetuation or aggravation of a particular abuse. Admittedly, if a past abuse were serious enough, then public confidence in the administration of justice could be so undermined that the mere act of carrying forward in the light of it would constitute a new and ongoing abuse sufficient to warrant a stay of proceedings. However, only an exceedingly serious abuse could ever bring such continuing disrepute upon the administration of justice. It is conceivable, we suppose, that something so traumatic could be done to an individual in the course of a proceeding that to continue the prosecution of him, even in an otherwise unexceptionable manner, would be unfair. Similarly, if the authorities were to fabricate and plant evidence at the scene of a crime, the continued pursuit of a criminal prosecution might well be damaging to the integrity of the judicial system.

[195] In **Tobiass**, the Supreme Court noted the prospective nature of a stay of proceedings, focusing on the prevention of the perpetuation of a wrong, rather than redressing a wrong that has already been done. Yet the Court contemplated exceptions to that general rule adding "if a past abuse were serious enough, then public confidence in the administration of justice could be so undermined that the mere act of carrying forward in the light of it would constitute a new and ongoing abuse sufficient to warrant a stay …". And from **Tobiass** and the Court's decision in **R. v. O'Connor**, [1995] 4 S.C.R. 411, at ¶75 we know that a stay will be appropriate in cases where "the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" [underlining mine]. From these and other authorities I am satisfied that the discretion to order a stay of proceedings may be triggered when the conduct found to be an abuse of process has manifested itself through the conduct of the

trial, as well as its outcome, in a way that constitutes an affront to the community's sense of fair play sufficient to warrant a stay of proceedings.

[196] The discretion to order a stay of proceedings cannot be divorced from the reason(s) for imposing a stay. Thus, while the Supreme Court of Canada's statements regarding stays of proceedings are helpful, it is important to acknowledge that they arose in an entirely different context. **O'Connor** involved the question of when prosecutorial misconduct (a failure to disclose records) constituted an abuse of process. **Tobiass** applied the principles from **O'Connor** to a situation where there had been inappropriate contact between the Attorney General and members of the judiciary.

[197] The best statement of the law regarding stays in Nova Scotia must start with s. 41(e) of the **Judicature Act**, which provides the Court with a broad discretion to issue a stay: "if … it thinks fit" on such terms "as shall be just". Further, the jurisprudence all appears to suggest that a stay of proceedings is an exceptional power which should only be exercised in the clearest of cases.

[198] As I have demonstrated, the abuse of process doctrine permeates any consideration regarding stays of proceedings and, to a lesser extent, the discussion surrounding striking of pleadings. From my review, I am inclined to agree with van Kassel's statement at p. 629 of his text that "the abuse of process doctrine may be the right basket into which all arguments for a permanent stay of proceedings based on egregious conduct should fall."

[199] I will turn now to a more detailed consideration of the doctrine. I will proceed in four steps. First, I will confirm that abuse of process is properly before the Court. Second, I will attempt to place some boundaries around the nebulous concept of abuse of process. Third, given the lack of case authority on whether litigation misconduct constitutes an abuse of process, I will turn to other Supreme Court of Canada decisions for guidance regarding abuse of process in other contexts. I will conclude by describing what I consider to be the proper approach this Court ought to apply in deciding whether the Bank's concealment of its settlement agreement and its litigation misconduct rises to the level of an abuse of process.

[200] As to the first question, I have already explained why the issue of the Bank's concealment and litigation misconduct said to constitute an abuse of process is squarely before the Court on appeal. In addition, the pleadings make this obvious.

Simply to illustrate, I quote from the Notice of Appeal of Dunham, Weir and Blackwood Holdings Inc.:

> (2) The Learned Trial Judge erred in law by not staying the proceedings advanced by the Respondent or striking the pleadings of the Respondent once he became aware that the Respondent had withheld disclosure of the existence of an important document from the Appellant and the Court.
>
> (3) The Learned Trial Judge erred in law by not staying the proceedings advanced by the Respondent or striking the pleadings of the Respondent once he became aware that the Respondent had misrepresented its position and state of knowledge of the facts of the case for over seven years.
>
> (4) The Learned Trial Judge erred in law in ruling that the misconduct of the Respondent could be addressed by way of punitive damages.

[201] In the Notice of Cross-Appeal filed by the Barthe Estate, the grounds include:

> (2) The Learned Justice erred in law in failing to strike the pleadings of the Appellant as an abuse of process after having determined that the Appellant had failed to disclose the existence of relevant evidence.

[202] In terms of remedy in this Court, the Barthe Estate requests that "the Order of the Honourable Justice Gregory M. Warner be varied and the Appellant's pleadings be struck as an abuse of process for failure to disclose relevant evidence".

[203] From the many comprehensive submissions made by the parties in this Court during the trilogy of appeals, the allegation was front and centre among the host of issues we were asked to address. For example, in his oral submissions before this Court, Mr. Dunlop suggested on several occasions that the Bank's conduct in this case amounted to an abuse of the court's processes. He said:

> I use the argument in the Dunham and Weir case to say that dealing with the bank's failure to disclose the settlement agreement, and the subsequent conduct to that, is not properly addressed by way of damages, punitive or otherwise. What we are talking about here is the procedure of the court, and the court's integrity and the integrity of the entire process and you don't deal with that by giving the other side some damages, you deal with that by punishing the party who has abused the process of the court.
>
> If there is one case before the Court in the past decade that is more important in terms of the court controlling its own process in letting a party know when it's crossed the line, this is it.

> Looking at the law, there seems to be a lot of overlap between striking pleadings and abuse of process as remedies; my request, we're talking equity here, we're talking controlling your own process. Blow it up so NBFL does not come back with respect to this litigation.
>
> [Underlining mine]

[204] In conclusion, on this point, there can be no doubt that the several claimants seek, and the Bank strongly opposes, substantial relief from the harm caused by the Bank's own conduct which is said to constitute an abuse of the court's own process.

[205] The second step in my analysis is intended to address the nebulous concept of the doctrine. In **R. v. Mahalingan**, 2008 SCC 63, Chief Justice McLachlin, at ¶42, said:

> … Abuse of process is a broad, somewhat vague concept, that varies with the eye of the beholder … this Court has said that successful reliance upon the doctrine will be extremely rare – only "in a process tainted to such a degree that it amounts to one of the clearest of cases".

[206] Among its various embodiments, abuse of process may constitute a tort in its own right, and is often pled to prevent duplicative claims in a manner similar to the doctrines of *res judicata* and issue estoppel. Justice Paul Perell has provided an excellent overview of the different manifestations of the abuse of process doctrine in *A Survey of Abuse of Process*, in Todd L. Archibald & Randall Scott Echlin, *Annual Review of Civil Litigation 2007* (Toronto: Thomson Carswell, 2007), pp. 243-269, at p. 243:

> The procedures of the law can be misused, and from this unfortunate truth emerges the idea that the court should have the power to respond to the abuse of its process. This idea has many manifestations. It is a constituent element of the court's statutory and inherent jurisdiction to deny vexatious litigants access to the court. It is a fundamental aspect of the court's inherent jurisdiction to control its own procedures, and it is a reason for staying or dismissing a proceeding. It is a rationale for the doctrine of *res judicata*, the rule that will have a proceeding stayed or dismissed because it is re-litigation, and it is a rationale for the related doctrine of collateral attack, which will bar a litigant from challenging an existing order from a court or administrative tribunal and, in effect, re-litigating what that court or tribunal decided. It is a freestanding doctrine available to stop a proceeding when the very technical requirements of *res judicata* or the collateral attack doctrine cannot be satisfied. It is a constituent element or the rationale for several rules of civil procedure, including rules about pleadings and about

> summoning witnesses for a proceeding. It is a nominate tort and a rationale for other torts, including malicious prosecution, maintenance and champerty. Abuse of process is also an aspect of criminal, constitutional and extradition law.

[207] In **Reece v. Edmonton (City)**, 2011 ABCA 238, the majority of the Alberta Court of Appeal highlighted the folly of either trying to categorize abuses of process or prescribe a definitive legal test for whenever an abuse of process may be said to arise:

> 18 The test for abuse of process has been stated in different ways, as the context requires. For example, in **R. v. Scott**, [1990] 3 S.C.R. 979 the Court stated at p. 1007:
>
> > ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice ...
>
> The issue in ***Scott*** was whether it was an abuse of process for the Crown to reactivate a criminal prosecution, after a stay had been entered. The test for abuse of process was stated in terms that were relevant to that issue.
>
> 19 It is therefore not appropriate to take any judicial statement of the ambit of the doctrine of abuse of process, and apply it mechanically to different factual settings and issues. Just because a particular proceeding does not fit into a particular authoritative recitation of the test for abuse of process does not mean that no abuse is present. Procedures that can "bring the administration of justice into disrepute" can take many forms.
>
> [Underlining mine]

[208] Another often-quoted statement regarding abuse of process is the British Columbia Supreme Court decision in **Babavic v. Babowech**, [1993] B.C.J. No. 1802 (S.C.) where Baker J. stated at ¶17-18:

> ... The principle of abuse of process is somewhat amorphous. The discretion afforded courts to dismiss actions on the ground of abuse of process extends to any circumstance in which the court process is used for an improper purpose. ...
>
> The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression...

[209] The leading Supreme Court of Canada case on abuse of process is **Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79**, 2003 SCC 63. In that case, the type of abuse of process at issue was the re-litigation of an employee's criminal conviction in an employment arbitration setting. The Supreme Court of Canada found that the arbitrator's failure to give full effect to the employee's criminal conviction rendered his decision, that the employee had been dismissed without cause, patently unreasonable.

[210] Justice Arbour, for the Supreme Court, reviewed the case law and underlying principles of the doctrine of abuse of process. While much of her review centres on this remedy in the context of issue estoppel and *res judicata*, she also enunciated several general principles regarding abuse of process:

> 35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601 (S.C.C.), at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659 (S.C.C.), at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979 (S.C.C.), at p. 1007:
>
> > . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.
>
> 36 The doctrine of abuse of process is used in a variety of legal contexts…
>
> 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63 (S.C.C.))). Goudge J.A. expanded on that concept in the following terms, at paras. 55-56:
>
> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute… See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> [Underlining mine]

Justice Arbour continued:

> 43 …In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see Blencoe, supra), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter, supra*, and *Demeter, supra*), the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.
>
> 44 The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:
>
> > The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.
>
> [Underlining mine]

[211] In its 2013 decision, **Behn v. Moulton Contracting Ltd.**, 2013 SCC 26, the Supreme Court of Canada repeated the principles articulated in **C.U.P.E. Local 79, supra**, when applying the abuse of process doctrine in a different context:

> 41 As can be seen from the case law, the administration of justice and fairness are at the heart of the doctrine of abuse of process. In *Canam Enterprises* and in *C.U.P.E.*, the doctrine was used to preclude relitigation of an issue in circumstances in which the requirements for issue estoppel were not met. But it is not limited to preventing relitigation. For example, in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, the Court held that an unreasonable delay that causes serious prejudice could amount to an abuse of process (paras. 101-21). The doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute.
>
> [Underlining mine]

[212] Subsequently, in **R. v. Anderson**, 2014 SCC 41, Justice Moldaver clarified (at ¶36) that "the court may exercise its inherent jurisdiction to control its own processes even in the absence of abuse of process." He observed (at ¶36) that "exercises of prosecutorial discretion are *only* reviewable for abuse of process [whereas] tactics and conduct before the court are subject to a wider range of review." Justice Moldaver then expanded on tactics and conduct in the following terms:

> 58 Superior courts possess inherent jurisdiction to ensure that the machinery of the court functions in an orderly and effective manner: *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 26. Similarly, in order to function as courts of law, statutory courts have implicit powers that derive from the court's authority to control its own process: *Cunningham*, at para. 18. This jurisdiction includes the power to penalize counsel for ignoring rulings or orders, or for inappropriate behaviour such as tardiness, incivility, abusive cross-examination, improper opening or closing addresses or inappropriate attire. Sanctions may include orders to comply, adjournments, extensions of time, warnings, cost awards, dismissals, and contempt proceedings.
>
> 59 While deference is not owed to counsel who are behaving inappropriately in the courtroom, our adversarial system does accord a high degree of deference to the tactical decisions of counsel. In other words, while courts may sanction the conduct of the litigants, they should generally refrain from interfering with the conduct of the litigation itself. [….]
>
> * * *
>
> 61 Finally, as with all Crown decision making, courtroom tactics or conduct may amount to abuse of process, but abuse of process is not a precondition for judicial intervention as it is for matters of prosecutorial discretion.
>
> [Underlining mine]

[213] These cases serve to illustrate situations where courts have considered the abuse of process doctrine in some of its more common manifestations. Another branch of the case law deals with an abuse of process as a result of inconsistent pleadings. See for example: **Mystar Holdings Ltd. v. 247037 Alberta Ltd.**, 2009 ABQB 480, **First Majestic Silver Corp. v. Santos**, 2012 BCCA 5, **Pepper's Produce Ltd. v. Medallion Realty Ltd.**, 2012 BCCA 247, **Deltaport Constructors Ltd. v. Vancouver Fraser Port Authority**, 2013 BCSC 1705 and **Walsh v. Mobil Oil Ltd.**, 2013 ABCA 238.

[214] My review of these and other leading authorities shows that abuse of process comes in many forms. Inordinate delay; vexatious litigation; multiple proceedings commenced in different jurisdictions claiming virtually the same relief on facts involving identical parties; bogus re-litigation; following previous judicial determinations of the same matters or issues; are all examples of situations where the courts have found an abuse of process. Other examples would include cases where the complaint was not so much directed towards the nature of the proceedings, but rather the conduct of the parties during the litigation. This case falls within the latter category.

[215] But whatever the type, the focus of the court's inquiry will always be directed towards the reputation of the administration of justice. Justice Arbour put it best in **Toronto (City) v. CUPE, Local 79**, **supra**, when she said:

> 51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. …

[216] The relative novelty of this case is that we are being asked to stay proceedings or strike the pleadings stemming from the Bank's concealment of the settlement agreement it negotiated with the Nova Scotia Securities Commission and its other actions throughout the course of this litigation.

[217] I am not aware of any case, and the parties did not direct the panel to any, where the Supreme Court of Canada has yet been asked to consider abuse of process in the context of the conduct of parties to civil proceedings, particularly where the genesis of the egregious conduct starts with the intentional concealment of a settlement agreement. Accordingly, this is in many respects, a case of first impression.

[218] Based on my assessment of the existing case law, I am satisfied that a litigant's conduct in civil matters may be found to be so egregious as to amount to an abuse of process, requiring a permanent stay of proceedings. I find support for that conclusion in the cases I will now canvass, which takes me to the third step in my analysis.

[219] I will start by reviewing the principles the Supreme Court has considered when determining whether an abuse of process exists in criminal and administrative law proceedings. One of the earliest cases was Justice L'Heureux-Dubé's decision in **R. v. Power**, [1994] 1 S.C.R. 601 at ¶11-12 where she stated:

> I, therefore, conclude that, in criminal cases, courts have a residual discretion to remedy an abuse of the court's process but only in the "clearest of cases", which, in my view, amounts to conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention.
>
> To conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases", as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice. [….] Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.

[Underlining mine]

[220] In **R. v. Nixon**, 2011 SCC 34, a case concerning the repudiation of a plea agreement in criminal proceedings, the Supreme Court of Canada tracked the evolution of the common law abuse of process doctrine and explained how the doctrine had merged with an applicant's section 7 **Charter** rights. Justice Moldaver reaffirmed in **R. v. Babos**, 2014 SCC 16 that a stay of proceedings for abuse of process in criminal proceedings falls into two categories of cases, which were first enunciated by Justice L'Heureux-Dubé in **R. v. O'Connor**, [1995] 4 S.C.R. 411 and confirms the "test" is the same for either category, while acknowledging (at ¶33) that "the test may -- and often will -- play out differently depending on whether the "main" or "residual" category is invoked.":

> 30 A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.
>
> 31 Nonetheless, this Court has recognized that there are rare occasions - the "clearest of cases" - when a stay of proceedings for an abuse of process will be warranted (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category) (*O'Connor*, at para. 73).

> 32 The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
>
> (2) There must be no alternative remedy capable of redressing the prejudice; and
>
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits". …

[221] In **United States of America v. Khadr**, 2011 ONCA 358, leave to appeal refused [2011] S.C.C.A. No. 316, the Ontario Court of Appeal undertook an abuse of process analysis in the context of extradition proceedings. Mr. Khadr, a Canadian citizen, was arrested and held in Pakistan for 15 months. He was returned to Canada and the United States sought his extradition to stand trial on terrorism charges. The Ontario Court of Appeal upheld the motion judge's decision that the extradition proceedings should be stayed due to the fact that the United States participated in human rights abuses against Khadr while he was in Pakistan and that this conduct disentitled them from seeking his extradition. Justice Sharpe provided some useful background with respect to abuse of process cases falling within the residual category (at ¶31-32):

> While this discretion is ordinarily exercised to ensure procedural fairness, the residual category extends to cases where the misconduct does not produce procedural unfairness. The residual power to grant a stay of proceedings for abuse of process where the individual's right to a fair trial is not implicated was described by L'Heureux-Dubé J. in *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 73, as addressing "the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process."
>
> The residual power to stay proceedings that do not produce procedural unfairness is not focused on protecting the rights of the individual litigant. Rather, it is aimed at vindicating the court's integrity and the public's confidence in the legal process in the face of improper state conduct. "The prosecution is set aside, not on the merits..., but because it is tainted to such a degree that to allow it to proceed

would tarnish the integrity of the court": *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667. As Lamer J. stated in *R. v. Mack*, [1988] 2 S.C.R. 903, at p. 942:

> The court is, in effect, saying it cannot condone or be seen to lend a stamp of approval to behaviour which transcends what our society perceives to be acceptable on the part of the state. The stay of the prosecution of the accused is the manifestation of the court's disapproval of the state's conduct. The issuance of the stay obviously benefits the accused but the Court is primarily concerned with a larger issue: the maintenance of public confidence in the legal and judicial process. In this way, the benefit to the accused is really a derivative one.

[222] In administrative law proceedings, the Supreme Court of Canada expressed the test for abuse of process in the following terms in **Blencoe v. British Columbia (Human Rights Commission)**, 2000 SCC 44, at ¶120:

> In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, supra, at p. 9-68). According to L'Heureux-Dubé J. in *Power, supra*, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power, supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

[223] The decision of the Ontario Court of Appeal in **Aecon Buildings v. Stephenson Engineering Ltd.**, 2010 ONCA 898, leave to appeal refused [2011] S.C.C.A. No. 84, is the only clear example from the case law where a Court of Appeal has stayed civil proceedings for an abuse of process.

[224] There, the abuse of process was also the concealment of a settlement agreement. Two parties in complex litigation entered a settlement agreement that was not disclosed to the remaining parties until three months after it was signed. The motion to strike was dismissed by the trial judge on the grounds that there was no actual prejudice that resulted from the failure to disclose. The Court of Appeal disagreed and allowed the appeal, issuing an order staying the third party proceedings and the fourth party proceedings against the appellant in the following terms (at ¶14-17):

> In this case, the [settlement] agreement was not voluntarily produced immediately upon its completion. It was only produced several months after its existence was discovered by the appellant and it was specifically requested.
>
> Other parties to the litigation are not required to make inquiries to seek out such agreements. The obligation is that of the parties who enter such agreements to immediately disclose the fact.
>
> Here, the absence of prejudice does not excuse the late disclosure of this agreement. The obligation of immediate disclosure is clear and unequivocal. It is not optional. Any failure of compliance amounts to abuse of process and must result in consequences of the most serious nature for the defaulting party. Where, as here, the failure amounts to abuse of process, the only remedy to redress the wrong is to stay the Third Party proceedings and of course, by necessary implication, the Fourth Party proceedings commenced at the instance of the Third Party. Only by imposing consequences of the most serious nature on the defaulting party is the court able to enforce and control its own process and ensure that justice is done between and among the parties. To permit the litigation to proceed without disclosure of agreements such as the one in issue renders the process a sham and amounts to a failure of justice.
>
> For these reasons, the appeal is allowed. The order of the motion judge is set aside and in its place an order will issue staying the Third Party proceedings and the Fourth Party proceedings against the appellant. The appellant is entitled to its costs of the appeal fixed in the sum of $27,500 inclusive of disbursements and applicable taxes.
>
> [Underlining mine]

[225] The facts in **Aecon** are the most analogous to the present case since the failure to disclose a settlement agreement was found to be an abuse of the court's process, and warranted "imposing consequences of the most serious nature" – a stay of proceedings. However, and with respect, the decision does not contain any analysis of the law that ought to be applied when determining whether a court should exercise its discretion by granting a stay for abuse of process in the context of civil proceedings.

[226] In **Autosurvey Inc. v. Prevost**, [2005] O.J. No. 4291 (S.C.J.), Quigley, J. of the Ontario Superior Court of Justice entered a stay of proceedings as a result of the plaintiff's egregious conduct in conducting an unauthorized "brute force entry" or "hacking" into the defendant's server.

[227] There are a handful of other relevant cases. In **Clark v. Alberta (Institute of Chartered Accountants)**, 2012 ABCA 152, the Alberta Court of Appeal upheld the decision of an appeal panel appointed under the *Regulated Accounting*

Profession Act, RSA 2000, c R-12 that stayed proceedings against Clark, an accountant, as a result of an abuse of process. The Appeal Panel found that the investigator for the Institute of Chartered Accountants of Alberta had breached s. 129 of the *Act* by disclosing confidential information by instructing Clark to send information related to the complaint he was investigating to his wife's email address. The Alberta Court of Appeal held (at ¶17-18):

> 17 The real difficulty in assessing the reasonableness of the outcome is whether a stay was available to cure the abuse of process. In *R v. Regan*, 2002 SCC 12, [2002] 1 SCR 297, the majority recognized "the existence of a residual category of abuse of process in which the individual's right to a fair trial is not implicated" (para 50). This can arise when the prosecution is conducted in such an unfair way that the integrity of the judicial process is jeopardized. Such a remedy is only available in extreme cases and is rarely appropriate. Here the record indicates that the propriety of a stay was argued before the Appeal Tribunal, and CIC's counsel stated "the remedy of a stay is reserved only for the most egregious cases", (AB F12/1.2). The record also indicates that the panel considered this case to be such an instance.
>
> 18 The Appeal Tribunal was not immune to the irony that the CIC's investigator had disclosed confidential information to third parties while investigating a complaint alleging Clark had done the same. Furthermore, it was aware that this was not only a breach of a duty of confidence, but a specific contravention of the Institute's enabling legislation. It appears that the Appeal Tribunal, therefore, in balancing the need to punish unprofessional conduct in the public interest and maintaining the integrity and confidence of its disciplinary process, determined that stay was the only appropriate remedy. In other words, the stay was the only way to hold the CIC to the standard of conduct expected of all members of the profession.

[228] I observe that in **Clark** (an administrative law/regulatory case) the Alberta Court of Appeal saw fit to rely upon **R. v. Regan**, 2002 SCC 12, a criminal case.

[229] Other than **Summers, supra**, the leading case in the United Kingdom dealing with a litigant's conduct and abuse of process appears to be the English and Wales Court of Appeal decision in **Arrow Nominees Inc. v. Blackledge**, [2000] EWCA Civ 200 where Lord Justice Chadwick said at ¶54:

> I adopt, as a general principle, the observations of Mr Justice Millett in *Logicrose Ltd v Southend United Football Club Limited (The Times, 5 March 1988)* that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules - even if such disobedience amounts to contempt for or defiance of the court

> - if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled - indeed, I would hold bound - to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.
>
> [Underlining mine]

[230] Before turning to the final step in my analysis in this section of my reasons which will be to consider the principles that ought to be applied by this Court in deciding whether the Bank's concealment of its settlement agreement and litigation misconduct rises to the level of an abuse of process, there are two discrete collateral issues to be addressed. First, would the test for abuse of process for litigation misconduct be different at the Court of Appeal level than at the trial level? Second, can the Court take into account the conduct of a party over the history of the proceedings, rather than just the latest incident?

[231] The first question can only be answered in the abstract due to the paucity of Canadian law on the subject of litigation misconduct and abuse of process. In **R. v. Hinse**, [1995] 4 S.C.R. 597, the Supreme Court of Canada confirmed the power of an appellate court to stay criminal proceedings for an abuse of process and suggested that the principles that should be applied are the same for both levels of Court. Chief Justice Lamer noted (at ¶23):

> In my view, when a court of appeal enters an order to suspend criminal proceedings which violate "the community's sense of fair play and decency", it is necessarily engaged in an exercise of its residual order power under s. 686(8) of the Criminal Code. The wording of the residual order provision is set out as follows:
>
> 686. ...

> (8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.
>
> The power of an appellate court to impose a stay of criminal proceedings, similar to a trial court, derives its origin from the inherent jurisdiction of a superior court of record at common law. But given the breadth of the language of the residual order provision, I believe that the concrete exercise of that inherent power necessarily manifests itself through the statutory font of s. 686(8). When a court of appeal invokes its power to suspend a vexatious or oppressive course of criminal proceeding in the course of allowing or dismissing an appeal, in my view, it is clearly engaged in rendering an order "that justice requires". While the power of a court of appeal to order a stay of proceedings for abuse of process traces its origins to the common law, the actual exercise of that authority inevitably carries a statutory gloss by virtue of s. 686(8) of the Criminal Code. […] The statutory form of this judicial power, needless to say, does not alter the substantive constraints imposed on the exercise of the power by the common law. In other words, notwithstanding the broad remedial language of s. 686(8), both trial and appellate courts may only impose a stay of proceedings for abuse of process in accordance with the principles and limits we have set out in *Jewitt*, *Keyowski*, *Mack*, *Conway*, and *Scott*.
>
> [Underlining mine]

[232] As to the second question, while this issue has not been directly addressed in Canadian jurisprudence, I am satisfied that this Court is entitled to take into account a party's conduct throughout the course of the litigation. I say that for three reasons. First, the Bank has been seriously chastised on previous occasions for its conduct in these proceedings. For example, back in 2005, Scanlan, J. warned the Bank (2005 NSSC 113, at ¶113) that "the actions of "its" solicitors verge on the threshold of warranting a stay". While I am not in any way suggesting that the Bank is to be punished twice for the same wrong, I am able to refer to this example and others (see ¶306-307) to illustrate the many occasions where the Bank has been put on notice in a series of strongly worded condemnations from the Bench. It stands to reason that these repeated warnings should be considered, both independently and cumulatively, as part of an overall assessment of whether the party's conduct rises to the level of an abuse of process warranting a stay.

[233] Second, and linked to the first reason, it is well established in Canadian law that courts are asked to consider a party's history in the litigation or in past proceedings between the parties, when determining whether to declare an individual to be a vexatious litigant. While I am certainly not suggesting that the

Bank's conduct in this action is vexatious, it does seem to me that the same principles ought to apply when considering whether a party's conduct rises to the level of an abuse of process.

[234] Finally, I find it helpful to recall the Supreme Court of Canada's judgment in **Babos, supra**. In that case, the trial judge dealt with an abuse of process application in the context of a criminal prosecution where the accused provided three distinct examples of state misconduct. The Supreme Court of Canada indicated that the misconduct did not warrant a stay. Justice Moldaver, however, went on to discuss his approach of considering the three types of misconduct individually rather than collectively. Justice Moldaver's reasoning at ¶73 is instructive and lends further weight to the notion that it can be appropriate to consider the conduct cumulatively:

> This case lent itself to an individualistic approach. The three alleged instances of misconduct were separate and distinct, committed at different times by different players. There was no link between them. And in only one instance -- the Crown's threatening behaviour -- was it necessary to consider the third stage of the test and balance the Crown's misconduct against society's interest in a trial on the merits. That said, I should not be taken as suggesting that an individualistic approach should always be followed. Indeed, a judge who is required to balance several instances of misconduct against the societal interest in a trial will almost certainly wish to consider the conduct cumulatively and in its full context. As well, there may be cases where the nature and number of incidents, though individually unworthy of a stay, will require one when considered together. But this is not such a case.
>
> [Underlining mine]

[235] From all of this, certain general principles emerge, which seem to apply to all types of abuse of process claims. The doctrine enables the court to prevent the misuse of its own procedures, in cases where such violations have proven to be manifestly unfair to a party to the litigation before it, or have in some other way brought the administration of justice into disrepute (**C.U.P.E., Local 79**). In all of its applications, the primary focus of the doctrine is the integrity of the adjudicative functions of courts (**Nixon**). Abuse of process is a flexible doctrine, which exists to ensure that the administration of justice is not brought into disrepute (**Behn**). Successful reliance upon the doctrine will be extremely rare – only a process that is tainted to such a degree that it amounts to one of the clearest of cases (**Power**; **Blencoe**, **Mahalingan**).

[236] What then should be the approach applied by this Court in the circumstances of this case?

[237] I am not particularly attracted to the "test" expressed in **Babos**, or **O'Connor** for an abuse of process in the context of criminal and extradition proceedings. There, of course, the impugned conduct is committed by the state, rather than one of the parties in civil proceedings. We know from **Babos** that society's interest in having a final decision on the merits will include the opportunity to see that justice is done, that the truth-seeking function of a trial is fulfilled, and that alleged victims of crime will have their day in court. While it is true that such considerations could also be engaged by society's interest in a decision on the merits in complex civil litigation such as this, there is generally far less societal interest in civil matters between individuals and corporations, than as between the state and an accused in criminal prosecutions.

[238] Closer to the mark would be the test applied by the Supreme Court of Canada for abuse of process in the administrative law context. In **Blencoe**, **supra**, the Supreme Court suggested that to find an abuse of process: (a) the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted"; and (b) the proceedings must be unfair to the point that they are contrary to the interests of justice. Obviously, part (a) of this test would have to be ignored or adapted to civil proceedings by removing certain words. What makes this approach more attractive in my view is that administrative proceedings are more analogous to civil than criminal prosecutions. Further, this is not too unlike the 'test' applied by the English Court of Appeal decision in **Arrow**, **supra**, which suggests that a case should not proceed if the abuse of process "would give rise to a substantial risk of injustice."

[239] Having regard to the numerous cases I have considered as well as the amorphous nature of the doctrine to begin with, I would not presume to prescribe a rigid test to be applied in all future civil disputes. I fully recognize that abuse of process is a "broad" and "somewhat vague" concept and one that "varies with the eye of the beholder". Great care must be taken not to narrowly define the boundaries of the doctrine, or try to mechanically fit different factual situations within its limits.

[240] That said, I would respectfully conclude that the approach this Court ought to take is to ask whether the Bank's conduct has tainted the case to such a degree as to be manifestly unfair to another party to the litigation, or has brought the administration of justice into disrepute by impairing the adjudicative function of the courts and undermining public confidence in the legal process.

[241] I will now apply that question to the actions and conduct of the Bank. A logical place to start is the events leading up to the "discovery" of the secret settlement agreement.

The Concealment of the Settlement Agreement

[242] Were it not for mounting suspicions and dogged pursuit by Commissioner David W. Gruchy of the Nova Scotia Securities Commission (formerly a Justice of the Nova Scotia Supreme Court before his retirement), the true state of affairs acknowledged in the settlement agreement negotiated and executed between the Commission's investigators and the President of the Bank, Mr. Kym Anthony in June, 2005, may never have seen the light of day.

[243] The Bank and the staff at the Securities Commission (the "Commission") executed a settlement agreement in June 2005. The Bank acknowledges in the agreement that it had "violated Nova Scotia securities law and engaged in conduct contrary to the public interest as set out in the Statement of Allegations". The Statement of Allegations included the following admissions:

> 20 Hicks and NBFL failed to properly supervise [Bruce] Clarke pursuant to Regulation 31(1) of the *Act* and IDA bylaw 29.7(2) and policy 2, in that they permitted Clarke and other staff at the Branch Office to communicate with clients and others through Clarke's personal e-mail address. …
>
> 25 Hicks and NBFL failed to properly supervise Clarke in that they failed to detect and/or permitted Clarke to participate in personal financial dealings with clients.
>
> 27 Clarke used the 540 Account to facilitate the market support for KHI on behalf of KHI Insiders. …
>
> 28 Hicks and NBFL failed to properly supervise Clarke in that they failed to establish and implement internal controls to monitor the activity in [the] 540 Account.
>
> 32 Hicks and NBFL failed to properly supervise the 540 Account pursuant to Regulation 31(1), 31(2)(b) and 31(4) made pursuant to the *Act*, in that they failed

> to monitor the creditworthiness of the 540 Account and the continued accumulation of KHI shares therein.
>
> 33 During the Relevant Period, NBFL did not adequately review month end closing bids of KHI by Clarke and his clients which resulted in a failure to detect a pattern of manipulative trading, contrary to Regulation 31(1)(b) made pursuant to the *Act*.

[244] At the same time that the settlement agreement was made, counsel for the Bank, Hicks (being the branch manager of the Bank's Halifax office) and Scott Peacock of the Commission entered into an escrow agreement to preclude the disclosure of the settlement agreement. The escrow agreement is dated May 30, 2005 and states:

> This letter is to confirm an agreement made on behalf of my clients, National Bank Financial Limited ("NBFL") and Eric Hicks ("Hicks") with the Nova Scotia Securities Commission ("NSSC"), Market Regulation Services Inc. (Market Regulation") and Investment Dealers Association of Canada ("IDA") whereby the Settlement Agreement will be held in escrow until such time as there is a final disposition of all regulatory proceedings relating to trading activity in the common shares of Knowledge House Incorporated ("KHI"). This will further confirm that Market Regulation and IDA will not initiate any regulatory proceedings against NBFL and/or Hicks relating to any of the matters which are the subject of my clients' Settlement Agreement with NSSC including the Statement of Allegations incorporated herein.
>
> [Underlining mine]

[245] The settlement agreement and the escrow agreement came to light in 2011 but was not made public until December 2012, eight months after the KHI trial ended in April 2012. The circumstances by which it came to light can be traced back to April 2010, where a Commission staff member was being discovered and refused to answer the following question:

> The documents indicate that after an extensive multi-year investigation, it was the opinion of yourself and Mr. Peacock that National Bank Financial should be charged. They weren't, can you tell me what you know about why they weren't charged?

[246] Counsel for the Commission staff objected on the basis that answering the question would violate undisclosed securities law. Commissioner Gruchy referred the validity of the objection to the Nova Scotia Supreme Court. That matter was heard by Rosinski, J. who determined that there was no basis for the investigators

to refuse to answer the question at discovery. Following the successful appeal of Justice Rosinski's decision, this Court directed that concerns about disclosure, privilege or related evidentiary procedural questions should be decided by the Commission.

[247] The parties then made submissions to Commissioner Gruchy, who subsequently released his decision in April 2012 and directed that the discovery question be answered. He outlined the normal Commission procedure for approving settlement agreements once they are concluded:

> 70. A settlement agreement was entered into, a Notice of Hearing for approval of the settlement agreement was made public, the hearing was followed by a decision and order of the Commission in a timely manner. After the settlement agreements were approved, they were made public.

[248] Commissioner Gruchy noted that four other individuals identified in the KHI investigation appear to have been dealt with in this way. Commissioner Gruchy found that the Bank/Hicks and Commission settlement agreement did not follow this normal procedure because of the escrow agreement. He concluded that the escrow agreement was invalid, stating:

> 84. There is no authority in the investigation orders, in the Act, or the Rules for Staff to enter into an escrow agreement to withhold an executed settlement agreement from the usual procedure. If there is no authority for Staff to enter into these types of agreements, it must not be done (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 29).
>
> * * *
>
> 87. I can see no public interest in maintaining the escrow agreement. It has thwarted the established process for dealing with settlement agreements and has had the effect of keeping the settlement agreement confidential for a completely unreasonable length of time.
>
> 88. […] It is this public confidence that comes to the fore in the present matter as the existence of the escrow agreement – which has kept a settlement agreement secret for seven years – cannot possibly be viewed by a right thinking member of the public, the man on the Clapham omnibus or any other standard of reasonableness, as something that would inspire confidence in securities regulation in Nova Scotia. For these reasons I decline to maintain the escrow agreement.

[249] The Bank appealed Commissioner Gruchy's decision to this Court in September 2012. In brief reasons, the appeal was dismissed (2012 NSCA 99).

[250] During the three days of appeal hearings in this Court all of the appellants (the Dunlop clients, together with Mr. Wadden) made the following submissions concerning the settlement agreement and the effect the concealment had on this litigation:

- NBFL had a duty to disclose the existence of the settlement agreement in June 2005 after the last signature was in place;
- The appellants gave NBFL a demand to produce the settlement agreement under Rule 14 and NBFL ignored the demand;
- The escrow agreement did not provide NBFL with a valid excuse to argue that it made a "mistake" by failing to disclose the settlement agreement;
- The failure to disclose the settlement agreement affected the litigation because NBFL made a number of significant admissions, especially that "there was manipulative trading of KHI stock by Clarke."
- The fact that this admission was concealed for 7 years had a monumental effect on the litigation and the motions heard and determined during that time.

[251] The appellants summed up their position on the Bank's concealment of the settlement agreement at ¶87 of their factum:

> In summary, for over seven and a half years NBFL improperly concealed from the Court and other litigants the existence of a document that was vitally relevant and went to the very heart of the matters to be determined. NBFL used the concealment to further its purpose of financially bludgeoning its opponents into submission in some cases with complete success. More importantly, NBFL attempted to determine the outcome of the litigation by hiding the Settlement Agreement and have a decision rendered on incomplete facts and contrary to the position NBFL had taken with the Securities Commission.

The Bank's Excuses

[252] At trial and on appeal to this Court, the Bank sought to justify or excuse its position with respect to disclosing the settlement agreement on the basis of four assertions:

- The unapproved settlement agreement was not required to be disclosed because it was not relevant to the litigation until 2012;

- There is no obligation to disclose an unapproved settlement agreement;
- NBFL was bound to keep the settlement agreement confidential in accordance with Rule 10.6 of the Nova Scotia Securities Commission Rules of Procedure (Rule 15-501) and in accordance with paragraph 15 of the settlement agreement;
- NBFL was obliged to keep the settlement agreement confidential between June 16, 2011 and December 4, 2012, pursuant to the order of Justice Rosinski.

[253] In effect, the Bank's argument is that the settlement agreement was not relevant to the litigation until February, 2012 when Justice Warner filed a decision (2012 NSSC 76) in which he determined that a September 2007 settlement agreement between the Bank and the Investment Dealers Association of Canada was not protected by settlement privilege, was relevant and should be admitted as evidence at trial. Further, even if the Bank had wanted to disclose the agreement in 2012, it was bound by the terms of Justice Rosinski's June 2011 order to keep the existence and contents of the agreement confidential.

[254] During oral submissions in this Court, the Bank in trying to explain its "predicament", characterized itself as an innocent party, tongue-tied and hamstrung and obliged to keep silent in the face of the "perfect storm" of confidentiality agreements, thereby cutting off any chance to "come clean". While I would reject the plea of innocence, I will borrow the "perfect storm" metaphor – but add to it the declaration that it was a storm of the Bank's own making.

[255] I will now explain why, with one exception, I would reject the Bank's arguments.

Was the Bank under a duty to disclose the settlement agreement?

[256] I am prepared to agree with the Bank's submission that it was (for a time) prohibited by Justice Rosinski's order from revealing the existence and contents of the settlement agreement between June 16, 2011 (the date of Justice Rosinski's decision reported as 2011 NSSC 240) and December 4, 2012 when the Commission approved the agreement and made it public. This Court continued the terms of Justice Rosinski's order in January 2012 when overturning the latter's decision (2012 NSCA 12). Commissioner Gruchy's decision was to be kept confidential for 30 days pending an appeal, which the Bank sought. At that appeal, this Court again continued Justice Rosinski's undertakings (2012 NSCA 99). The record suggests that Mr. Dunlop on behalf of his clients informed Justice Warner

on the first day of trial, February 13, 2012, that he would be making a Demand for Production under Rule 14.11. The record before this Court does not contain a copy of that document. Thus, Justice Rosinski's order can provide the Bank with a full answer as to why Mr. Dunlop's demand was ignored. However, the order cannot explain or excuse the Bank's deliberate choice not to disclose the settlement agreement during the preceding six years, that is, between June 2005 and June 2011.

[257] And even more obvious and fundamental to this disturbing set of circumstances is the fact that Rosinski, J. would never have been faced with the motion which led him to issue a prohibition order, had the Bank done what it was required to do in the first place; that is, by not pleading what it knew to be false, and by disclosing the contents of the settlement agreement to the very parties whose interests and reputations were harmed by the Bank's own conduct and the actions of its employee, Clarke.

[258] I will now explain my reasons for rejecting the Bank's other excuses.

1. The unapproved Settlement Agreement was "not relevant"

[259] The Bank concedes that disclosure of documents in Nova Scotia is based on relevance. In 2005 the old **Rules** governed. Under Rule 20.01, a party must disclose all documents "relating to every matter in question in the proceeding." Courts applied the very broad semblance of relevancy test to disclosure. (See for example, **Brown v. Cape Breton (Regional Municipality)**, 2011 NSCA 32). Paragraph 4 of the unapproved settlement agreement contains a privative clause which read:

> 4. The parties to this Agreement acknowledge and agree that the facts and conclusions set out in Part III of this Settlement Agreement herein are for the purposes of this Settlement Agreement only and further agree that this agreement of facts is without prejudice to the Respondents or Staff in any other proceeding of any kind including, but without limiting the generality of the foregoing, any proceeding brought by staff of the Commission under the Act (subject to paragraph 14) or any civil or other proceeding which may be brought by any other person or agency. No other person or agency may raise or rely upon the terms of this Settlement Agreement or any agreement to the facts stated herein whether or not this Settlement Agreement is approved by the Commission.
>
> [Underlining mine]

The Bank says the underlined section of the settlement agreement means that it was "irrelevant" to the civil proceedings. Simply repeating the Bank's assertion is so shocking as to invite its immediate rejection. The starting point for my analysis is that the Bank admits in the settlement agreement that it failed to supervise Clarke in several respects. The Bank knew that the failure to supervise was a live issue and that these admissions were potentially devastating to its own liability at trial. The Bank knew or should have known that the admissions it made in the settlement agreement were extremely relevant to this litigation.

[260] The only exception for not disclosing a relevant material under the old **Rules** would be if the document were privileged. Had some generic reference to the settlement agreement been made in the List of Documents during production as required under the **Rules**, all parties would have been aware of the existence of the document or "thing", and a motion could have been argued before a judge of the Nova Scotia Supreme Court to determine whether privilege attached to it. Whether the issue of settlement privilege was before Commissioner Gruchy at the Securities Commission was hardly the point. This critical question involving a claim for privilege in complex, ongoing litigation before the courts could only be decided by a judge.

[261] There are other compelling reasons why the privative clause did not justify a failure to disclose the agreement. In my view a party should not be able to avoid or contract out of its disclosure obligations under the **Civil Procedure Rules**, by inserting a privative clause into an agreement that it itself has privately negotiated. There was no legal basis under the **Securities Act** or the Commission's own rules that would permit parties to insert a privative clause.

[262] Neither can the Bank now seek to justify its position by relying upon a decision of the Registrar in Bankruptcy in **Re: Dunham**, 2005 NSSC 57. In that case the Bank appealed the trustee's decision that its claim against Mr. Dunham was a contingent or unliquidated claim. In *obiter* the Registrar made passing reference to the settlement agreement but as *obiter*, the Registrar's reference had no effect on his ultimate decision. It does not appear that the Registrar was ever asked to consider the relevance of the information. Further there is no evidence that the parties ever placed before the Registrar the law with respect to these types of privative clauses, or whether the issue was even argued before him. See for example, **Hill v. Gordon-Daly Grenadier Securities** (2001), 56 O.R. (3d) 388 (Ont. Div. Ct.), aff'g (2001, 5 C.P.C. (5th) 389 (Ont. S.C.J.), which thoroughly

canvassed the issue and which decided that privative clauses are not enforceable. The Divisional Court stated at ¶14:

> Quite apart from the fact that the appellants had agreed that they would not take a public position contrary to their admissions in the settlement agreement, it is offensive to one's sense of justice and an affront to common sense to prevent the plaintiff from proving, on a motion to certify a class proceeding, that which the defendants have already admitted in a public forum before a statutory body acting in the public interest. …

[Underlining mine]

[263] On appeal to this Court the Bank attempted to justify its failure to disclose by emphasizing the Registrar's decision as the "leading authority in Nova Scotia" and saying there were inconsistent decisions out of Ontario about the admissibility of settlement agreements in subsequent civil proceedings (they being **Hill, supra**, and **Moyes v. Fortune Financial Corp. (**2002), 22 C.P.C. (5th) 154 (Ont. S.C.J.). I have already explained why the Registrar's decision in **Re: Dunham** is *obiter*. I would add this. **Hill** is undoubtedly the leading decision of its time because it was a 3-judge decision of the Divisional Court, upholding a Superior Court judge's decision. **Hill** was also followed in a third case on this very issue decided in 2003, that being **Clarke v. Yorkton Securities Inc.** (2003), 46 C.P.C. (5th) 294 (Ont. S.C.J.). Against this, we have Nordheimer, J.'s decision in **Moyes**. Thus, while there were inconsistent decisions from Ontario, the weight of these decisions in 2005 when the settlement agreement was signed by the Bank, was five judges in favour of the settlement agreement being admissible in subsequent civil proceedings, versus one against. The Bank surely would have known that. The timing of the June 2005 settlement agreement, coming three months after the Registrar's *obiter* in **Re: Dunham**, appears to be a happy coincidence for the Bank. Interestingly, in **Clarke, supra**, the motions judge quotes from the following paragraphs in **Hill**, which very succinctly set out the compelling reasons why the settlement agreement was admissible. In my view, ¶22 quoted below, particularly resonates with the facts of this case and I think is equally applicable to the proceedings before the Nova Scotia Securities Commission. From all of this one is left to wonder whether the side escrow agreement with the Commission was created as a device to avoid the consequences of entering into a settlement agreement, which are captured so clearly by the Divisional Court in **Hill** at ¶22 (quoting from **Clarke** below):

26 The Divisional Court in *Hill* in paragraphs 21 and 22 set out this issue as follows :

> [21] However, that expectation [that their discussions are private and privileged] does not arise within the context of proceedings before the Commission; quite the opposite. When the appellants were charged under the *Securities Act*, they knew that they were involved in a proceeding before a quasi-criminal, statutory tribunal and that they were subject to a process that was defined by legislative enactment with ground rules quite unlike those that accompany the resolution of private disputes. The Practice Guidelines for Settlement Procedure before the Commission provide that after a proposed settlement is approved by the Commission, the settlement agreement and any related order will be published in the OSC Bulletin. Section 68 provides that "no party to this agreement will make any public statement inconsistent with this agreement". Section 71 provides that "any obligations of confidentiality shall terminate upon approval of this settlement by the Commission".
>
> [22] The appellants entered into the settlement agreement with full awareness that what was being admitted to would be made public. They knew that an order would be made and that the order would also be made public. Therefore, they must be taken to have expressly waived any claim to privacy or to privilege, since both of these characteristics would be entirely inconsistent with the process with which they were involved. When they agreed to the facts set out in the statement of allegations, they knew that an order would issue and they saw, in advance, the nature and wording of that order. They also knew that the whole process was a public one. In our view, the essence of what occurred before the Commission was a plea of guilty to provincial offences which constituted admissions against interest. In the circumstances, we doubt whether the rule respecting settlement agreements has any application whatever. We therefore agree with Cumming J. when he said that any expectation to privacy or privilege was lost when the settlement was approved by the Commission.

Given this background I reject the Bank's argument that its concealment of the settlement agreement in 2005 was reasonable based on the law that existed at that time. It clearly was not justified for all of the reasons I have just given and also the obvious fact that they should have brought the whole matter before a judge to decide whether (a) the escrow agreement was valid; (b) the settlement agreement was admissible; and (c) the settlement agreement was privileged.

[264] In my view, the settlement agreement was a critical, highly relevant piece of evidence for which the Bank was bound to seek the court's formal determination of its claim for privilege, if the Bank wished to decline to disclose it.

2. There is no duty to disclose an unapproved settlement agreement

[265] I accept that cases like **Hill, supra**, or **Moyes, supra**, are judgments that deal with approved settlement agreements whereas here we are speaking of an unapproved settlement agreement. However, that does not mean that the Bank was not obliged to bring the matter before a judge in Nova Scotia and have the matter determined. In any event, such an application would only address the issue of disclosure, which is not to be confused with adopting and pleading a position that misleads the Court.

[266] The Bank points to clause 15 of the agreement as obliging it to ensure that the agreement remained confidential. Clause 15 reads:

> 15 Staff or the Respondents may refer to any part or all of this Settlement Agreement in the course of the hearing convened to consider this agreement. Otherwise, this Settlement Agreement and its terms will be treated as confidential by all the parties to the Settlement Agreement until approved by the Commission, and forever if, for any reason whatsoever, this settlement is not approved by the Commission.

[267] I would agree that *in the normal course of events*, there would be no obligation to disclose an unapproved settlement agreement between the time that it is executed and the time the Commission holds a hearing to determine whether it is in the public interest to approve the agreement. As Commissioner Gruchy points out in his decision with reference to four other individuals involved in the Commission's KHI investigation, this time ranged from two to ten weeks. But this case was hardly "normal". Seven and a half years elapsed between the execution of the agreement and its revelation to the parties most affected. The only reason in this case that the agreement remained "unapproved" was because the Bank entered into a side agreement, the purpose of which was to see that it would remain unapproved. Thus the Bank avoided the normal procedure by initiating an escrow agreement with the Commission to prevent the approval of the settlement agreement until all KHI-related regulatory proceedings concluded. It may be that the Bank would have been under no obligation to disclose an unapproved settlement agreement in the normal course of events when this normally takes 2-10 weeks. But that is not what happened here. When the Bank unilaterally initiated an escrow agreement to make sure that the settlement agreement could not be approved until some indeterminate point in the future, it strikes me as being disingenuous and grossly unfair for the Bank to now suggest that its disclosure obligations in ongoing litigation (which were subject to the semblance of relevancy

test under operating rules of procedure in Nova Scotia) were somehow placed in abeyance until that "unknown" moment arrived. In my view, the proper thing for the Bank to have done in these circumstances would have been to approach the other parties to the agreement at any time between 2005 and 2011 to waive compliance with the escrow provision, which would then have immediately allowed the settlement agreement to be forwarded to the Commission for approval. It did not do so.

3. The Bank was obliged to keep the settlement agreement confidential pursuant to clause 15 of the settlement agreement and the Commission's Rules.

[268] The Bank says its obligation to keep the settlement agreement confidential extended to the very existence of the agreement itself, pursuant to clause 15 ("this settlement agreement and its terms will be treated as confidential by all the parties to the settlement agreement until approved by the Commission") and in accordance with the *Nova Scotia Securities Commission Rules of Procedure* (Rule 15-501), which are made pursuant to the **Securities Act**.

[269] Settlement agreement is defined in *Rule* 1.1 as "an agreement that clearly identifies the matter or matters that the agreement is intended to resolve and that contains …

> (c) the terms of settlement agreed to by the Parties, including the provisions of any order requested of the Settlement Panel and the Respondent's or Applicant's consent to the order.
>
> (e) a provision on whether the agreement is confidential pending approval of the settlement by the Settlement Panel.

[270] *Rule* 10.6 states: "Unless the Settlement Panel otherwise determines, the Settlement Agreement shall not be made public prior to its approval by the Settlement Panel. Upon approval by the Settlement Panel, the Settlement Agreement shall become a public document."

[271] However, the Bank cannot rely on these **Rules** since they only came into effect in June 2007. The Bank cannot rely on **Rules** drafted two years after the settlement and escrow agreements were executed to create an *ex post facto* justification for why this settlement agreement could not be made public or disclosed. Commissioner Gruchy (at ¶64) acknowledged that the procedure as set out in the 2007 **Rules** governing settlement agreements "was the practice under the

previous rules as well." However, at the time the settlement agreement was executed, the **Act** and the prior **Rules** were silent on settlement agreements. In addition, as noted above, Commissioner Gruchy cited four examples of other individuals in the KHI investigation, who were dealt with "in the normal course" and his findings show the average length of time between the execution of the settlement agreement and its approval by the Commission was 2-10 weeks. Commissioner Gruchy found that the settlement agreement did not follow the usual procedure between the Bank and the Commission and (at ¶84) that "there is no authority in the investigation orders, in the [**Securities**] **Act** or the **Rules** for Staff to enter into an escrow agreement to withhold an executed settlement agreement from the usual procedure. If there is no authority for Staff to enter into these types of agreement, it must not be done".

[272] The Bank also says it was bound to keep the settlement agreement confidential until its approval by the Commission in accordance with paragraph 15 of the settlement agreement. The answer to this submission is the same as the answer to NBFL's first submission: a party cannot avoid or contract out of its disclosure obligations under the **Civil Procedure Rules** by inserting a term into an agreement that it negotiates. Further, as I have said, the Bank could also have written to the other parties to the agreement to seek to waive compliance with paragraph 15 so that the existence of the settlement agreement could be disclosed. It did none of these things.

[273] In conclusion, but for Justice Rosinski's order prohibiting disclosure of the existence or terms of the settlement agreement between June 16, 2011, and December 4, 2012 (which would never have arisen had the Bank acted honourably), I do not accept any of the Bank's submissions which seek to excuse its deliberate concealment of the agreement and its terms.

[274] Neither am I impressed by the Bank's arguments at trial that its admissions in June 2005 did not mean that it had chosen one position over another, nor concede that Mr. Clarke had manipulated the price of KHI shares. The Bank's formal acknowledgement in its 2012 post-trial brief that it failed to supervise Clarke and failed to review his activities in the 540 account is hardly much of a "concession" in light of the fact that the Bank first made this admission in the settlement agreement executed in 2005. The "admission" came seven years too late, after the colossal expense of a trial at which the individual investors were forced to "prove" this very fact.

[275] The astonishing discovery of the secret settlement agreement and its companion escrow agreement was a "smoking gun" in this case. Looking back, it changed everything. Its existence was not established until almost eight months after the trial had ended when presumably Justice Warner was in the midst of writing his reasons. He agreed to entertain post-trial submissions on the effect, if any, disclosure of the agreement might have on the evidence presented during the trial. For the trial judge to say that he did not need the settlement agreement to show that Clarke had manipulated KHI's share price or that the Bank's failure to supervise Clarke's activities "was apparent in the trial evidence" is, respectfully, to have asked himself the wrong question. In approaching the matter that way the judge erred. Instead of asking what impact this post-trial discovery might have had on the evidence led at trial, he ought to have asked himself whether the admissions made by the Bank in the secret settlement agreement as compared to the public position taken by the Bank in court, constituted an abuse of process and, if it did, with what result. In failing to address it, he erred in law. It is an issue that is squarely before us on appeal and is critical to the disposition of these three appeals.

[276] I will turn now to my assessment of the impact the concealment of the settlement agreement had on this litigation. In doing so I will provide five further examples of what I consider to be the Bank's misconduct, simply to illustrate my point.

The Harm Caused

[277] The first example of misconduct to which I will refer is the Bank's representation to this Court in October 2005 that it had not chosen a position, when the admissions it made in the settlement agreement executed in June, 2005 clearly suggest otherwise.

[278] On this point I am prepared to assume without deciding that when the conspiracy case was first launched in 2003, the Bank could, with some legitimacy, protest that it did not have sufficient knowledge of the facts to make a determination as to which of the two contrary scenarios – manipulation or no manipulation – was factually correct. But then came the execution of the settlement agreement and the escrow agreement in June 2005. In the settlement agreement the Bank agreed that it had failed to supervise Clarke and the Bank further agreed that it "did not adequately review month end closing bids of KHI by Clarke and his clients, which resulted in a failure to detect a pattern of manipulative trading."

[279] In October 2005, the Bank appeared before this Court as respondents in the appeal of Justice Scanlan's inconsistent pleadings decision. The Bank did not advise this Court about the admissions it had already made in the settlement agreement. Rather, it continued to maintain (as Justice Scanlan had found) that it did not know enough to take a definite position. Justice Bateman, writing for the Court, dismissed the appeal (2005 NSCA 139), saying at ¶21:

> We do wish to comment upon an assertion made by the appellants' counsel in the course of argument lest his submission be shared by other parties to these and related proceedings. It seemed to be his submission that where a party has strong evidence of one position, that party may not plead another position in the alternative. We do not agree. The authorities cited by him do not support his contention and we are aware of no authority that does. There is, of course, ample authority for the proposition that a party may not plead that which it knows to be false, or a sham or wholly fictitious: W.B. Williston, Q.C. and R.J. Rolls, *The Law of Civil Procedure, supra* at p. 665; **Brailsford v. Tobie**, [1888] 10 ALT 194 ; **J.C. Decaux Pty. Ltd. v. Adshed Street Furniture Pty Ltd.** 178 A.L.R. 339 (F.C.A.). But that principle does not apply where a party has investigated and formed an opinion about the legal effect of the facts as it understands them. The appellants rely on **United Australia Limited v. Barclays Bank Limited**, [1941] A.C. 1 (H.L. Eng.) and, in particular, Lord Atkin's speech at p. 30. But that case and that passage in it have nothing to do with the proposition advanced by the appellant. The case concerned the ancient doctrine of waiver of tort and the passage in Lord Atkin's speech relates to a party who "... with full knowledge ... has done an unequivocal act showing that he has chosen ..." one of two inconsistent remedies. There is nothing before us to support such a conclusion here. With respect, counsel for the appellants has confused the well recognized principle that one cannot plead something known by the pleader within its own knowledge to be false, with a principle requiring the party to plead only what the pleader knows to be true. The first statement is correct; the latter is not. An opinion of solicitors based on their belief that there is strong evidence to support a proposition does not result in the client thereby "knowing" that any other position is false.
>
> [Underlining mine]

[280] Using Justice Bateman's language, I conclude that the Bank had, through its execution of the settlement agreement, committed itself to an unequivocal act showing that it had decided "which of two conflicting positions … was the true one", by unequivocally coming down on the side of manipulation by Clarke and an acknowledgement that it had failed to supervise Clarke's activities. In my opinion the execution of the settlement agreement changed everything. From that point on the Bank had acknowledged in one forum its own negligence and failure to comply

with regulatory laws and policies. Yet, in court, in its pleadings, it professed absolute innocence.

[281] The importance and role of pleadings cannot be overstated. Generally, a party must plead all facts material to the cause or causes of action alleged against the opposite party. The purpose of pleadings is to define the issues to be tried and provide notice to all parties of the case they will have to meet when preparing for and participating in a trial. Apart from defining the real issues dividing the parties and providing fair warning to the other side of what is going to be claimed, pleadings serve the ultimate purpose of achieving the orderly, efficient and cost-effective resolution of a dispute on its merits by setting the boundaries of discovery, preventing surprise and avoiding adjournments. See generally: **Quadrangle Holdings Ltd. v. Coady**, 2015 NSCA 13, leave to appeal to SCC requested; **Chudy v. Merchant Law Group**, 2008 BCCA 484, leave to appeal refused [2009] S.C.C.A. No. 7; **Canadian Bar Association v. British Columbia**, 2008 BCCA 92, leave to appeal refused [2008] S.C.C.A. No. 185; **Rieger v. Burgess**, [1988] S.J. No. 247, (Sask. C.A.), leave to appeal refused [1988] S.C.C.A. No. 209; and **Beals v. Saldanha**, [2001] O.J. No. 2586, 54 O.R. (3d) 641 (Ont. C.A.), aff'd 2003 SCC 72.

[282] As I explain further below (¶334-335), years after the settlement agreement was signed, and then years after its existence was discovered, the Bank still tried to insist that it, and its employee Clarke, had complied with the law and done nothing wrong, such that they were entirely blameless, were in no way responsible for the losses experienced by others, and were themselves the innocent victims of a fraud perpetuated by a invariably fluctuating list of insiders.

[283] It is disingenuous for the Bank to now suggest that its concealment of the settlement agreement was justified because it could not have known what was in Clarke's mind. In the face of the Bank's admissions of fault and the importance of that admission to those individuals and businesses who had claimed against the Bank (or had been sued by the Bank as alleged "conspirators" or otherwise), Clarke's intentions were hardly significant.

[284] In 2008 the Bank attempted to amend its pleadings to remove all references to Mr. Clarke, without explaining why it was attempting to do so, which then led to Justice Warner's subsequent finding of bad faith against the Bank.

[285] In October 2007 pursuant to CPR 40.01 of the old **Rules**, the Bank discontinued, as of right and without leave, any and all claims, cross-claims,

counterclaims and third party claims brought by it against Bruce Clarke in all of the actions. In April 2008, the Bank brought a motion seeking to amend the pleadings "to remove any material fact allegations that its former employee, Bruce E. Clarke, participated in the alleged conspiracy to manipulate the stock price of KHI between 1999 and September 2001, or committed other wrongful acts."

[286] Warner, J. dismissed the motion (2008 NSSC 135) and this Court upheld his decision on appeal (2008 NSCA 92). If the settlement agreement had been disclosed, it is difficult to see how the Bank could ever have attempted to bring a motion that it should be permitted to withdraw the material fact allegations against Clarke. The fact that the Bank (as found by Justice Warner) brought this motion, in bad faith, when it was (so we now know) concealing the very information that would have precluded the motion being brought in the first place, provides another example of misconduct which rises to the level of an abuse of process.

[287] Moreover, our present knowledge of the existence and contents of the settlement agreement offers greater scope to revisit Justice Warner's findings of bad faith against the Bank. This stems from the fact that the Bank never explained why it was seeking to amend its pleadings. This is what Warner, J. said at (2008 NSSC 135) ¶6:

> The closest that NBFL comes to giving a reason for the proposed amendments is:
>
> > "NBFL discontinued all of its claims against Mr. Clarke to narrow its issues before the court for the due presentation of its case at discoveries and then later at trial. NBFL is therefore not adding any new causes of action but, in fact, removing allegations against a party it discontinued its claims against, which is permitted under the *Civil Procedure Rules*. It would be odd indeed if NBFL, exercising its right to discontinue against a party, in these circumstances [is] not allowed to drop the very allegations setting forth the now discontinued claim." [Underlining in original]

[288] Justice Warner found that the Bank's failure to provide a *bona fide* reason to the Court to justify the amendments constituted bad faith at ¶153:

> It is reasonable to infer, and the respondents have satisfied me on the basis of the material before the Court, that NBFL has no *bona fide* reason to alter the material fact allegations made against Bruce Clarke at this time. Its discontinuance of claims against Bruce Clarke (which is not irrevocable) does not justify "the sea change" in its material fact allegations respecting the participation of Bruce Clarke in an alleged conspiracy or other wrongdoing. To the extent that NBFL convinced Justice Scanlan in November 2004 that their state of knowledge of the

> actions of Bruce Clarke was a *bona fide* basis for alleging his involvement in a conspiracy, if one existed, it has not even attempted to proffer some factual basis, in the face of the respondents' submission that no basis exists, for the withdrawal of the allegations. This rings of bad faith.

[289] In the appeal decision (2008 NSCA 92 at ¶36), Justice Cromwell (as he then was) neatly summarized the four circumstances that justified the finding of bad faith against the Bank:

> The judge found that NBFL acted in bad faith in seeking the proposed amendments. He noted that he was "entitled to draw inferences from the totality of the circumstances ...": Reasons para. 133. The judge drew this inference from four related facts: NBFL's amendments were contrary to the position it had taken in sworn evidence before the Court in 2004 (i.e., that there was a strong factual basis for its allegations against Mr. Clarke), that no factual basis for this change of position had been offered, that a settlement agreement between Mr. Clarke and the Securities Commission was "contraindicative" of NBFL's amendments application and that the timing of the change in NBFL's position suggested that it was a tactical move that might make it easier to respond to other pending applications, particularly a summary judgment application by some of the respondents that was to focus on Mr. Clarke's role.

[290] As I have pointed out, the Bank's attempt to withdraw the material fact allegations against Clarke left a gaping hole in the Main action. Justice Cromwell again explained at ¶29 and 38:

> […] Over the years the case has been ongoing, NBFL has, until now, asserted not only that Mr. Clarke played a key and unique role in the alleged conspiracy, but that it had conducted a detailed investigation of the facts which supported that conclusion. The proposed amendments, therefore, evidence an unexplained and dramatic change of heart on the part of NBFL coupled with an absence of any alternative explanation of how the alleged conspiracy with respect to accounts maintained at NBFL was carried out. Viewed in that context, I cannot fault the judge for finding a large unexplained gap in NBFL's material fact allegations. [Underlining in original]
>
> * * *
>
> … Before the discontinuance, NBFL's theory of the case was clear: Mr. Clarke was the instrumentality by which the conspiracy was put into operation and concealed from responsible officials of NBFL. With Mr. Clarke gone, as in the proposed amendments, it is apparent that theory has changed substantially, but in unspecified and unexplained ways. To put it simply, the judge was of the view

> that NBFL could not simply take out the allegations against a key player with a unique role and pretend that everything else remained the same. …

[291] The Bank's position has shifted depending on the forum – regulatory proceedings or civil litigation – and the particular stage of the litigation. In 2008, having persuaded courts in 2005 that it could allege a conspiracy and deny a conspiracy at the same time, it sought to amend its pleadings in the Main action to remove all references to Clarke. This to me seems almost breathtaking in its audacity given that, as Cromwell, J.A. explained, the Bank presented no viable alternative theory as to how a conspiracy was carried out.

[292] No other Bank employee was named in the Bank's pleadings in the Main action. Thus, by late 2008, the Bank had discontinued all claims against Clarke but had been refused leave to amend the pleadings to remove all references to him. Four years later, at trial, the Bank still presented no theory and called no witnesses or evidence to prove a conspiracy.

[293] In this, the Bank's actions caused considerable harm and massive expense to the other litigants who found themselves caught up in more than a decade of needless litigation which should have otherwise been resolved years ago. Here are two specific examples of the harm experienced by others.

[294] The Bank chose not to withdraw the Main action even though the Bank knew that it would not be seeking to prove that Clarke was part of the conspiracy from the time that it discontinued all claims against him in 2007, and that there could be no conspiracy without Clarke. Instead of withdrawing the claim against the dozens of individuals named in the Main action, it took the claim to trial, and then offered no evidence against the one conspirator with whom it had not settled, Wadden, and the other conspirator, Clarke, who the courts would not permit the Bank to remove from its pleadings. This led to an almost surreal situation which Mr. Dunlop captured nicely in his post-trial submissions:

> "despite the hopelessness of proving a conspiracy without someone to carry it out for the alleged conspirators, NBFL refused to withdraw the claim and Your Lordship will be required to make a determination based on the evidence presented at trial, which of course is non-existent."

[295] The second example of harm to a litigant's position by the Bank's actions is seen in the trial judge's disposal of the Main action and how he came to impose liability against Wadden. I will be saying more about that later in these reasons. For the moment, it is enough to point out that Justice Warner's order after trial is

silent about the Main action but he allows the Bank's third party actions against Wadden. A review of the pleadings shows that the Bank's third party action simply incorporated its pleadings from the Main action. Although the Bank adduced no evidence and presented no theory of a conspiracy to the trial judge, and while the trial judge failed to mention or apply the legal test for a conspiracy, Mr. Wadden was nonetheless found to have been a conspirator and jointly and severally liable with the Bank. That is a finding I will set aside when, later in these reasons, I deal with Mr. Wadden's claims in particular.

[296] The third example of misconduct on the part of the Bank relates to the position it took in a hearing before Nova Scotia Supreme Court Justice Suzanne M. Hood in 2008. Briefly, by way of background, in September 2007, the Investment Dealers Association released a decision in Quebec regarding the supervision of branch offices by the Bank's head office in Montreal. In January 2008, the Bank brought a motion seeking to strike certain paragraphs of Dr. Ristow's affidavit and exhibits attached to that affidavit. The exhibits contained the settlement agreement between the IDA and the Bank as well as the discipline hearing's decision released the same day. The Bank argued that this information was "wholly unrelated" and irrelevant to the litigation. Justice Hood found that these exhibits were relevant and refused to strike them (2008 NSSC 30). On this point she said:

> RELEVANCE
>
> [12] As Haliburton J. said in *Bell v. Canada (Attorney General)*, [2006] N.S.J. No. 487, in para. 23:
>
> > ... The issue to be decided, as I understand, is whether or not an agreement was concluded ... It is in that specific context that I consider the relevance of the representations set forth in Mr. Dunlop's affidavit.
>
> I must determine what the issue or issues are in the litigation which are at stake in the summary judgment application. <u>One of the issues is whether NBFL failed to properly supervise Clarke</u>; that is the context in which I must look at the impugned paragraphs and exhibits.
>
> [Underlining mine]

[297] Clearly, when the Bank appeared before Hood, J. it knew that it was withholding proof of an admission in the settlement agreement between itself and the Commission that the Bank had failed to supervise Clarke.

[298] I have already explained why the settlement agreement was a highly relevant and critically important piece of evidence in this litigation. Had Bank officials

been in any doubt about that, surely Justice Hood's decision in 2008 should have disabused them of any such misapprehension.

[299] The fourth example of Bank misconduct to which I will refer is the Bank's decision to challenge the summary judgment motion, in part, on the basis that Dr. Ristow had not put forward any proof that the Bank had failed to supervise Clarke when, all along, the Bank was concealing proof of that very fact.

[300] The Bank successfully defended Dr. Ristow's summary judgment application in 2009 (2009 NSSC 305). There is no doubt that the Bank had every right to defend his claims vigorously. However, two elements of its defence show a continuation of the Bank's misconduct and an abuse of the court's process.

[301] Back in 2005 (in his decision reported as 2005 NSSC 113), Justice Scanlan commented on an allegation made by appellants' counsel that the Bank was motivated to launch the Main action in 2003 against Clarke and others because it wanted to portray itself as the innocent victim in the face of the regulatory investigation. Justice Scanlan seems to have accepted this submission at ¶48-49:

> I am satisfied Messrs. Haber and Wisenfeld were as much concerned with reputational risk management for NBFL as they were with the debt collections. In cross-examination Mr. Haber said:
>
> > "(He) ... first started to become aware of what was happening in regard to Knowledge House in late August and September it quickly became pretty clear to me pretty quickly that this was going to be a bit of a mess on a number of different levels given the magnitude of the losses that we had suffered, given the fact that a company had collapsed in this context, given the heavy involvement of our Halifax branch to the ownership of the stock, given the fact that it was getting media."
>
> Mr. Haber also acknowledged the prospect of regulatory investigation by the Security Commission, the Investment Dealers Association and Regulation Services Inc. was one of his main concerns. Central to that concern was the issue as to whether or not Mr. Clarke or others of the Halifax branch of NBFL had been properly supervised. This was all part of the reputational risk management concern of Messrs. Haber and Wisenfeld. […]

> In terms of the timing of the issuance of the statement of claim by NBFL it is clear that in terms of reputational risk management, NBFL was motivated to have the statement of claim issued prior to what they thought was the imminent completion of the regulatory investigations. On behalf of NBFL Mr. Haber asserted they were wanting to issue the statement of claim prior to the issuing of the investigation report so that it would not look as though NBFL was trying to divert attention from NBFL by the issuing of claims. Applicant's counsel suggest that the early release of the statement of claim was intended to divert attention from NBFL by attempting to portray NBFL was a victim. On this point I can only conclude that I recognize there are two sides to this argument. The statement of claim was issued on August 28, 2003 alleging manipulation. The report of the investigators has not yet been filed.
>
> [Underlining mine]

[302] Similarly, it was suggested before Justice Warner in 2008 that just as the Bank decided that it was in its best interests to launch a conspiracy claim against Clarke and others in 2003, so it was in its interests to amend the pleadings to withdraw allegations against Clarke in light of this imminent summary judgment application brought by one of Mr. Dunlop's clients against the Bank where the Court would determine whether Clarke was involved in the manipulation of KHI stock. Justice Warner agreed with the respondents that the timing of the motion constituted bad faith on the part of the Bank (2008 NSSC 135) at ¶156 and 160:

> … The timing of the change in NBFL's position was shortly before counsel for Mr. Ristow gave notice of his intention to resurrect and pursue the summary judgment application against NBFL, which NBFL was notified would be focused on Bruce Clarke's actions while an employee of NBFL. It appears that the removal of the material fact allegations against Mr. Clarke might make it easier for NBFL to respond to this application. Whether or not it would be a successful tactic is not necessarily relevant. The fact that it may assist NBFL is some evidence that the proposed amendment has a tactical purpose unrelated to NBFL's knowledge with respect to the material fact allegations against Mr. Clarke.
>
> * * *
>
> … The timing of the proposed amendment coincides precisely with Mr. Dunlop's advancement in the Ristow summary judgment application against NBFL, which application is centred on Mr. Clarke's conduct as an employee of NBFL. The inference that the proposed amendment is motivated by that summary judgment application, and not by some new or "full knowledge" of Clarke's actions that have not been disclosed to this Court, is irresistible.

[303] Before Justice Hood, however, Dr. Ristow failed to prove the facts sufficient to support his claim for summary judgment. One of the critical facts missing is set out by Justice Hood in her decision at ¶78:

> The settlement agreement between NBFL and the IDA with respect to the Joliette branch is not proof that NBFL failed to supervise Bruce Clarke in the Halifax office. At trial, it may be helpful but it is not sufficient to establish Lutz Ristow's claim at this time.

[304] While Justice Hood's conclusion is unimpeachable, what she did not know was that NBFL had withheld proof of that fact from the individual investors for over four years – a continuation of the abuse of the court's process. While the outcome of Dr. Ristow's summary judgment application may or may not have been different if he had been able to lay the 2005 settlement agreement and NBFL's admissions before Justice Hood, the more concerning fact is that a highly relevant document continued to be withheld.

[305] The fifth and final example of litigation misconduct to which I will refer is what I see as the Bank's attempt to use this prolonged litigation as a sword, contrary to Justice Scanlan's clear warning in 2005 "not … to sacrifice innocent investors or to use their financial might to crush litigants into submission in a situation in which it may result in an injustice." (2005 NSSC 113 at ¶50)

[306] There are exceptionally clear and strongly worded findings of fact made by judges in several prior decisions, as well as the findings of fact made by Justice Warner in this case which speak to the Bank's attitude throughout. Simply to illustrate, in the amendment of pleadings decision, 2008 NSSC 135, Justice Warner noted at ¶163 and 168:

> A review of the twists and turns in the pleadings and disclosure phases of this litigation over the past seven years, leads to the common sense conclusion that those litigants with the deeper pockets have a better likelihood to have their case properly prepared and presented to the Court than those who have empty or near empty pockets. It is obvious that all of the litigants to these actions do not have the same financial stake in the action (that is, in absolute terms or in relative terms), or the same capacity to protect their interests in this litigation. This is not litigation between parties similarly situated with similar capacities to effectively participate. Many of them are defendants in the 16 debt actions and/or third parties added by NBFL in the Main Action in respect of their claim of conspiracy and fraudulent misrepresentation. They are not the initiators of the litigation.

* * *

> The Chief Justice of the Supreme Court of Canada has often expressed concern with respect to delays in the civil justice system and their effect on the relevance of the system. In one such address to the Empire Club of Canada at Toronto on March 8th, 2007, (posted on the Supreme Court's website) she made relevant statements that infuse the issue of prejudice as it appears in this case. She said in part:
>
> > "On the civil side, different but similar problems arise. Whether the litigation has to do with a business dispute or a family matter, people need prompt resolution so they can get on with their lives. Often, they cannot wait for years for an answer. When delay becomes too great, the courts are no longer an option. People look for other alternatives. Or they simply give up on justice."
>
> [Underlining mine]

[307] In her decision, 2010 NSSC 214, dismissing the abuse of process application, Justice Hood made the following comments at ¶83-84:

> I do have concerns about NBFL's approach to this litigation. Its original counsel were removed because of breach of solicitor/client privilege; its amendment of pleadings motion was denied, in part, upon a finding of bad faith in bringing the motion; NBFL is making a motion with respect to conflict of interest by the applicant's counsel which does not arise out of dealings with NBFL itself but with respect to the relations of Mr. Dunlop's clients inter se; it has discontinued against or settled with some of the major players in the litigation but not with the applicants, some of whom no one alleges to be participants in an alleged conspiracy; it has refused to disclose settlement agreements with those with whom it has settled or against whom it has discontinued.
>
> I have discussed each of these above and have said there may be good reasons for the actions NBFL has taken in this litigation. It does, however, leave a lingering concern that NBFL may in fact be doing, or trying to do, just what Justice Scanlan cautioned about five years ago.
>
> [Underlining mine]

[308] Furthermore, in his liability decision, Justice Warner had no difficulty coming to the conclusion that the Bank's behaviour in the litigation towards Dunham and Weir was outrageous. He found, at ¶892, 915, 917, 921 and 923-4:

> The aggressive, no-holds-barred, prolonged pursuit of litigation against Dunham, with respect to liability more than quantum, in light of what NBFL knew when it commenced the Main Action about Clarke's misconduct, and which it defended in

> motions before Justice Scanlan in 2005, is not justifiable. It was, in hindsight, outrageous.
>
> * * *
>
> NBFL's conduct of its litigation against Weir and Blackwood has been outrageous. It promised to settle, then reneged, and waged an aggressive, no-holds-barred, defence of their claim, especially respecting liability.
>
> * * *
>
> The quantum of this punitive judgment award is based upon the abusive and disingenuous treatment of Weir and Blackwood after the margin calls. The bullying and threats, followed by the litigation, followed by the acknowledgment of wrongdoing in March 2003 and advance of settlement, followed by nine years of contesting vigorously the Weir / Blackwood claim is abusive conduct of an exceptional nature.
>
> * * *
>
> NBFL's actions speak louder than its submissions. There was no justification, on the evidence before the Court, for NBFL to contest Weir's claim after 2003, except as to quantum.
>
> * * *
>
> NBFL's conduct in contesting the Weir / Blackwood claim after March 2003, when it acknowledged its liability to him, was intentional. It persisted in an outrageous manner over a lengthy period of time (9 years).
>
> The vulnerability of the Plaintiffs and consequential abuse of power by the Defendant reflected a substantial power imbalance. Many other "outside" investors dropped out of the litigation between 2001 and the commencement of trial 11 years later. NBFL has benefited from the fact that many could not stay in the arena with it.
>
> [Underlining mine]

[309] Finally, Warner, J. made similar findings in his costs decision, 2014 NSSC 264 where at ¶246-47 he declared:

> NBFL was the reason this litigation was so complex and so lengthy. It commenced the Main Action. It commenced most of the third party proceedings. This Court found in its trial decision that NBFL knew or should have known before it commenced the litigation and, at least, since 2005 that its broker Clarke had acted wrongfully in respect of these parties and that it had been, at the least, negligent in its supervision of Clarke.
>
> Costs are to be determined in the context of the litigation. It would not do justice between the parties to award NBFL substantial costs for litigation that it was primarily responsible for making so lengthy and complex, especially in light of

> what it knew, or should have known from the beginning, and what its counsel represented to the court in justifying commencement of the Main Action (2005 NSSC 8, and 2005 NSCA 139), and its officers advised Weir early in the litigation.

[310] As explained earlier in this judgment, I do not repeat these highly critical condemnations by other judges so as to punish the Bank "twice" for the same transgressions. Rather, it is simply to illustrate the repeated pattern of misconduct by the Bank throughout this interminable litigation coupled with an absence of any attempt by the Bank to apologize, make amends or change its ways.

[311] To return to first principles, Rule 1.01 states that the object of the **Civil Procedure Rules** is for "the just, speedy, and inexpensive determination of every proceeding." The Supreme Court of Canada in two recent cases: **Hryniak v. Mauldin**, **supra**, (at ¶1); and **Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)**, 2014 SCC 59 (at ¶38), has reiterated the importance of access to justice in civil proceedings and the difficulty of ensuring that access:

> [1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> * * *
>
> [38] This Court affirmed that access to the courts is essential to the rule of law in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214. As Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (p. 230). The Court adopted, at p. 230, the B.C. Court of Appeal's statement of the law ((1985), 20 D.L.R. (4th) 399, at p. 406):
>
> > ... access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens... . Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, interference from whatever source falls into the same category. [Emphasis added.]

> As stated more recently in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, per Karakatsanis J., "without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined" (para. 26).

[312] For all of these reasons I find that the Bank's repeated efforts to keep secret the contents of the settlement agreement it negotiated, as well as the other examples I have provided of very serious misconduct, constitute that rare and exceptional circumstance where the Court's own process has been abused, thereby requiring the Court's swift and unequivocal intervention.

[313] All of this justifies striking the Bank's pleadings in all of its claims, counterclaims and defences in every action in which it was a participant in matters which form the subject of these three appeals. Obviously those are the only cases under consideration here. Nothing in these reasons should be taken to reflect upon any other outcomes or settlements achieved between or among parties who are not participants in these appeals.

[314] Without such pleadings to support the Bank's claims, or counterclaims, or cross-claims or defences, there is nothing left to sustain the Bank's claims for damages, or indemnity, or protection from exposure to liability. All that remains then is to consider the claims brought by the several claimants against the Bank and the trial judge's treatment of those claims and forms of relief.

[315] I will turn to that now.

[316] Lastly I will address the proper remedy and relief that ought to be afforded to those parties whose positions were seriously prejudiced as a result.

Relief & Remedies

[317] I begin by acknowledging that the Bank's position in filing suit, or resisting claims made against it, was not solely based upon declared innocence and ignorance with respect to the conduct of its employees, particularly Clarke. I am not saying that revealing the existence and contents of the settlement agreement would have forced the Bank to capitulate and surrender to each and every claim, without protest. Obviously the claimants would still have had to establish a cause of action and prove their damages. But there can be no doubt that the Bank's denial of any knowledge surrounding the activities of Clarke and those working in concert with him was the centrepiece of the Bank's claims and defences such that disclosure of the true state of affairs, in a timely manner, would have had a

profound effect on the outcome. What impact a timely disclosure of the Bank's admissions might have had on the other proceedings which were settled, abandoned or otherwise concluded, is not before us. This judgment does not speak to any other cases simply because the evidence and issues in those cases are not before us.

[318] In these reasons, "the Bank's claims" means each and every claim, cross-claim, counterclaim, third party claim or any other conceivable claim initiated by the Bank in all proceedings to which these three appeals relate. Similarly, "the Bank's defences" refers to all manner of defences raised by the Bank in all proceedings relating to the three appeals disposed of in this judgment.

[319] The jurisprudence to which I have referred on the subject of abuse of process typically refers to "striking the pleadings" or "granting a stay" as disjunctive, in other words, separate remedies. While that may be customarily the approach to take, I see no reason in law or logic why in the extraordinary circumstances of this case both remedies cannot be invoked. If, as the Supreme Court of Canada reminds us in **Tobiass, supra**, that staying proceedings is a prospective remedy available to courts in the enforcement of its own process by preventing further perpetuation of harm, then striking pleadings can be seen as an equally effective tool applied retrospectively to sanction past misdeeds.

[320] From the time its President signed the settlement agreement in June 2005, the Bank adopted and maintained a position before the courts which it knew was not true.

[321] An interesting glimpse into the contortions the Bank went through – two years before trial – to maintain its inconsistent positions in the pleadings, and to try to explain why it was maintaining a conspiracy case while discontinuing its claims against Clarke, may be gleaned from reading the transcript of the examination for discovery of Mr. Richard Rousseau, Executive Vice-President of the Bank, held January 5, 2010. Other identified actors would include "Jim" or "Mr. Hodgson", then of counsel for the Bank, and Mr. Dunlop, counsel for most of the claimants. In Mr. Dunlop's questioning of Mr. Rousseau the "Settlement Agreement" to which Mr. Rousseau's attention is being drawn is the 2004 settlement agreement between Bruce Clarke and the Nova Scotia Securities Commission. It is obviously not a reference to the subsequent settlement agreement negotiated and signed by the Bank and the Commission in June, 2005 and concealed thereafter. Mr. Rousseau's questioning began this way:

Q. Okay. What I'd like to do is try and get from you an understanding of the allegations being made by National Bank Financial in these proceedings. Am I correct in my understanding that NBFL alleges that there was a conspiracy to artificially maintain or inflate the share price of Knowledge House?

A. Yes.

Q. And in relation to that conspiracy NBFL alleges that there were a number of conspirators, correct?

A. Yes.

…

Counsel then referred the witness to the Bank's Statement of Claim and asked Mr. Rousseau to name those persons or entities it said were involved in the conspiracy alleged in the Bank's claim. After identifying certain individuals by name Mr. Rousseau was asked (Volume 17, p. 8102) whether Bruce Clarke was among the conspirators. We see this exchange:

Q. … Bruce Clarke?

A. No.

Q. So Bruce Clarke was not a participant in this conspiracy?

A. Not on my understanding based on the documents that I've looked at.

Q. Was Bruce Clarke's company ending in the letters 540 Limited a participant in this conspiracy?

A. Not based on the information I've looked at, no.

Q. So you're saying that the bank, sorry, National Bank Financial Limited is not alleging that either Bruce Clarke or his numbered company were a participant in the conspiracy.

A. That's my understanding, yes.

…

Mr. Rousseau's discovery continued on January 6, 2010, where we see this exchange when questioned by Mr. Dunlop:

Q. Are you telling - - I'm going to ask the question until I get an answer. Either yes or no, that NBFL - - you're the spokesman for them - - do they accept that Mr. Clarke did the things he's admitted to in the Settlement Agreement?

MR. HODGSON: He's answered the question.

MR. DUNLOP: What is the answer, then, Jim?

MR. HODGSON: The answer is no, we don't know.

MR. DUNLOP: Okay. The answer is no, you don't accept it?

MR. HODGSON: Do not accept it.

MR. DUNLOP: Thank you.

MR. HODGSON: Don't know.

- BY MR. DUNLOP:

Q. And that – do you accept Mr. Hodgson's answer, Mr. Rousseau?

A. That's what I've said. These are his admissions, not NBFL's admissions.

Q. Okay. So he – as far as NBFL is concerned, he may have just, for whatever reason, decided to plead guilty and end his career, even though he may not have done anything wrong?

A. I don't know what Mr. Clarke was thinking.

Q. All right. Did Mr. Clarke breach any of NBFL's internal policies in his matters relating to Knowledge House?

A. We fired him because he did not handle properly the credit that he was responsible for.

…

[322] From these startling machinations, we gain a much better appreciation of the Kafkaesque situation which confronted Mr. Dunlop upon his eventual discovery of the hidden 2005 settlement agreement. Based on the record we can be assured that Mr. Dunlop did not know about the Bank/Commission settlement agreement when he cross-examined Mr. Rousseau in January, 2010. Indeed the very question put to Commission investigators at discovery that set this train in motion and provoked the disclosure of the Bank/Commission settlement agreement occurred, in April, 2010, three months after Mr. Rousseau was discovered.

[323] It would appear that Mr. Dunlop first became aware of the Bank/Commission settlement agreement upon publication of Justice Rosinski's sealed decision of June 16, 2011. Thereafter Mr. Dunlop had to sign a confidentiality agreement so that he could not disclose anything within that Bank/Commission settlement agreement, to his clients. This sealing order/confidentiality agreement was upheld by this Court in overturning Rosinski, J.'s decision (2012 NSCA 12) and by this Court in upholding Commissioner Gruchy's decision to disclose the agreement (2012 NSCA 99).

[324] Clearly, Mr. Dunlop knew about the Bank/Commission settlement agreement by the start of trial when he said at AB, Volume 17, p. 8209:

> I could not proceed as an officer of the Court with the knowledge that I have if the Court does not have - - also have that knowledge.

But it is equally clear that he was still prohibited from telling his clients and the judge about it (AB, Volume 17, p. 8210):

> I'm not allowed to tell my clients what is the single biggest factor in their favour. I'm not allowed to tell you the single most important fact about this entire matter.

[325] At trial there were skirmishes over whether Mr. Rousseau's discovery evidence was admissible, and if it was, on what basis. Ultimately, the trial judge admitted the evidence and described (AB, Volume 25, p. 14,654) that the limited purposes were:

> …for the purpose of dealing with the claim for punitive damages and the *bona fides* of NBFL's positions in this litigation and not for the truth of or the merit of the opinion of Mr. Awad and Mr. Haber...

[326] The words and actions of the Bank in perpetuating this subterfuge must be denounced by this Court in the strongest possible terms. In the vernacular, the Bank tried to "whistle and chew at the same time" without thought or regard for the harm its posturing caused others. Settlement privilege, or similar procedural devices were never intended to be used as a shield to conceal such a distorted view of the truth.

[327] In my view, the proper approach to take in this case is to apply both remedies, which is to say striking the Bank's pleadings (all of its claims and all of its defences) and permanently staying the proceedings. My approach will unequivocally declare this Court's denunciation of the Bank's conduct by turning the dial back to zero as far as the Bank's claims and exposure are concerned, while at the same time blowing up any possibility that those claims or defences might somehow be recast and resurrected at a future date.

[328] To understand the process by which the trial judge came to ask himself the wrong question, I need to refer to parts of his decision which show how he perceived the purpose of the "new" evidence. He said:

[148] At trial, the Dunlop Clients sought to have the Court receive undisclosed evidence that he considered relevant and important to the proceeding. NBFL objected vehemently to any disclosure of the subject matter of the evidence Dunlop proposed to tender. Counsel advised that NBFL would seek a mistrial if the subject matter was disclosed. The request by Dunlop was made both before the Dunlop Clients had closed their case and at the end of the hearing of all parties' evidence.

[149] Specifically Dunlop requested that his clients be entitled to reopen the case if the evidence he was prevented from introducing at the trial could, at a later date, be introduced. The Court advised that it would entertain a motion to receive new evidence within a reasonable time after the close of the evidence, if that occurred before the court had rendered a decision.

[150] On December 4, 2012, a Settlement Agreement entered into in June 2005 between NBFL and its Halifax manager Eric Hicks on the one part and the Nova Scotia Security Commission, the Investment Dealers Association of Canada, and Market Regulation Services Inc., respecting the conduct of NBFL and Hicks in relation to its dealings with the subject matter of this litigation, and which, by order of the Commission, had been kept secret until approved by the Commission, was approved by the Nova Scotia Securities Commission and made public.

[151] On December 5, 2012, Dunlop wrote to the Court requesting that I grant his request to reopen the case if the evidence that was referred to as the "big secret" became public before I rendered my decision. He asked that the court reconvene so the NBFL / Hicks settlement agreement could be tendered as evidence and submissions be advanced as to the consequences of the agreement.

[152] On December 6, Hodgson, counsel for NBFL, replied in part:

> For purposes of the Record, NBFL objects to the admissibility into evidence of the Agreement. However, this is an issue which has already been fully argued and upon which your Lordship has already ruled. Accordingly, (unless your Lordship has reconsidered his Decision) NBFL accepts that the Agreement will be entered into evidence as an Exhibit.
>
> All counsel are in your Lordship's hands. However, given the time of the year, I am wondering if it might be more expeditious for Mr. Dunlop to simply provide written argument for "the consequences" of the Settlement Agreement ... and for NBFL to provide its written Submissions ...

[153] Hodgson's reference to my decision, was my decision respecting the admissibility of a Settlement Agreement between NBFL and IDAC, arising from failure by NBFL to supervise other branch operations during the time frame of the alleged wrongdoing by Clarke, which decision is reported as 2012 NSSC 76. On December 6, Dunlop replied to Hodgson's letter thanking him "... for agreeing that the Settlement Agreements be entered as exhibits for your consideration ... [and] I am in agreement with Mr. Hodgson's suggestion that we deal with the matter by way of written argument rather than try to schedule a court appearance."

[154] On the same day, the Court wrote to counsel, in part as follows: "... based on counsel's agreement on procedure, I am prepared to accept written submissions as to the "consequences" (your words) or use that may be made of the settlement agreement." I set time lines for written submissions. Dunlop's submissions were received on December 14, and NBFL's on December 21, 2012.

B.3.1 Dunlop Clients Supplementary Submissions

[155] In June 2005, NBFL and its Halifax manager Eric Hicks, entered into a Settlement Agreement with the Nova Scotia Securities Commission Staff, the Investment Dealers Association of Canada ("IDAC") and Market Regulations Services Inc. ("MRS"), with an attached Statement of Allegations. The Agreement dealt with the subject matter of this litigation and the prior publicly-available settlement agreement between the Commission and Clarke. The Agreement provided that it was to remain confidential until approved by the Commission.

[156] The NBFL/Hicks/NSSC/IDAC/MRS Settlement Agreement was approved by the Commission and became public on December 4, 2012. The Dunlop Clients tendered the Settlement Agreement, the decision of the Nova Scotia Securities Commission ("Commission") dated December 4, 2012, approving the Settlement Agreement signed June 2005, together with the Nova Scotia Securities Commission decision dated April 17, 2012, amended September 30, 2012, and two decisions of the Nova Scotia Court of Appeal respecting the Settlement Agreement - the Court's decisions of January 31, 2012 (2012 NSCA 12) and September 21, 2012, (2012 NSCA 99).

[157] These decisions discuss the process by which the Settlement Agreement was kept secret for seven years. They explain why the Dunlop Clients were unaware of the Settlement Agreement and agreed facts in the Statement of Allegations until shortly before the joint trial of these proceedings was commenced. The decisions also explain why the Dunlop Clients were prevented from introducing evidence in this litigation of the Settlement Agreement and the agreed Statement of Allegations until after the trial was completed and initial post-trial submissions in this proceeding were made.

[158] They explain why it is appropriate that this Court, not having yet rendered a decision, entertains the request to admit into evidence, and consider, if admitted, the purpose, and how the Settlement Agreement approved by the Commission on December 4, 2012, should impact this proceeding.

[Underlining mine]

[329] Earlier in his decision Warner, J. referenced the Bank's admission this way:

[35] For the first time in this litigation, in its post trial brief, NBFL admitted that it failed to adequately supervise Clarke. It admitted that it was under a duty to review the activity of Clarke's "540" account, an account of 2317540 Nova Scotia

> Limited, a corporation owned and controlled by Bruce Clarke, a broker employed at NBFL's Halifax office. The numbered company ("540") opened a margin account with NBFL that was designated by NBFL as a "pro" account because it was controlled by one of its brokers, a designation that mandated extra supervision by NBFL management. The effect of this admission is that, if Clarke is found to have acted unlawfully; that is, fraudulently, negligently or in breach of his contractual obligations to the Dunlop Clients or to any of them in connection with the 540 account, NBFL is liable to those Dunlop Clients for Clarke's action both on the basis of NBFL's own negligence and breach of contract, and on the basis of vicarious liability for the acts of Clarke who, it is not contested, was acting throughout in his capacity as broker employed by NBFL.

[330] Returning to the claimants' position that the Bank's misconduct called for severe sanctions the judge said:

> [161] The Statement of Allegations relates to the activities of Clarke, commencing in 1999, as an investor advisor for a number of KHI insiders and entering into an arrangement to act jointly to maintain the market price of KHI shares. Clarke carried this out through several means, including, in particular, trading in the 540 account, with cash and share transfers from KHI insiders and margin debt from NBFL. Deposits of money and shares from KHI insiders into the 540 account, enabled Clarke to buy significant quantities of KHI shares on margin in a manner described in para 33 of the agreed Statement of Allegations, resulting in a pattern of manipulative trading that NBFL failed to detect and prevent.
>
> [162] In their December Supplementary Submissions, the Dunlop Clients appear to accept as given that the Settlement Agreement constitutes acknowledgment of facts in the Statement of Allegations for this litigation, despite para 4 of the Agreement.
>
> [163] Counsel focuses on the non-disclosure by NBFL of the existence of the Settlement Agreement, and the effect on this litigation.
>
> [164] Counsel argues that the Settlement Agreement made in June 2005 was improperly concealed for seven years, contrary to the *Securities Act*, as determined by the Commission in 2012. The *Civil Procedure Rules*, both the old (1972) and the new (2009), require parties to fully disclose the existence of all relevant documents, and to disclose the contents of all relevant documents for which privilege is not expressly and specifically claimed. NBFL never disclosed the existence of the Settlement Agreement, nor claimed non-disclosure of their contents on the basis of privilege.
>
> [165] Demand for disclosure was made by the Dunlop Clients on NBFL. NBFL should have acknowledged its existence and claimed privilege.

[166] The Escrow Agreement that NBFL relied upon to not disclose the existence of the Settlement Agreement had no legal validity, as determined by the Commission, a Supreme Court Justice, and the Nova Scotia Court of Appeal. Any *bona fide* but mistaken belief that NBFL could legally not disclose the existence of the Agreement ended with those decisions.

[167] NBFL's refusal to disclose the existence of the Agreement, and the admissions contained in the Agreement, including the express acknowledgement of Clarke's manipulative trading in KHI's shares and NBFL's failure to supervise him properly with regards to the activities in his 540 account, both of which is central to this litigation, have had an obvious impact on the claims, and ability of the claimants to pursue a remedy, against NBFL for more than 10 years.

[168] Having hidden the existence of the Settlement Agreement since 2005, NBFL was able to argue conflicting theories as to the wrongdoing of itself, of Clarke and of other parties, for which NBFL had already accepted responsibility. In a decision not to strike NBFL pleadings by Justice Scanlan [[2005] N.S.J. No. 13], Justice Scanlan had written: "Until a Court determines whether there was stock manipulation, NBFL will not know what its rights or liabilities may be ... NBFL says at this point, and perhaps not until the Court decides what occurred, does NBFL have full knowledge of the factual situation so as to enable it to assert its rights with certainty."

[169] Similarly, in another decision by Justice Scanlan [[2005] N.S.J. No. 186], Justice Scanlan admonished NBFL, whom he noted was blinded by the regulatory investigation, "... to not sacrifice 'innocent investors' or use their financial might to crush litigants into submission in a situation in which it may result in an injustice."

[170] Counsel cites several later motions in this litigation where NBFL took a position about the facts contrary to its admissions in the Settlement Agreement with the Commission, IDAC and MRS. All of these Court decisions show a reliance upon NBFL's representation that it did not know the facts and should be permitted to continue with conflicting pleadings with respect to the facts surrounding Clarke, the 540 account, and the use of that account to manipulate KHI shares.

[171] Counsel argues that the concealment of the Settlement Agreement was highly improper. It seeks several remedies arising from the concealment, including striking of NBFL's pleadings, solicitor-client costs to all parties, and exemplary and punitive damages.

[172] Counsel submits that NBFL has been cited for its bad faith in these proceedings previously. This is not its first misconduct. Counsel cites *Church of Scientology of Toronto v Maritime Broadcasting* (1979), 33 N.S.R. (2d) 500 (NSCA), in comparing NBFL's conduct to contempt.

[173] Counsel submits that NBFL's conduct since 2005 amounts to a concerted effort to shield evidence of its wrongdoing from the Court and the Dunlop Clients.

> For remedies, he refers to *Homer Estate v Eurocopter SA*, 2003 BCCA 229, cited in *Grewal v Nijjer*, 2011 BCCA 505, *Aecon Buildings v Brampton*, 2010 ONCA 898 and *Ameron International v Sable Off shore Energy Ltd et al*, 2011 NSCA 121.
>
> [174] Counsel argues that NBFL's wrongful non-disclosure of the existence of the Settlement Agreement put all parties through seven years of unnecessary litigation, many parties of whom were not deep pocketed litigant and were those to whom Justice Scanlan referred to in his 2005 decisions.

[331] Then, after referring to the Bank's reasons for choosing not to disclose the existence and content of the settlement agreement, Warner, J. went on to explain his view of the issue which he saw through the lens of "bad faith". He said:

> [193] In summary, both the Dunlop Clients' brief and the NBFL brief respecting the admission and use that should be made of the Settlement Agreement with attached admissions of facts made by NBFL in that Agreement, focussed on allegations by each of the other's bad faith.
>
> [194] The Settlement Agreement, including the attached Statement of Allegations is admissible for the same reasons as set out in this Court's decision of February 17, 2012 (2012 NSSC 76) respecting the IDAC/NBFL Settlement Agreement.
>
> …
>
> [196] As noted in para 183, NBFL submits that its admissions in the Settlement Agreement should not impact this Court's decision for five reasons. … Its failure to supervise the activity in the 540 account was apparent in the trial evidence.
>
> …
>
> [198] I do not rely on NBFL's admissions in the Settlement Agreement, and in particular, paras 12, 27 and 33 of the Statement of Allegations, to conclude that the admissions contained in that Settlement Agreement, with respect to Clarke are true. …
>
> [199] … The trial evidence of Clarke, a knowledgeable, experienced professional, whose disbelieved plea of ignorance and innocent intent, is drowned out by his actions as revealed in the documents and trading records tendered at trial.
>
> …
>
> [201] The description of Clarke's conduct in the Statement of Allegations at paras 12, 27 and 33 use the word "manipulative" only once; however, the totality of the admission, which adds nothing new to (nor distracts from) the trial evidence upon which I rely, is that Clarke, acting jointly with KHI insiders, traded in significant numbers of KHI shares, both in his own 540 account and as the agent and broker for KHI insiders for the purpose of secretly facilitating market

> support, to the detriment of those who relied on the open regulated public market. They include those to whom Clarke and NBFL owed a duty of care in contract, tort and equity.
>
> …
>
> [203] …The intent of Clarke is obvious from his actions. His statements of ignorance and innocent intent were not credible, and belie his obvious intent - to use the shares and money given to him to purchase on margin KHI shares in the 540 account, and to facilitate trades among insiders, for the purpose of propping up the KHI share price secretly; in short, to conduct and facilitate manipulative trading in KHI shares.
>
> [204] The Court does not rely upon the Statement of Allegations in the Settlement Agreement. The admissions in the Settlement Agreement are obvious through assessment of the other trial evidence.
>
> [205] The existence of the Settlement Agreement and circumstances by which it was kept secret may be factors relevant to the assessment of punitive damages.
>
> [Underlining mine]

[332] From these passages we can see that the trial judge's attention was focused on whether he needed the settlement agreement and attachments to prove Clarke's improper activities, and to what extent (if at all) the settlement agreement was relevant to a claim of bad faith.

[333] Respectfully, that was not the question the judge ought to have asked himself. As I have explained, it was essential that he consider and decide whether the Bank's concealment of the settlement agreement as well as its conduct throughout the litigation amounted to an abuse or process, and, if it did, with what result. Failing to appreciate the importance of that question, and then not answering it, was a serious error in law.

[334] The significance of the omission is all the more startling when one considers the position asserted by the Bank throughout the trial, and right up to its "admission" in its post-trial written submissions. Here is how the trial judge characterized the Bank's position during the trial. He said:

> [488] NBFL's submissions were primarily to the effect that Clarke did nothing wrong. It submits that the activity in the 540 account and by Clarke was a very insignificant portion of the trading KHI shares. I disagree. Other than the arranged sales by Potter to wealthy investors, the 540 account represented a significant portion of the market activity in KHI shares, from March 2000, when KHI

> insiders lent money and shares to the 540 account, until the end of January 2001, when the 540 account ran out of margin debt for the last time.
>
> [Underlining mine]

[335] Recognizing the fact that the Bank spent years concealing the existence of the settlement agreement I am struck by the irony of the Bank's vigorous attempts post-trial, to minimize its relevance, scope, significance or impact. In fact, the Bank straight-facedly adopted exactly the same posture in its post-trial submissions; that is that the Bank and Clarke were blameless all along. As the trial judge noted in his reasons:

> [116] The Court has already noted that, after Dunlop's post-trial submissions were made, and for the first time, NBFL acknowledges, in its post-trial submission, that it failed to supervise Clarke in respect of the 540 account. NBFL did continue to claim that Clarke did nothing wrong.
>
> …
>
> [133] NBFL knew it had no defence to Dunham's claim, even while it advanced conflicting pleadings and claims, including claims first that Clarke and others had conspired to cause the loss to NBFL and its client and, on the other hand, that neither NBFL nor Clarke had done anything wrong.
>
> [Underlining mine]

[336] Before leaving this subject, I wish to emphasize what the trial judge said in ¶205 of his reasons:

> [205] The existence of the Settlement Agreement and circumstances by which it was kept secret may be factors relevant to the assessment of punitive damages.
>
> [Underlining mine]

Curiously, the judge never again referred to the settlement agreement in his assessment of punitive damages.

[337] The settlement agreement is a lengthy document and includes an unconditional admission of the facts contained in the Statement of Allegations and the orders and administrative penalties assessed against the Bank, as well as its former branch manager, Mr. Eric Hicks. I need not refer to each and every admission of fact, all of which are exceedingly important and relevant to the litigation. I will simply illustrate the significance of the Bank's admissions by

referring to a few. The Statement of Allegations incorporated within the settlement agreement (all of which were admitted) includes these specific admissions:

Clarke Settlement Agreement

12. On April 30, 2004, Clarke entered into a Settlement Agreement with the NSSC. In the Settlement Agreement, Clarke admitted that:

… (b) Commencing in late 1999 certain KHI insiders and persons in a special relationship to KHI (the "Insider Group") entered into an arrangement to act jointly to maintain the price of KHI stock (the "Arrangement"), and to carry out transactions in the market to this effect and to provide liquidity for the stock. Clarke agreed to assist the Insider Group in carrying this Arrangement into effect. The Arrangement was never disclosed to the public, contrary to the provisions of the Act.

(c) In the period March, 2000 to July, 2001, Clarke made a large number of purchases of KHI shares on margin through 540... under the overall direction and control of the Insider Group ... to maintain the price of KHI within a certain range; to create the effect of a liquid market for the shares and ... to collaterally affect the values upon which margin could be based...

(d) … None of the members of the Insider Group filed any reports ... as required by ... the Act. ...

Branch Office Reviews

13. Hicks was responsible for reviewing all accounts pursuant to Regulation … made pursuant to the Act and IDA by-laws …

14. … All comment sheets reviewed by this investigation and signed off by Hicks reveal that ….

(b) account reviews for the months November 1999 through July 2001 did not make any queries of unusual activities in KHI by Clarke ….

15. During the Relevant Period, Hicks as manager of the Branch Office, failed to ensure that the Branch Office conformed with prudent business practices and serviced its clients adequately. …

20. Hicks and NBFL failed to properly supervise Clarke … also failed to monitor the contents of the e-mail transmissions to and from Clarke's personal e-mail address in contravention of NBFL's own internal policies and as required pursuant to Regulation … made pursuant to the *Act* and IDA by-law …

25. Hicks and NBFL failed to properly supervise Clarke in that they failed to detect and/or permitted Clarke to participate in personal financial dealings with clients.

27. Clarke used the 540 Account to facilitate the market support for KHI on behalf of KHI Insiders as follows:

(a) On March 6, 2000, $100,000 was deposited to the 540 Account via transfer from an NBFL account that was beneficially owned by Dan Potter. (the "$100,000 Deposit"). NBFL did not make any inquiries of Clarke with respect to the deposit to the 540 account;

(b) In March 2000, Calvin Wadden caused a share certificate for 220,000 shares of KHI to be deposited to the 540 Account. NBFL did not make any inquiries of Clarke with respect to the deposit of this share certificate to the 540 Account;

(c) On September 15, 2000, a share certificate for 350,000 shares of a TSX Venture traded security, Crossoff Inc., was deposited by Clarke to the 540 Account. NBFL did not make any inquiries of Clarke with respect to the deposit of this share certificate to the 540 Account; and

(d) In or about December 2000, Raymond Courtney caused a share certificate for 100,000 shares of KHI to be deposited to the 540 Account. NBFL did not make any inquiries of Clarke with respect to the deposit of this share certificate to the 540 Account.

28. Hicks and NBFL failed to properly supervise Clarke in that they failed to establish and implement internal controls to monitor the activity in 540 Account …

32. Hicks and NBFL failed to properly supervise the 540 Account … pursuant to the Act, in that they failed to monitor the creditworthiness of the 540 Account and the continued accumulation of the KHI shares therein. …

33. During the Relevant Period, NBFL did not adequately review month end closing bids of KHI by Clarke and his clients which resulted in a failure to detect a pattern of manipulative trading, contrary to Regulation …. Pursuant to the *Act*.

34. It is therefore in the public interest for the Commission to order that each of the Respondents pay an administrative penalty and costs in accordance with … the *Act* respectively.

[Underlining mine]

[338] Quite apart from these specific admissions, Clause 8 of the settlement agreement provides:

Conduct Contrary to the Public Interest

8. The Respondents (being the Bank and Hicks) acknowledge that during the Relevant Period they violated Nova Scotia securities law and engaged in conduct contrary to the public interest as set out in the Statement of Allegations.

[Underlining mine]

[339] To appreciate the significance of these admissions in the face of the contradictory position taken by the Bank when pursuing or defending against the appellants in court will require a somewhat tedious but necessarily detailed review of the pleadings before and after the June 2005 settlement agreement. I will start with the pre-June 2005 filings.

Pre-June, 2005 Filings

[340] In the fall of 2001, NBFL commenced a number of Debt actions against individuals whose margin accounts were over balance when the share price of KHI collapsed. Wadden was among the first to defend his claim and counterclaim on the basis that the actions of the Bank's employee, Bruce Clarke, caused his loss. Wadden alleged:

> 8. Clarke was an officer and director of a numbered company ("NuCo") that maintained at material times an account at National Bank Financial known as the box account (the "Box Account"). Clarke solely or, in the alternative, with third parties including Potter and Colpitts, controlled at material times NuCo and the Box Account and used NuCo and the Box Account to buy, sell and hold securities in Knowledge House for the sole or partial purpose of manipulating the trading price of Knowledge House securities to keep the trading price above the Threshold Value.

[341] Dunham and Weir filed similar statements of defence and counterclaims. In their counterclaims, Dunham and Wadden also alleged that the Bank "failed to monitor or supervise Clarke notwithstanding a clear duty to do so."

[342] In September 2002, the Bank filed statements of defence to counterclaims that Weir, Dunham and Wadden filed against the Bank in response to the Bank's Debt actions against them. With respect to Wadden, Dunham and Weir, the Bank denied vicarious liability for the actions of Clarke and states that if the allegations against him are proven, then Clarke "was acting on a frolic of his own." Against Dunham, the Bank stated that "with respect to the allegations in paragraphs 20 to 24 of the defence and counterclaim [which included the allegation of failure to supervise], … it always conducted itself in a businesslike and reasonable manner and within the parameters of its rights according to the margin agreement as set out above and industry regulations."

[343] The Bank stated that it "is not aware of any actions of Bruce Clarke … that were for the sole or partial purpose of manipulating the trading price of Knowledge House securities to keep the trading price above the threshold value as alleged in

paragraph 8 of the defence and counterclaim". In all defences, the Bank denied it owed the Dunlop clients a fiduciary duty, a duty of care in negligence or that it breached any contract with the Dunlop clients. It appears the Bank's initial Statement of Claim, filed in September 2001, and its defences to the counterclaims in the Debt actions, filed in September 2002, were never amended from the date of filing until they were addressed at trial by Warner, J. in 2012. The Bank slightly amended its third party action in the Debt actions in May 2006, but this had no effect on the substance of those pleadings.

[344] In August 2003, the Bank filed the Main action where it alleged that Clarke and others were involved in a conspiracy to manipulate the share price. Wadden defended the Main action and launched another counterclaim against the Bank. I will consider the effect of the trial judge's decision with respect to the Main action below in the part of the decision dealing with Mr. Wadden.

Post-June 2005 Filings

[345] There are two main events following the execution of the June 2005 settlement agreement that bear greater scrutiny. I note here that the Bank amended its Statement of Claim in the Main action on May 2, 2006 but this amendment did not radically alter the pleadings.

[346] Whatever amendments were made by the Bank to its pleadings in 2006 changed absolutely nothing in terms of what the Bank had to prove, legally, in the different actions. They simply removed some of the parties from the pleadings. Thus, despite the fact that the Bank committed itself to an unequivocal position in 2005, it never amended the pleadings at all to reflect this change. The slight tinkering to the pleadings in May 2006 did nothing to disclose what the Bank knew to be the true state of affairs.

[347] Perhaps the most important document is the Bank's defence to Wadden's counterclaim in the Main action, which was filed on March 27, 2007. In this document, the Bank made the following denials:

> 5. In response to paragraph 107, NBFL denies that it consented, condoned or acquiesced in any of the alleged conduct of Bruce Clarke and states that the Defendant instructed, or alternatively, acquiesced in the instruction of Bruce Clarke, directly or indirectly by Daniel Potter and/or Blois Colpitts, with respect to the improper trading in Knowledge House Inc. ("KHI") shares in the various Defendants' margin accounts with NBFL.

> 6. NBFL denies that it failed to monitor the conduct of Bruce Clarke and if he was involved in improper trading of KHI shares, or any other shares as alleged or at all, then NBFL denies that it was aware, at any material time, of such conduct, and further, any such conduct was not of a kind that would make NBFL liable as claimed or at all.
>
> 7. In response to paragraph 108, NBFL denies that it neglected or refused to control margin accounts, as alleged or at all, that in any way, caused, or contributed to, the collapse of KHI share value.
>
> 8. In reply to paragraph 109 and 110, NBFL denies that it was informed of the true nature of trades conducted by the Defendant and others. NBFL states that the details of trading in KHI shares from which NBFL could have identified the impropriety of the trades in question, were known, or ought to have been known, by the Defendant, and were deliberately concealed from NBFL.
>
> 9. NBFL denies the allegations in paragraphs 115, 116 and 117 and states that it did not breach any agreements or duties as alleged or at all that in any way caused, or contributed to, the collapse of KHI share value and NBFL denies that there was no reasonable notice given to margin account holders prior to NBFL exercising its right to liquidate shares in the margin accounts pursuant to the various margin account agreements.
>
> ***
>
> 11. In further reply to the whole of the Statement of Defence and Counterclaim, NBFL denies that it consented to, condoned or acquiesced to a variety of regulatory breaches as alleged and states that at all material times the Defendant was fully aware of the trading activity in KHI shares alleged to have been in breach of applicable regulatory schemes.
>
> 12. In further reply to the whole of the Statement of Defence and Counterclaim NBFL states that at all material times NBFL conducted itself within its rights according to the agreements in force between it and the Defendant including but not limited to margin account agreements. At no time did NBFL breach any such agreements with the Defendant as alleged or at all.
>
> [Underlining mine]

[348] The key assertion in the Statement of Defence that runs contrary to the admissions in the settlement agreement is the Bank's denial that it failed to properly supervise Clarke in a number of different ways. This is pleading something that the Bank knew to be false. It is also difficult to reconcile the Bank's insistence in its pre-June 2005 pleadings (which it never amended) that Clarke was on a "frolic of its own" and denying vicarious liability for his actions with the Bank's admissions in the settlement agreement that it failed to supervise

Clarke. Warner, J. points out what follows, legally, from the Bank's admission on May 17, 2012 in its post-trial brief that it failed to supervise Clarke:

> [35] … The effect of this admission is that, if Clarke is found to have acted unlawfully; that is, fraudulently, negligently or in breach of his contractual obligations to the Dunlop Clients or to any of them in connection with the 540 account, NBFL is liable to those Dunlop Clients for Clarke's action both on the basis of NBFL's own negligence and breach of contract, and on the basis of vicarious liability for the acts of Clarke who, it is not contested, was acting throughout in his capacity as broker employed by NBFL.

[349] This is an admission that the Bank hid from every other party to this litigation, from the time it executed the settlement agreement in June 2005.

[350] The profound effect such a disclosure would have had on the course of this litigation, cannot be denied.

[351] As I have already explained, the trial judge made a serious error in failing to pursue that inquiry. With respect, the issue was not whether the Bank's *ex post facto* admissions in the settlement agreement served to confirm the evidence adduced at trial, but how the Bank's deliberate withholding of the settlement agreement affected the litigation. For example, the Dunlop clients were forced to call Clarke as a witness, and establish that the Bank failed to supervise him. The Dunlop clients were compelled to take steps to prove something that the Bank admitted seven years before and had deliberately withheld. The fact that the Bank admitted that it failed to supervise Clarke in its May 17, 2012 post-trial brief after all evidence had been adduced is one of the most egregious examples of trying to close the stable door after the horse has bolted. By then the writing was on the wall, and the Bank's admission that it had failed to supervise Clarke, had violated securities laws, and had acted contrary to the public interest was no concession or admission at all.

[352] From all of this the inescapable conclusion is that following the execution of the settlement agreement by its National President in June 2005, the Bank sought to maintain a position in its claims against others, and in its own defence, which it knew to be false.

[353] I will now consider the proper remedy for each claimant in the three appeals.

The Barthe Action – Barthe Estate

No Ratification

[354] It will be recalled that the late Michael Barthe (in two separate purchases) invested a total of $3,325,000.00 in KHI shares. He lost the value of his shares, except a minimal recovery, and the interest on those shares. He sued to recover his complete investment. The Bank denied liability and counterclaimed against Barthe alleging Barthe was aware of the market manipulation scheme and failed to alert Bank officials. The Bank third partied Wadden for any liability found against it. Essentially the trial judge allowed the Barthe Estate to recover only half of its lost investment. Warner, J. reasoned:

> [928] … the evidence appears to show that Barthe paid the last two installments on the private placement after he became aware of the stock manipulation scheme and he knew or should have known, that Clarke was a party to that scheme.

Thus the judge reasoned that Barthe had "ratified" Clarke's actions and so was only entitled to recover the:

> [930] loss to Barthe in the value of the KHI shares was 1.7 million dollars, less the amount recovered by his sale of those shares after the collapse of NBFL. …

plus pre-judgment interest. The judge rejected the Bank's mitigation arguments and dismissed its counterclaim and third party claims against Barthe.

[355] As noted earlier, the Bank appealed on a variety of grounds including the assertion that the judge erred in failing to find that Barthe had ratified all of Clarke's actions and therefore was disentitled to recover any of his lost investment, or in finding that any of Clarke's conduct had resulted in an artificial share price, in the absence of any evidence that it had done so. The Barthe Estate cross-appealed seeking, among other relief, recovery of the entire lost investment.

[356] Having concluded that the Bank's pleadings ought to be struck, and their claims permanently stayed, I will not consider at all the substance of the Bank's appeal or any of the trial judge's analysis or findings with respect to it.

[357] I need only address the Barthe Estate's cross-appeal based on what it says was the trial judge's failure to properly apply the law with respect to the defence of ratification.

[358] I agree. In my respectful view, the judge erred in his finding that the late Michael Barthe had ratified Clarke's activities and that as a consequence the Barthe Estate had no claim to its second investment in his payment of $1,625,000.00 as the last of his two installments.

[359] Respectfully, the trial judge's consideration of ratification is flawed both in terms of law and in fact. I will deal first with the facts. Clarke testified at trial and admitted during cross-examination that Barthe had no inkling whatsoever of anything that Clarke was doing. Thus, there was no "conduct" that Mr. Barthe could be said to have "ratified". This uncontradicted evidence that Barthe knew nothing about Clarke's nefarious activities cannot somehow be stretched to establish a link between Barthe and Daniel Potter who was never called to testify at trial. The judge placed great emphasis on the January 15, 2001 "confidential memo" which Potter sent to Barthe and Ristow on January 19, 2001. In the mind of the trial judge this was the "smoking gun" upon which Mr. Barthe must have then known that the KHI share price was a sham such that everything he did after that date was to condone the manipulation scheme which Clarke and other insiders had orchestrated. The judge put it this way:

> [508] On January 19, 2001, Potter sent Barthe and Ristow a January 15 confidential memo outlining KHI's need for three million dollars in new equity immediately and advising of the reduction of KHI's bank operating credit lines. …
>
> [509] This letter was significant. It was the first time that KHI or anyone disclosed to Barthe and Ristow the fact that KHI was in desperate needs of new equity, and involved in a daily market support program because of the downward pressure on KHI's market share price.
>
> …
>
> [565] I have found that Barthe did not know of the market manipulation scheme until after January 19, 2001. …
>
> [756] Barthe's claim against NBFL is based solely on Clarke's participation in the stock manipulation scheme and the fraud perpetrated Barthe (sic) by reason of it.
>
> …
>
> [928] Barthe made two investments in KHI after Clarke became involved in the stock manipulation scheme. However, as the Court found, the evidence appears to show that Barthe paid the last two installments on the private placement after he became aware of the stock manipulation scheme and he knew or should have known, that Clarke was a party to that scheme.

[360] Respectfully, I see nothing whatsoever in the so-called "January 15 confidential memo" (nor the attachments that went with it) which could satisfy a suitably informed and reasonable observer that Michael Barthe had become "aware of the stock manipulation scheme and … knew or should have known, that Clarke was a party to that scheme." The judge used this as the basis for finding that Michael Barthe must then have surely known of a secret plot on the part of Clarke, Potter and other insiders to artificially manipulate the share price of KHI, thus putting Barthe "on notice" that he had better divest himself of any ownership in the company. Such a conclusion was in my view a palpable and overriding error.

[361] Further, the judge erred in law by relying upon the January 15 memo as constituting proof of the truth of its contents. Specific agreements were negotiated between counsel for the parties as to the extent to which documents were being admitted at trial. A detailed table was prepared to that effect. Some documents were admitted simply to prove that they had been sent, or received. Others were explicitly stated as being admitted as proof of the truth of their contents. Delivery of the communiques from Potter to Barthe were explicitly labelled as not being admitted for proof of their truth. Yet the trial judge relied upon this documentation in exactly that way. As Mr. Dunlop insisted on behalf of his clients at trial, if the Bank had wanted to rely upon the content of those communiques for the truth of the information therein contained, they ought to have called Mr. Potter as their witness. That would be the only way to establish the "truth" of the information Potter had written in the memo and communicated to the late Mr. Barthe. But Potter never testified.

[362] Finding that Barthe "knew" the true state of affairs after January 19, 2001, and then decided to effectively ride it out and condone the activities of the insiders in the hope that it would ultimately lead to a recovery of his investment seems inconsistent with the evidence that Messrs. Barthe and Ristow were considered to be fair and honourable gentlemen.

[363] I would also respectfully find that the judge erred in his appreciation and application of the law with respect to the defence of ratification. Neither the judge nor this Court on appeal was provided with a single case standing for the proposition that a defence of ratification could be said to exist in the circumstances of this case as between an investor (Barthe) and a third party (Potter). The authorities: see **Connolly v. Walwyn Stodgell Cochran Murray Limited** (1993), 121 N.S.R. (2d) 278 (C.A.), leave to appeal refused [1993] S.C.C.A. No. 253; **Williamson v. Williams** (1997), 160 N.S.R. (2d) 106 (C.A.), leave to appeal

refused, [1997] S.C.C.A. No. 441; **Blackburn v. Midland Walwyn Capital Inc.**, [2003] O.J. No. 621 (S.C.J.), aff'd 2005 O.J. No. 678 (Ont. C.A.), leave to appeal refused, [2005] S.C.C.A. No. 196, have only ever considered the defence, in the context of a stock market relationship such as occurred here, as between an investor and a broker. The Bank's attempt to extend the defence of ratification to somehow connect Michael Barthe to Clarke (whom he had never met, and concerning whose activities Clarke said under oath that Mr. Barthe was completely unaware) and through Clarke to Potter with whom he never had the kind of relationship upon which ratification could be founded, finds no support in the law.

[364] For all of these reasons, I would set aside the trial judge's finding that Mr. Barthe's involvement on and after January 19, 2001 constituted ratification, such that he "lost" his ability to recover the amount of the second installment of his investment worth $1,625,000.00. I find that the Barthe Estate is entitled to recover from the Bank that sum from the date of that investment to the date of this judgment, plus pre-judgment interest at the rate approved by the trial judge. In order to fix the date of that investment I turn to the judge's decision and what he said concerning Mr. Barthe's payment of the $1.625M, in two installments. The judge said:

> [531] It is not clear from the evidence when Barthe and Ristow paid the two remaining instalments on their Subscription Agreement in the amount of $1,625,000.00. It is clear that they did pay this remaining commitment.
>
> …
>
> [570] It appears from the evidence that, while there is no direct evidence of when Barthe made his $1,625,000.00 payment to the private placement, he likely made those payments when they were due for payment on May 15 and August 15, 2001. Whenever Barthe made those payments, it is clear he made them after January 19, 2001, when he became aware for the first time that the KHI share price had been manipulated.

[Underlining mine]

From this I conclude that May 15, 2001 is the proper date to use for Mr. Barthe's payment of the first installment, such that pre-judgment interest will start to run, on the sum of $1.625M, from that date, to the date of this judgment, at the rate approved by the trial judge.

[365] Later in these reasons I will consider the matter of punitive damages to the Barthe Estate on account of the Bank's abuse of process.

[366] I will turn now to a consideration of the appropriate remedy and relief in the second appeal.

The Debt Action – Dunham, Weir and Blackwood

No Ratification

[367] To recap, the trial judge found that Clarke's misrepresentations were not negligent. They were in fact intentional:

> [370] I find that Clarke did not make negligent misrepresentations to Dunham. He intentionally failed to disclose, and by his silence, intentionally misrepresented the circumstances of KHI and the trading of KHI shares, because of his conflict of interest.

[368] The judge found that Clarke was liable to Dunham, Weir and Blackwood for having breached his duties in contract, and as a fiduciary. Clarke was found to have taken advantage of Dunham's naivety and vulnerability by failing to disclose his conflicts of interest, which included his own investments in KHI and his participation in the stock manipulation scheme. On several occasions Clarke ignored Dunham's specific investment instructions. He did not attempt to diversify Dunham's account. Clarke acted fraudulently when he failed to comply with Dunham's instructions to sell shares (to his own advantage), or provide the honest professional advice his position demanded. For its part Warner, J. found that the Bank breached its duty and standard of care owed both in contract, and in negligence, by failing to properly supervise Clarke and Clarke's 540 account. Importantly, the judge found that had the Bank done its job, it would have uncovered Clarke's fraud, and his many various conflicts of interest.

[369] Thus, the judge found the Bank liable to Dunham on three fronts: vicariously, on account of Clarke's wrongdoing; directly liable to Dunham for his losses on account of the Bank's own negligence and breach of contract; and liable for punitive damages for the manner in which it continued to deal with Dunham, notwithstanding the Bank's discovery years earlier that Dunham was entirely blameless.

[370] Based on the trial judge's valuation of the shares, he calculated Dunham's loss at $810,000.00, less the net proceeds received from the sale of certain shares, as well as the principal portion of the margin debt, said to be $318,603.96. The judge also disallowed other claims including consequential losses, on the basis that

Dunham had failed to prove causation. Because there is no easy way to meaningfully distill the judge's calculations and findings, I will refer to his decision starting at ¶858:

> Lost Value of KHI Shares
>
> [858] It is not possible to determine exactly what would have happened if Clarke had not acted fraudulently and breached his fiduciary duty to Dunham - sold his KHI shares and diversified Dunham's account between June and August 2000. That said, it is not speculative to calculate the loss in the KHI share price, but for Clarke's breach wrongdoings. There was a market price at which KHI shares were traded on the TSX.
>
> [859] KHI was a thinly-traded stock. Except for the arranged block purchases by wealthy investors (Keating, Banks, Barthe and Fountain) and by Clarke, there was no obvious large purchasers. Nevertheless, the number of the shares sought to be sold by Dunham was not substantial.
>
> [860] I conclude that it was likely that, but for Clarke's failure to give prudent investment advice and his dishonesty in diverting Dunham from selling KHI shares and, instead, creating margin debt, Dunham would have sold almost all (and possibly all) of his KHI shares before the end of September 2000. I therefore calculate the loss of KHI share value as being the market value at which KHI shares sold between June 30 and September 30, 2000.
>
> [861] For the most part, KHI shares sold between $6.65 and $6.80. The highest price during that period was $6.95 and the lowest price (on two different days) was $6.40. I estimate that the median price at which KHI shares sold during the period was $6.75.
>
> [862] Excluding the first 30,000 shares, which were sold by Clarke to pay off Dunham's debt to KHI and withdrawn for personal use, I calculate the loss to Dunham from the failure to sell his KHI shares as 120,000 KHI shares at $6.75 or $810,000.00. From this, I deduct the net proceeds from the sale of the 13,000 KHI shares on September 13, November 7, and December 19, 2000.
>
> [863] The law is clear that for a breach of fiduciary duty, one of the remedies is to disgorge the wrongdoer from profits.
>
> [864] Clarke acted fraudulently and in breach of his fiduciary duty. I disallow deduction of any brokerage fees that would normally be incurred on the sale of these shares. For the same reason, in giving credit for the sale of 13,000.00 KHI shares, I give credit for only the net amount received.
>
> [865] Second, NBFL argues that from this should be deducted the margin debt of $353,021.96.

[866] Dunham argues that, by reason of Clarke's fraud and breach of fiduciary duty, for which NBFL was liable, Dunham should not be liable for any of the margin debt.

[867] It appears from the submissions of the parties, that of the margin debt, $34,418.00 was interest charged monthly on the margin debt by NBFL. The remainder of the margin debt appears, for the most part, to be in the form of withdrawals by Dunham for his personal use. The personal use appears primarily to relate to the construction of a residence and the purchase of a vehicle, but may have included monies for investments in other projects pursued by Dunham after he left KHI in April 2000.

[868] The principle that wrongdoers, especially those with a fiduciary duty or who acted fraudulently should be disgorged of any profit, means that it would be inequitable for Dunham to be liable for the portion of the margin debt related to interest charged by NBFL on the debt.

[869] At the same time, the Court fails to see the rationale for deducting from the value of the KHI shares that should have been sold by Clarke the principal amount of margin debt that was withdrawn by Dunham for personal purpose. For that reason, the Court deducts from the $810,000.00 loss in the market value of his KHI shares not the just the net amount recovered from the sale of 13,000 KHI shares, but the principal portion of the margin debt, which I believe is $318,603.96.

[870] Dunham is entitled to prejudgment interest from September 1, 2000. Absent better evidence, the default prejudgment interest rate, set out in the *Civil Procedure Rules* is 5%. NBFL, in its post-trial submission, provides detailed calculations supporting a prejudgment interest of 2.614%. This rate is calculated on the basis of the average of the one-year Treasury Bill and two-year Government of Canada Bond Rate for the relevant period. I adopt that rate, compounded and calculated monthly, not in advance.

Consequential Losses

[871] The claimed consequential losses over 11 years include:

a) Lost income from June 30, 2000 to December 31, 2012, at the rate of the $40,000 per year ($440,000.00).

b) Loss of the value of investments ($80,000.00).

c) Loss of his investment in a business project "Fantasy Stocks", which he claims he was unable to complete because of lack of financing -- $113,000.00.

d) Interest paid on credit cards -- $51,576.00.

e) Professional fees paid in relation to his filing for personal bankruptcy -- $2,200.00.

> f) Interest paid on the mortgages he took out on the home that he mortgaged to live on and pursue his projects on -- $126,000.00.
>
> [872] The law permits claims for consequential losses. The starting point, however, is causation and the application of the "but for" analysis to the connection between the wrongdoing of the defendant and the loss to the plaintiff.
>
> [873] Dunham did not cease his employment with KHI and was not prevented from pursuing other employment, by reason of the failure of Clarke to diversify his account.
>
> [874] As a result of his withdrawals in his margin account, Dunham's home appears to have been paid in full, until he took a collateral mortgage on July 31, 2001 in the amount of $159,000.00 and remortgaged the property on August 30, 2002 for $337,533.75 (of which some of the proceeds were used to pay off the earlier mortgage). I agree with NBFL that the timing of the mortgage advances negates Dunham's claim that the failure of Dunham's various business projects, including "Fantasy Stocks" was casually connected to the failure of Clarke / NBFL to liquidate his KHI shares.
>
> [875] Dunham has failed to establish that the consequential losses were caused by Clarke's wrongdoing. A determination of what other reason may have led to the failure of those business ventures, and the money borrowed through the two mortgages is not necessary.

[371] The judge's reasoning and conclusions with respect to the separate claims advanced by Weir and Blackwood are equally detailed and not easily distilled. The judge said:

> [902] I found that Clarke / NBFL are liable to Weir and Blackwood for failing to sell their KHI shares when they dipped below $5.00 after Weir's communication to Clarke on January 19, 2001.
>
> [903] As I noted in the analysis of Dunham's claim, KHI was a thinly-traded stock, but not so thin that, if Clarke had followed instructions, the small quantum of shares held by Weir and Blackwood would most likely have sold on the market. The Court notes that the sale of 1,000 KHI shares on March 24 brought more than $5.00.
>
> [904] Because the failure to follow instructions was intentional and based on Clarke's conflict of interest and fraud, NBFL should not be entitled to profit from broker fees or commissions respecting the sale of the shares. The principle of disgorgement applies.
>
> [905] The loss to Weir in his LIRA account is $25,000.00, calculated as 5,000 KHI shares at $5.00. The loss to Blackwood in its margin account is $35,000.000, calculated as 7,000 KHI shares at $5.00. The loss to Weir in his margin account is $140,625.00, calculated as 28,125 KHI shares at $5.00.

[906] Respecting the latter shares, I found that the standing instructions to sell of January 19, 2001, apply to the shares placed into Weir's margin account on February 28 (unbeknownst to him). NBFL argues that those shares were restricted from being sold until June 27, 2001. I disagreed in my analysis. Even if I was wrong, they should have been put on the market on June 27, 2001. I am satisfied that it is likely that they would have been sold if that had been done.

[907] Consistent with my analysis respecting Dunham's claim for damages, the principal portion of the margin debt owed by Weir and Blackwood to NBFL is deductible from the award for loss in the value of the KHI shares.

[908] The interest portion (all interest charged and/or paid at any time) is not deductible from the claim for the loss in value of the KHI shares on the same principle that Clarke / NBFL should not profit, or should be disgorged of any profit from Clarke's intentional wrongdoing.

[909] I agree with Weir and Blackwood that the manner in which NBFL dumped Blackwood 325,000 Enervision shares on the market on September 19, 2001, for a nominal price (about two cents per share) was unreasonable, and not done in good faith. Just because NBFL had a sole discretion under the margin account agreement to deter how to handle margin debt and had no duty to maximize the price, its conduct in this case clearly was not intended to benefit NBFL so much as to cause damage to Weir, who at that time was accusing (with the benefit of hindsight rightly) NBFL of wrongdoing.

[910] Blackwood has produced no evidence as to what the market value of the Enervision shares would have been, " but for" NBFL dumping them on the market on September 19. Weir has testified with respect to the loss of his business reputation and its consequences upon Enervision. That loss has not been quantified.

[911] The Court found that because Enervision had just entered into a major contract in Norway that Weir was not able to mitigate the damage caused by NBFL's dumping of the shares, by purchasing them himself.

[912] Absent evidence of the quantum of the loss to Blackwood respecting the manner in which NBFL dumped those shares; I decline to award damages. However, that is not the end of the matter. My interpretation of the evidence of Weir, and the communications and documents associated with the advance of the $100,000.00 by NBC in March 2003, is that the $100,000.00 advance by NBC to the Weirs related primarily to the settlement of Weir's (and Blackwood's) complaint against NBFL related to the damage to Enervision and Blackwood's investment in Enervision. Consequently, I find that NBC is not entitled to repayment of the $100,000.00 advanced towards a settlement of the Enervision aspect of the Weir / Blackwood claim against NBFL's liability to Weir and Blackwood with respect to its loss of the KHI shares, nor to a set-off against the other damages awarded to Weir and Blackwood.

[372] Stripped to its essentials, the claimants' appeal attacks these findings saying the judge erred in failing to vitiate their margin debt, in calculating pre-judgment interest and in reducing some of their claims, and in rejecting others, particularly their substantial "consequential losses" on the basis that they had failed to prove causation. The Bank cross-appealed saying the judge erred in failing to find that Dunham, Weir and Blackwood were well aware of Clarke's fraudulent activities especially because he had repeatedly refused to honour their instructions. Thus, the claimants were said to have ratified and condoned Clarke's actions such that they had no claim against the Bank.

[373] After carefully considering the entire record as well as counsels' lengthy written and oral submissions, I am satisfied that the Bank's abuse of process requires a partial adjustment of the trial judge's conclusions with respect to the Dunham, Weir and Blackwood claimants. In his decision the judge started with Dunham's $810,000.00 loss in the market value of his KHI shares but then deducted what he described as the principal portion of the margin debt, said to be $318,603.96, on the basis that to do otherwise would be "inequitable". I disagree. The Bank's own egregious conduct amounting to an abuse of process effectively extinguishes its claims and defences such that Dunham's entire margin debt is vitiated, including the amount for principal that the judge had exempted.

[374] On the same basis I would reverse the judge's conclusion at ¶907 of his decision:

> [907] Consistent with my analysis respecting Dunham's claim for damages, the principal portion of the margin debt owed by Weir and Blackwood to NBFL is deductible from the award for loss in the value of the KHI shares.

Consequently, the entire margin debt owed by Weir and Blackwood is vitiated, including the amount for principal that the judge had exempted.

[375] In all other respects I see no basis for interfering with the calculations or quantum of damages awarded by the judge to the Dunham, Weir and Blackwood claimants. Each finds support in the evidence and none reflects palpable and overriding error. Accordingly, I would not vary the judge's other calculations, or his award of pre-judgment interest to the claimants at the rate he approved being 2.614%, compounded and calculated monthly, not in advance (see ¶870 of his decision) or disturb his rejection of their claim for consequential losses, for the reasons he described.

[376] In light of my decision that the Bank's pleadings should be struck and its claims permanently stayed, I need not consider the substance of the Bank's cross-appeal which sought relief from liability on the basis of a defence of ratification, except to say that there is no merit to it in any event. In *Securities Litigation and Enforcement*, 2nd ed., by Joseph Groia and Pamela Hardie, (Carswell: Toronto, 2012), the authors say at p. 270:

> If it is found that a client has ratified a broker/dealer's wrongful acts, the broker/dealer may void liability. Ratification can be either express or implied but it must be done knowingly.

[Underlining mine]

[377] The Ontario Court of Appeal made a similar point in **Blackburn v. Midland Walwyn Capital Inc., supra**, at ¶18: "In order for ratification to occur, the client must know all of the circumstances." Or, as the trial judge puts it in **Penner v. Yorkton Continental Securities Inc.**, [1996] A.J. No. 278 (Q.B.), at ¶84:

> Did Penner ratify Buskell's conduct? No. Ratification requires the client to have full knowledge of what has happened, and to then condone it. Here, Penner was not fully informed. He did not know the size of the trading. He was told by Buskell that the trading was profitable. In fact, it was losing money month after month.

[Underlining mine]

[378] When dealing with this particular case, the judge was correct in his appreciation and application of the law regarding ratification. He properly found that one cannot condone and ratify conduct of which one is unaware. After deciding on the evidence that Dunham and Weir were left completely in the dark as far as Clarke's fraudulent scheme was concerned, they could not in any way have "lost" their right to sue for damages after "ratifying" what he had done.

[379] The judge awarded each of Dunham, and Weir and Blackwood, punitive damages of $200,000.00 which they say is woefully inadequate to address the Bank's conduct in this case. I will address that issue later in these reasons when I consider the potential for enhanced punitive damages on account of the Bank's abuse of process.

The Main Action – Wadden

Vindication

[380] To recap, this case is limited to Wadden's appeal. The Bank did not cross-appeal.

[381] At trial, the Bank accused Mr. Wadden, together with others, of being part of a secret conspiracy whose members fraudulently manipulated the market price of KHI shares, thereby deceiving the Bank into extending substantial credit which then enabled the conspirators to acquire further shares and fuel their margin accounts. The Bank sued Wadden claiming repayment of all debts owed the Bank in regard to loans secured by KHI shares; punitive damages; collateral expenses; indemnification for any claims for which the Bank might be found liable; other damages; and solicitor and client costs.

[382] Initially the Bank had sued a group of alleged conspirators, but by the time the trial started, the Bank's claims against all of the other defendants had been settled, discontinued or otherwise terminated leaving Mr. Wadden as the only party still standing.

[383] Wadden denied all of the allegations made against him by the Bank and counterclaimed seeking damages directly against the Bank for its negligence, breach of contract and illegal activities, and vicariously for the actions of its broker Clarke. Among Wadden's claims were damages for lost reputation; pecuniary losses; a declaration that the margin agreements were null and void; punitive damages; and solicitor and client costs.

[384] In simple terms the trial judge found that Mr. Wadden was a conspirator and part of a group which deliberately and secretly manipulated the price of KHI shares to fuel their own greed and protect their debt exposure. On this basis the judge allowed the Bank's claim against Wadden in part, and also found that Wadden would be jointly and severally liable to the Bank for the Bank's liability to the Barthe Estate. Further, although the judge does not actually address this in his reasons, the order of Warner, J. dismissed Wadden's counterclaim against the Bank where he sought recovery of his losses based upon the value of his KHI shares in March 2000, 18 months before the company's collapse.

[385] As indicated earlier, Wadden was self-represented at the hearing in this Court. He adopted the submissions of Mr. Dunlop on behalf of his clients in the

other two appeals, in particular, the request that the pleadings be struck and a stay entered on account of the Bank's abuse of process. He also sought punitive damages and recovery of the pecuniary losses he said he suffered at the hands of the Bank and its employee Clarke. Mrs. Wadden, acting as agent and spokesperson for her husband, very ably presented a number of detailed submissions challenging many of the factual findings of the judge as well as attacking his analysis and conclusions on the basis of serious alleged errors in law and procedure. In response, the Bank said that the judge's analysis was legally sound and that none of his factual conclusions were the product of palpable and overriding error.

[386] In considering the merits of Wadden's appeal, I will start with his complaints regarding the trial judge's factual findings and assessment of credibility.

[387] Reduced to its essentials, Wadden's submission on this aspect of his appeal are in fact an invitation to this Court to reconsider and reweigh the evidence presented at trial and reach a different conclusion than Justice Warner. Respectfully, that is not our role. Unless we are convinced the judge misconstrued the evidence, or neglected material evidence, or found facts or drew inferences which are obviously wrong, and bear on the outcome, then we cannot intervene.

[388] On appeal, a similar level of deference is paid to a trial judge's assessment of credibility. For whatever reason, Mr. and Mrs. Wadden failed to impress Justice Warner. He made strong findings which criticized the credibility and reliability of their evidence. Whether I would have reached the same conclusion is not the test we are obliged to apply.

[389] Deciding matters of credibility is a matter for which trial judges are particularly well-suited. The advantage of seeing and hearing testimony first-hand is much preferred than reading cold prose in a transcript on appeal. That is why considerable deference is accorded to a trial judge's assessment of any witnesses' credibility and reliability. The test is not whether we agree with that assessment, or whether we might have decided the matter differently. Unless we are persuaded that the judge's findings are the product of palpable and overriding error, we must not intervene.

[390] Having personally supervised these matters during several years of judicial case management, and then presided over this complicated trial, Justice Warner was well-placed to very carefully consider the testimony of Mr. and Mrs. Wadden,

their lawyer Brian MacLellan, Q.C., and others, and draw his own conclusions concerning credibility and reliability of that evidence. Despite Mrs. Wadden's able submissions I think that Justice Warner's decision does contain references to the evidence purporting to explain why he rejected much of their testimony and found that they were not reliable witnesses. I need not repeat those examples here. While I may not have reached the same conclusion as the trial judge, I am, respectfully, not able to say that on this record the judge was so obviously and so seriously wrong in his assessment as to require our intervention.

[391] But that is not the footing on which Mr. Wadden's appeal succeeds or fails. The deferential constraint which limits our appellate function in such matters need not be an obstacle in Wadden's quest for vindication. In my respectful view, the reversible error in this case was the judge's failure to properly apply the law of conspiracy. That flawed analysis was the sole basis of the Bank's success in its claims against Wadden for damages and indemnification, as well as the judge's apparent rejection of Wadden's attempts to counterclaim for his loss.

[392] At the hearing, in response to a question from the panel, counsel for the Bank acknowledged that the trial judge's language (at ¶728) that Wadden "knew or should have known of the manipulation efforts of Potter and Clarke …" is not sufficient in and of itself to ground a finding of conspiracy. However, counsel for the Bank suggested that the decision is replete with factual underpinnings of conspiracy and that it is not fatal that the trial judge has not put forward the "well-known legal test" for conspiracy. Instead, the Bank argued that the judge reviewed the evidence and ascribed blame to various people including Wadden and that these factual findings should not be disturbed on appeal.

[393] With respect, the absence of the legal test is fatal. One cannot infer from the trial judge's findings that Wadden was part of the conspiracy, as this term is defined in law. Paragraphs 201-202 refer to "joint activities" and "acting jointly with KHI insiders", but the word, conspiracy or conspire, does not appear in these paragraphs at all. One of the few references to a conspiracy appears later in the judgment at ¶703 where the trial judge mentions a conspiracy "between Clarke, Potter and Colpitts". The trial judge then says (at ¶705-707):

> 705 The same cannot be said about Wadden. Wadden discovered the market manipulation and conspiracy. He was faced with a choice of losing everything and then suing to recover his losses or participating in the scheme with the hope that Potter would be able to find a buyer to allow him to sell his shares and exit the conspiracy. He chose the latter.

> 706 Wadden was certainly faced with a difficult choice, but it can hardly be said that "but for" the actions of Clarke, Wadden would not have suffered the losses he experienced. Wadden's losses occurred after he assumed the risk and responsibility of holding the second largest stake in the equity of KHI.
>
> 707 Wadden knew about the box account and that KHI was being manipulated by Clarke and others. He took a chance; it did not pay off. It was Clarke that pushed Wadden to the precipice, but it was Wadden who chose to remain there, and it is Wadden that must bear the responsibility for any damages that resulted from him falling off.

[394] Interestingly, the trial judge suggests that Wadden "discovered the market manipulation and conspiracy" rather than being part of it, and having discovered it chose to remain a participant. These sentences cannot support a factual finding of conspiracy. Neither do they permit any meaningful evaluation on appeal.

[395] Even if the trial judge's reasons did allow for careful appellate review, and one could infer that he found as a fact that Clarke and Wadden were co-conspirators, the decision contains no analysis that then applies these "facts" to the legal test for conspiracy. The trial judge failed to apply the legal elements of unlawful conduct conspiracy established by the Supreme Court of Canada in the leading case of **Cement LaFarge v. BC Lightweight Aggregate**, [1983] 1 S.C.R. 452. More recently in **Agribrands Purina Canada Inc. v. Kasamekas**, 2011 ONCA 460, Justice Goudge provides a succinct explanation of the law:

> 24 The seminal case in Canada on the tort of civil conspiracy is *Canada Cement Lafarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452. Speaking for the court, Estey J. described at p. 471 two categories of conspiracy recognized by Canadian law:
>
> > Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
> >
> > (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
> >
> > (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

> In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

25 This case deals with the second category, namely unlawful conduct conspiracy. The first does not apply because there was no finding that the predominant purpose of the appellants' conduct was to cause injury to the respondents. The respondents did not advance that proposition at trial.

26 For the appellants to be liable for the tort of unlawful conduct conspiracy, the following elements must therefore be present:

> a) they act in combination, that is, in concert, by agreement or with a common design;
>
> b) their conduct is unlawful;
>
> c) their conduct is directed towards the respondents;
>
> d) the appellants should know that, in the circumstances, injury to the respondents is likely to result; and
>
> e) their conduct causes injury to the respondents.

[396] The Bank had to prove the five elements listed in ¶26 of **Kasamekas**. Critically, there is no finding that Wadden acted "in concert, by agreement or with a common design"; there is no finding that the co-conspirators conduct was "directed towards the Bank"; and there is no finding that Wadden "should have known" that injury to the Bank "is likely to result".

[397] The impact of the judge's finding on the personal and professional lives of Mr. and Mrs. Wadden was eloquently described by Mrs. Wadden in her oral submissions to this Court:

> To live with this allegation, to live with the allegation that you've participated in a civil conspiracy from 2003 until August 2013 when Justice Warner rendered his decision and for there to be no comment by Justice Warner on this matter was devastating. How is it reasonable that Mr. Wadden could be accused of a serious offence, have to defend against the claim legally, financially and reputationally and come away with a decision that took over 14 months to write and not understand the outcome of the case?

[398] In his pleadings Wadden said that if the Bank proved its claim that its own employee, Clarke, had participated in a conspiracy to manipulate the market price of KHI shares, then the Bank, by its own conduct, including breaches of various duties, was precluded from claiming against Wadden for any damages arising from such conduct. He pleaded and relied upon the *Contributory Negligence Act*, R.S.N.S. 1989, c. 95 and the doctrine of *ex turpi cause non oritur actio*.

[399] In his reasons the judge never addressed whether either the statute or the legal principle – that if one is engaged in an illegal activity, one cannot sue another for damages out of that activity – assisted Mr. Wadden.

[400] In sum, the trial judge did not make any findings of fact about what constitutes a conspiracy, who was involved, or how long the conspiracy lasted. The judge's reasons do not permit review; there are not the necessary factual findings to support the Bank's claim of a conspiracy; and the trial judge did not apply the legal test for a conspiracy to the few facts that he found.

[401] In the result and despite Justice Warner's strong findings of credibility against Mr. Wadden, he did not link those findings to the legal test for conspiracy. As I have already explained, this error is fatal to the judge's analysis. It was wrong to brand Mr. Wadden as a conspirator.

[402] Before leaving this subject I would add this: the judge's key finding is hardly consistent with the uncontradicted evidence that Wadden made formal complaints about the conduct of the Bank and Clarke to the Investment Dealers Association and to the Ontario Securities Commission, and was the first to allege conspiracy against the Bank in his defence to the Debt action and counterclaim filed October 17, 2001. This strikes me as hardly the type of action or accusation a "conspirator" would initiate.

[403] As I will now explain, without a finding that Wadden was part of a conspiracy as a matter of law, he can no longer be found liable to either Barthe, or Weir and Blackwood.

The Third Party Action – Liability to Weir and Blackwood

[404] Because the Bank's third party claims have been struck, the following analysis may be moot. But I think it is important nevertheless to explain why Wadden cannot be found liable to Weir/Blackwood or Barthe.

[405] A closer look at the pleadings in the third party claim reveals that Wadden cannot be held liable to Weir or Blackwood. The Bank's pleadings state as follows:

> 27 In the counterclaim of Weir in this action ("the Counterclaim"), Weir has alleged that there was wrongdoing on the part of NBFL and Clarke, and that NBFL is liable to Weir on the basis of direct and vicarious liability. In the event that NBFL is found liable to Weir (which is denied), NBFL says that the losses were caused by a conspiracy on the part of the third party defendants and NBFL claims over against the third party defendants.
>
> 28 With respect to the third party defendants, Potter, Starr's Point, Gramm, 230 NSL, 828 NSL, Richter, Snow, Meg Research, 748 NSL, Wadden, Courtney, Schelew, Colpitts, SMSS, Clarke and 540 NSL, NBFL adopts in the within action the allegations of NBFL in its third ~~Second~~ amended statement of claim in *NBFL v. Potter et al*,, SH 206439, which is attached hereto as Appendix B1.
>
> * * *
>
> 31 On the basis of the allegations in the above-referenced pleadings, NBFL claims indemnity and contribution as against the third party defendants for any damages awarded to Weir in the within action.
>
> [Underlining mine]

[406] Thus, for Wadden to be liable as a third party, the Bank must prove that Weir's and Blackwood's losses were caused by a conspiracy on the part of the third party defendants. In the alternative, there must be something within the allegations in the Main action to substantiate Wadden's liability. If the Main action is struck, there is nothing else to ground Wadden's liability. Given that the third party claim is based entirely on a conspiracy, the third party claim should have been dismissed because Wadden has not been proven in law to be part of a conspiracy. If a conspiracy is not proven and the legal test for a conspiracy not even considered, the Bank's third party claims cannot be successful.

[407] Further, the judge did not deal with causation with respect to the third party claims. He did not undertake a "but for" analysis with respect to the third party claim against Wadden. Without any basis for liability in the Main action, Wadden cannot be jointly and severally liable with the Bank for damages to Weir or Blackwood.

The Third Party Action – Liability to the Barthe Estate

[408] So too must the Bank's third party claim against Wadden for the Barthe Estate be struck.

[409] A closer look at the pleadings in the Bank's third party claim against Wadden in the Barthe action reveals that the pleadings are worded almost identically. The Bank's pleadings state as follows:

> 26 In their claim in this action, Barthe and Ristow have alleged that there was wrongdoing on the part of NBFL and Clarke, and that NBFL is liable to them on the basis of direct and vicarious liability. In the event that NBFL is found liable to Barthe and/or Ristow (which is denied), NBFL says that the losses were caused by a conspiracy on the part of Barthe, Ristow and the third party defendants. NBFL has counterclaimed against Barthe and Ristow, and hereby claims over against the third party defendants.
>
> 27 With respect to the third party defendants, Potter, Starr's Point, Gramm, 230 NSL, 828 NSL, Richter, Snow, Meg Research, 748 NSL, Wadden, Courtney, Schelew, Colpitts, SMSS, Clarke and 540 NSL, NBFL adopts in the within action the allegations of NBFL in its ~~Second~~ third amended statement of claim in *NBFL v. Potter et al.*, SH 206439, which is attached hereto as Appendix B1
>
> * * *
>
> 30 On the basis of the allegations of the above-referenced pleadings, NBFL claims indemnity and contribution as against the third party defendants for any damages awarded to Barthe and Ristow in the within action.

[410] In my opinion, Wadden cannot be liable to Barthe for the same reasons. If the Main action is dismissed, there is nothing else that can ground Wadden's liability. Given that the third party claim is based entirely on a conspiracy, this third party claim should have been dismissed because Wadden has not been proven in law to be part of a conspiracy. In addition, causation remains an open question with respect to the Barthe Estate; it is not at all clear that Barthe's losses were caused but for Wadden's inaction.

[411] I must now consider the impact of all of this upon Wadden's counterclaims.

Wadden's Counterclaims

[412] Wadden filed two counterclaims. The Bank filed the Debt action against Wadden in September 2001 and he counterclaimed in October 2001. The Bank defended this claim in September 2002.

[413] The Bank filed the Main action against Wadden in August 2003 and he filed another counterclaim against the Bank in November 2003. The Bank defended this claim in March 2007.

[414] It is instructive to compare Wadden's two counterclaims. In his initial (2001) defence and counterclaim, Wadden said three things. First, he denied the indebtedness and alleged that if there were such a debt, it was caused by Clarke and the Bank by reason of a breach of contract, breach of fiduciary duty and negligence. Second, he alleged that Clarke disobeyed Wadden's instructions and followed the instructions of third parties regarding his account. Finally, Wadden also alleged:

> 8. Clarke was an officer and director of a numbered company ("NuCo") that maintained at material times an account at National Bank Financial known as the box account ("the Box Account"). Clarke solely or, in the alternative, with third parties including Potter and Colpitts, controlled at material times NuCo and the Box Account and used NuCo and the Box Account to buy, sell and hold securities in Knowledge House for the sole or partial purpose of manipulating the trading price of Knowledge House securities to keep the trading price above the Threshold Value.

[415] In its September 2002 defence to Wadden's initial counterclaim, the Bank denied these three allegations and suggested that if Clarke were found to have acted in the manner alleged with respect to the second and third claims above, "Clarke was on a frolic of his own and the Bank is not vicariously responsible for the actions of Clarke."

[416] Wadden's claims in his 2003 counterclaim are framed more broadly. There does not appear to be a breach of contract claim but the fiduciary duty and negligence claims remain. In addition, Wadden pleads that Clarke breached his duty of honesty and loyalty to abide by and comply with the requirements of the Stock Exchanges as well as the by-laws and regulations of the Investment Dealers Association. Wadden alleges that the Bank breached its duty to monitor and supervise Clarke, including controlling the granting, monitoring, supervision and use of margin accounts.

[417] The Bank filed a defence to the counterclaim in March 2007, pleading something it knew to be false. As I have already explained, this serious misconduct together with the several other examples I have given all provide sufficient reason to strike the Bank's Statement of Defence with the result that Wadden's counterclaims ought to have been addressed.

[418] Unfortunately, the trial judge did not go on to consider the extent of Wadden's loss, had he been successful. Such an inquiry would involve a damage assessment where Wadden would have the chance to quantify his losses, should he wish to do so. At such a hearing Wadden would not have to prove liability on the part of the Bank, since that is effectively established by striking the Bank's pleadings and forever staying its proceedings. The Bank would, however, have standing to challenge the *amount* of any losses claimed by Wadden. The record here does not permit us to conduct that analysis. I would therefore remit that question to a different Justice of the Supreme Court, to determine.

The Bank's claim against Wadden in the Debt action

[419] The Bank claimed against Wadden for $1,086,072.00 for the margin debt in his NBFL account. Wadden admitted the amount of the debt.

[420] The Bank sought repayment of the margin debt from Wadden in its post-trial submissions. At ¶32 of his decision, the trial judge notes:

> NBFL and NBC sued on margin accounts for liquidated sums. There is no real contest that, subject to counterclaims and set offs, debts were incurred in the amounts claimed in respect of the margin accounts. Dunham owed $353,021.96; Weir owed $60,177.68; Blackwood owed $10,403.74 and Wadden owed $1,086,072.00.

[421] This is the only part of his decision where Justice Warner mentions the Bank's Debt action against Wadden. The judge goes on to deal with the margin debt owed by Dunham, Weir and Blackwood Holdings but any analysis with respect to Wadden is missing.

[422] In the result, the trial judge's reasons on these aspects do not permit meaningful appellate review. The first issue Warner J. had to adjudicate was the Bank's margin debt claim against Wadden for $1,086,072.00. He did not do so.

[423] Perhaps due to the acknowledgement of the debt at the outset of the trial, no party on appeal seemed particularly concerned about this omission from the judge's reasons. But it is problematic. It means that the judge did not complete the required analysis. Although Wadden denied liability for the debt, his pleadings clearly indicate that if the debt were proven, then Clarke and the Bank were liable to Wadden for (i) breach of contract, (ii) breach of fiduciary duty or (iii) negligence, and the Bank was vicariously responsible for Clarke's actions and the debt was caused by these breaches or negligence. Thus, Wadden was using these

three causes of action as a shield for the Debt action and also as a sword for his counterclaims.

[424] The trial judge never considered whether the Bank and Clarke were negligent in their dealings with Wadden, or breached their fiduciary duties or contract with Wadden. There was no analysis of any of these causes of actions or defences. This is particularly concerning because the trial judge expressly recognized that these were live issues:

> [230] Three of the four groups of Dunlop Clients (Dunham, Weir and Wadden) expressly plead breach of fiduciary duty, negligence and breach of contract by Clarke and NBFL.
>
> [231] In addition, Wadden expressly pleads that Clarke, on his own or possibly with third parties including Potter and Colpitts, unlawfully manipulated the KHI share price. Weir adopts and incorporates Wadden's claim that Clarke, alone or with others, manipulated the KHI share price.
>
> [232] Barthe, in his action, pleads breach of contract by NBFL and Clarke, as well as negligence by NBFL in failing to supervise Clarke, who, Barthe alleges, was involved in a stock manipulation scheme with Potter. He relied upon and incorporated NBFL's pleadings of a conspiracy to manipulate KHI's share price against Clarke and Potter in the Main Action.
>
> [233] The Dunlop Clients: Dunham, Weir and Wadden allege that Clarke failed to follow instructions to sell KHI shares. All three allege that Clarke held various conflicts of interest between his duty to them as clients, with actions and interests of himself, of the 540 account and of KHI insiders such as Potter. Dunham and Wadden allege that Clarke disclosed confidential information to others, including Potter and Colpitts, and sacrificed the interests of Dunham and Wadden for himself and others.
>
> [234] Dunham alleges that Clarke breached such fundamental duties as a failure to diversify Dunham's account in light of Dunham's instructions and his obvious naivety with respect to investing. Wadden alleges that Clarke counselled him to purchase KHI shares when he knew or ought to have known that the price was being artificially maintained.
>
> [235] All of the Dunlop Clients allege that NBFL failed to monitor or supervise Clarke and his various dealings in KHI shares, including through the 540 account.

[425] Despite labelling part of his reasons "Analysis of the liability issues of each of the Dunlop Clients against Clarke and NBFL", the trial judge, in fact, conducts no analysis of the Bank's liability to Wadden or whether Wadden had a defence to the Bank's debt claim.

[426] The reasons are silent both on the Bank's margin debt claim against Mr. Wadden but also on Mr. Wadden's two counterclaims against the Bank for breach of fiduciary duty, breach of contract, negligence and the Bank's failure to supervise Clarke. These legal principles are not considered in this section of the trial judge's reasons. The trial judge never considers whether Clarke owed Wadden a fiduciary duty or whether Clarke breached his contract with Wadden by depositing Wadden's shares in the 540 account. At one point in his reasons, the trial judge raises the spectre of negligence by Clarke in the following terms but does not analyze the issue any further:

> [635] Late on August 3, 2000, MacLellan left a voice message for Colpitts, in which he refers to Colpitts' phone call to him from NBFL's office that afternoon. The message is clear that MacLellan then understood that Wadden's shares had not gone to NBFL but to Clarke's numbered company account. MacLellan tells Colpitts in the message that he could stop writing about the shares if Colpitts' people had the ability to give NBFL 100,000 KHI shares so that Wadden could receive his 100,000 shares back.
>
> [636] It was against NBFL policy for Clarke to be doing business with a client without approval from NBFL's head office. It was negligent for NBFL not to have been supervising Clarke's 540 account and therefore not know about the issue raised by MacLellan with Clarke.

[427] Instead, the trial judge's 98 paragraph analysis of "liability issues of Mr. Wadden against Clarke and NBFL" in fact contains no analysis of Wadden's claims against the Bank. Instead, it contains a repudiation of Mr. and Mrs. Wadden's credibility and a review of the evidence the trial judge found to support his conclusion that Wadden had an "epiphany" on August 23, 2000 and was actively involved in the manipulation scheme.

[428] In sum, the trial judge does not expressly consider the Bank's margin debt claim of in excess of $1million against Wadden, Wadden's potential defences to this claim or either of Wadden's counterclaims.

[429] Even if the margin debt to the Bank was proven, Wadden's defence was that the debt was caused by Clarke and the Bank by reason of breach of contract, breach of fiduciary duty and negligence. Unlike every other plaintiff, the trial judge never examined these three causes of action/defences in the context of Mr. Wadden's claims. The trial judge never considered how the Bank's failure to supervise Clarke affected Mr. Wadden – including the depositing of the share certificate in Mr. Clarke's own 540 account – and despite having found that Clarke

failed to follow Wadden's instructions with respect to one transaction, he does not make a finding of breach of contract. He also does not consider whether Clarke and Wadden were in a fiduciary relationship.

[430] Notwithstanding these failings which of course support Mr. Wadden's position, I prefer to take a more direct and simpler route by finding that the Bank's claim for the margin debt is necessarily captured by Wadden's defence and counterclaims based on abuse of process. In other words, having found that the Bank's conduct amounted to an abuse of process, all of its claims are struck with the result that the Bank no longer has any claim against Wadden for the margin debt. Further, based on Wadden's success in appealing the finding of conspiracy, his liability on the Main action disappears as does his third party liability to Barthe, Weir and Blackwood, which is based on the Main action, and Wadden's alleged involvement in the conspiracy. The trial judge never dealt with Wadden's defences to the margin debt claim, nor Wadden's counterclaims against the Bank. Because Wadena has succeeded in demonstrating that the judge was wrong to have found him to be a conspirator, and that the Bank's conduct throughout constitutes an abuse of process, I would find that Wadden (should he wish to do so) is entitled to seek relief on his counterclaims and is not liable to the Bank for any margin debt because that claim is struck and forever stayed.

[431] This only leaves the question of potential punitive damages to Mr. Wadden. I will deal with that now by referencing first the punitive damages the judge *did* award. But before doing so I will briefly address pre-judgment interest.

Pre-Judgment Interest

[432] Before considering punitive damages I wish to make it clear that with respect to all of the pecuniary and liquidated damages I have awarded I would apply the same pre-judgment interest rate adopted by Justice Warner, that being 2.614%, compounded and calculated monthly, not in advance.

Punitive Damages

[433] There can be no question that the trial judge gave careful consideration to punitive damages in his assessment of the claims advanced by Dunham as well as by Weir and Blackwood. He said:

> [883] Punitive damages is relevant to both the Dunham and Weir claims. …

[434] Of the Bank's treatment of Dunham, the judge said:

> [892] The aggressive, no-holds-barred, prolonged pursuit of litigation against Dunham, with respect to liability more than quantum, in light of what NBFL knew when it commenced the Main Action about Clarke's misconduct, and which it defended in motions before Justice Scanlan in 2005, is not justifiable. It was, in hindsight, outrageous.
>
> [893] The conduct is exceptional. It merit punitive damages.
>
> …
>
> [896] Rousseau swore in 2005 that NBFL had overwhelming evidence that Clarke was part of the stock manipulation scheme. It continued the litigation with Dunham, a clear vulnerable victim of Clarke's wrongdoing for several years thereafter.
>
> [897] Assessment of a quantum for punitive damages is not a precise science. The circumstances in respect of Dunham, based on the harm to him; based on the need for deterrence and to recognize that the defendant should not benefit from the misconduct of its broker, suggests that punitive damages should at least be in the amount of $200,000.00.

[435] As for the Bank's conduct towards Weir and Blackwood, the judge said:

> [923] NBFL's conduct in contesting the Weir / Blackwood claim after March 2003, when it acknowledged its liability to him, was intentional. It persisted in an outrageous manner over a lengthy period of time (9 years).
>
> [924] The vulnerability of the Plaintiffs and consequential abuse of power by the Defendant reflected a substantial power imbalance. Many other "outside" investors dropped out of the litigation between 2001 and the commencement of trial 11 years later. NBFL has benefited from the fact that many could not stay in the arena with it.
>
> [925] The quantum of the damage award has to be proportionate with to the need for deterrence. The Defendant is a substantial national institution. An important portion of its business involves investments by its clients in the Canadian securities market. It is a factor, even if of limited importance, that the quantum of the punitive damage claim recognize that a smaller award would have less deterrence on it than a less substantial corporation.
>
> [926] Applying these factors to the purpose of punitive damages, I award Weir and Blackwood jointly punitive damages in the amount of $200,000.00.

[436] On appeal, the claimants say the judge erred in thinking the Bank's conduct in this case could be adequately addressed by such an award. The amount awarded is said to be wholly inadequate in condemning such blatant wrongdoing.

[437] I agree. What is missing of course from the judge's analysis is any consideration of the Bank's abuse of process. And Wadden was excluded from the inquiry, completely. Had he asked himself the right question and come to the conclusion – as I have – that the Bank's misconduct amounts to an abuse of process requiring striking its pleadings and granting a permanent stay, I am certain that the award for punitive damages would have been far greater.

[438] The legal principles to be considered when deciding whether to award punitive damages may be gleaned from a series of cases from the Supreme Court of Canada starting with **Whiten v. Pilot Insurance Co.**, 2002 SCC 18; **Fidler v. Sun Life Assurance Co. of Canada**, 2006 SCC 30; and **Honda Canada Inc. v. Keays**, 2008 SCC 39.

[439] From these and other leading authorities we know that the discretion to award punitive damages "should be most cautiously exercised" and courts "should only resort to punitive damages in exceptional cases". Punitive damages require proof of conduct that amounts to "an independent actionable wrong", typically seen as so shocking as to "depart markedly from ordinary standards of decency … so malicious and outrageous (to be) … deserving of punishment on their own". Punitive damages "are directed to the quality of the defendant's conduct, not the quantity (if any) of the plaintiff's loss". The aim of punitive damages "is not to compensate the plaintiff, but rather to punish the defendant". They are "the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant". Punitive damages are intended to punish the wrongdoer, express the court's clear denunciation and serve as a deterrent not only to the wrongdoer, but others who may be inclined to follow the same example.

[440] In **Whiten, supra**, the Supreme Court of Canada dismissed an appeal from a jury award of $1,000,000.00 in punitive damages against an insurance company whose misconduct was found to meet the criteria I have just described. In writing for the majority, Binnie, J. said at ¶105:

> [t]his was an exceptional case that justified an exceptional remedy.

[441] Justice Binnie said the key to any award of punitive damages is that they must be "rationally required to punish the defendant's misconduct" and they must be proportionate to the blameworthiness of the defendant's conduct. He said:

> [111] I earlier referred to proportionality as the key to the permissible quantum of punitive damages. Retribution, denunciation and deterrence are the

> recognized justification for punitive damages, and the means must be rationally proportionate to the end sought to be achieved. A disproportionate award overshoots its purpose and becomes irrational. A less than proportionate award fails to achieve its purpose. Thus a proper award must look at proportionality in several dimensions ...

[442] Justice Binnie went on to provide a list of the types of factors which might influence the level of blameworthiness assigned to the wrongdoer. As one would expect, the more egregious the conduct, the greater the potential award. He said:

> 112 The more reprehensible the conduct, the higher the rational limits to the potential award. The need for denunciation is aggravated where, as in this case, the conduct is persisted in over a lengthy period of time (two years to trial) without any rational justification, and despite the defendant's awareness of the hardship it knew it was inflicting (indeed, the respondent anticipated that the greater the hardship to the appellant, the lower the settlement she would ultimately be forced to accept).
>
> 113 The level of blameworthiness may be influenced by many factors, but some of the factors noted in a selection of Canadian cases include [I have included the factors but omitted the case references]:
>
> (1) whether the misconduct was planned and deliberate:
>
> (2) the intent and motive of the defendant:
>
> (3) whether the defendant persisted in the outrageous conduct over a lengthy period of time:
>
> (4) whether the defendant concealed or attempted to cover up its misconduct:
>
> (5) the defendant's awareness that what he or she was doing was wrong:
>
> (6) whether the defendant profited from its misconduct:
>
> (7) whether the interest violated by the misconduct was known to be deeply personal to the plaintiff

[443] Later at ¶123 of his reasons Binnie, J. added:

> [123] … The key point is that punitive damages are awarded "if, but only if" *all* other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence, and denunciation. …

[444] Having regard to the seven factors described by Justice Binnie I would find that the Bank's misconduct in this case can be said to have "satisfied" each of those factors. Without question, its misconduct was planned and deliberate. It

intended to hide the existence and content of the settlement agreement to suit its own purposes. It persisted in such outrageous conduct over many years. During that period the Bank did its best to cover up its actions. In my view the Bank knew or ought to have known that what it was doing was wrong. Obviously it hoped to profit from its own misconduct and did so in the knowledge that its actions would be harmful to the personal interests of the various claimants.

[445] As mentioned, **Whiten** came before the Court as an appeal from a jury award. In that context Binnie, J. included in his reasons a list of points which might be included in a jury charge to assist the jury in deciding first whether punitive damages were necessary and if so, what amount of damages would be appropriate. In my respectful view this same list offers considerable guidance to trial (and appellate) judges generally, whether in the context of a jury trial or not. In the words of Justice Binnie:

> [94] … it would be helpful if the trial judge's charge to the jury included words to convey an understanding of the following points, even at the risk of some repetition for emphasis. (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[446] Further guidance may be gleaned from the decision of the Supreme Court of Canada in **Royal Bank of Canada v. W. Got and Associates Electric Ltd.**,

[1999] 3 S.C.R. 408. This case arose in the context of a commercial dispute where the Supreme Court upheld a trial judge's award of $100,000.00 for "exemplary" damages (by times also referred to as "punitive" damages) for the Bank's egregious conduct (described at ¶11-12 of the judgment) which included the Bank's failure to give notice to Got of its intention to put the business into receivership and the Bank's having misled the Master into issuing a receivership order by tendering a misleading affidavit. The judgment of the Court was delivered by McLachlin and Bastarache, JJ. who said at ¶28-29:

> 28 It is argued that these five concerns do not rise to the level required to trigger an award for exemplary damages. We agree that the first concern of the trial judge, deterrence, may not, taken alone, justify exemplary damages. As a rule, deterrence can be achieved through the award of compensatory damages and refusal to grant exemplary damages is not condonation of the violation of the rule of law. We also question the third concern, the absence of other forms of punishment. With regard to the trial judge's fifth concern, we would not endorse the suggestion that the bank could be subjected to a higher standard of scrutiny than the average commercial litigant because of its privileged condition in Canadian society. Nevertheless, this is a case where the conduct of the bank "seriously affronts the administration of justice", as stated by the trial judge. We agree that the bank's conduct did not have to rise to the level of fraud, malicious prosecution, or abuse of process to justify an award of exemplary damages.
>
> 29 Therefore, despite our reservations, we agree that it was within the discretion of the trial judge to award exemplary damages. Viewing the trial judge's concerns cumulatively, and giving due weight to the advantage he had to assess the need for deterrence and condemnation of the abuse of the court's process, as well as the need to maintain proper business practices, we are not prepared to interfere with the award for exemplary damages in this case. We emphasize, however, that an award for exemplary damages in commercial disputes will remain an extraordinary remedy.

[Underlining mine]

[447] Further, in **3058354 Nova Scotia Co. v. On*Site Equipment Ltd.**, 2011 ABCA 168, leave to appeal refused [2011] S.C.C.A. No. 373, the Court of Appeal appears to endorse the trial judge's approach in awarding punitive damages for a party's misconduct during litigation. The discussion by Bielby, J.A. at ¶56 *ff.* is helpful. Lastly, I have considered the comprehensive discussion of punitive damages by Justice M.D. Acton in **Branco v. American Home Assurance Co.**, 2013 SKQB 98, a case where punitive damages of $1,500,000.00 and $3,000,000.00 were awarded against AIG, and Zurich insurance companies, respectively.

[448] Taking into account the principles addressed in these cases and my finding that the Bank's conduct in this litigation was so egregious as to rise to the level of an abuse of process, I would find that the trial judge's award of punitive damages was clearly inadequate and a wholly erroneous assessment.

[449] In **Richard v. Time Inc., supra**, the Supreme Court of Canada articulated the correct standard of appellate review when considering the quantum of punitive damages awarded at trial:

> [190] It should be borne in mind that a trial court has latitude in determining the quantum of punitive damages, provided that the amount it awards remains within rational limits in light of the specific circumstances of the case before it (*St‑Ferdinand*, at para. 125; Whiten, at para. 100). Appellate intervention will be warranted only where there has been an error of law or a wholly erroneous assessment of the quantum. An assessment will be wholly erroneous if it is established that the trial court clearly erred in exercising its discretion, that is, if the amount awarded was not rationally connected to the purposes being pursued in awarding punitive damages in the case before the court (*St‑Ferdinand*, at para. 129; *Provigo Distribution inc. v. Supermarché A.R.G. inc.*, 1997 CanLII 10209 (Que. C.A.)). In our opinion, errors of this nature have been made in the case at bar, and they warrant the intervention of this Court in assessing the quantum of punitive damages.

[450] Further clarity in the application of this standard is provided by Binnie, J. in **Whiten** at ¶96:

> 96 The trial judge should keep in mind that the standard of appellate review applicable to punitive damages ultimately awarded, is that a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct, as discussed below. [Emphasis in original]

Justice Binnie then goes on to explain at ¶100-101 that courts of appeal can be somewhat less deferential when it comes to punitive damages:

> 100 The applicable standard of review for "rationality" was articulated by Cory J. in *Hill, supra*, at para. 197:
>
> > Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

> 101 The "rationality" test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of its quantum.

[451] I have no hesitation in saying that on the record in this case the Bank's misconduct is so outrageous that punitive damages are rationally required to serve as a deterrent.

[452] I recognize that most of the cases to which I have referred considered punitive damages in the context of bad faith, arising in the employment law or insurance law field. Conceptually that is different than a finding of abuse of process. Bad faith arises out of the breach of duty of good faith owed by the malefactor to the person wronged. There, the impugned conduct forms a direct link, from wrongdoer to victim. Abuse of process on the other hand, adds a third element, the judiciary, to the dynamic. The misconduct is seen to have directly besmirched the integrity of the court's own process, yet in a way that has caused serious damage to the interests of other affected, innocent parties. Each case calls for punitive damages to punish the offender and achieve the other included objectives – but the context in which they arise is different.

[453] I have found the Bank's conduct throughout this litigation to have been so highly reprehensible as to be seen by any reasonable observer as a marked departure from ordinary standards of decent behaviour. The misconduct, as reflected in the many examples I have given, carried on unabated for years without apology or any effort to make amends. The intentional concealment of the settlement agreement was bad enough, but so were the many other incidents of serious misconduct I have described. Whether examined individually, or cumulatively, they are a stain on this Court's integrity amounting to an abuse of process warranting significant punitive damages. Further, responsibility for the harm suffered by the appellants lies solely at the feet of the Bank. As far as the proceedings addressed in this judgment are concerned, there are no other participants to share or deflect the blame. The various claimants were vulnerable and placed at a considerable disadvantage when compared to the Bank's power and largesse. I recognize of course that striking pleadings and staying proceedings have a punitive component. So too do compensatory damages and costs. However, in my judgment the other relief which the appellants will receive by the terms of this judgment are not sufficient to punish the Bank or adequately achieve the objectives of retribution, deterrence and denunciation. Whatever compensatory damages are awarded to the appellants will be insufficient to accomplish those

objectives. I am satisfied that a proper award of punitive damages is the only way to rationally and proportionately accomplish those objectives.

[454] The impugned conduct and the damage that results will be different, depending on the circumstances. For that reason, damage awards in other cases may only assist in providing rough comparisons. Bounded by the notions of proportionality and rationality, quantification really comes down to a sum that reflects the careful application of judicial experience to the gravity of the conduct, as seen through the eyes of the court whose integrity and process were sullied.

[455] In my considered opinion each of the claimants in the three appeals: that being the Barthe Estate; the Dunham, Weir and Blackwood claimants; and Wadden have all suffered equally from the Bank's intentional concealment of the settlement agreement and the series of other acts of misconduct I have described. Furthermore, they have all claimed punitive damages in their pleadings and submissions before the trial judge and this Court. Therefore an award to each of them is necessary. While properly quantifying a punitive damage award is a difficult process and one that does not lend itself to a formulaic calculation, it does seem to me that recognizing the 10 years of misery, humiliation and expense suffered by all of the claimants at the hands of the Bank and constrained by the principles of rationality and proportionality to which I have referred, a proper quantum of punitive damages for each of the groups of claimants which will be sufficient to punish the Bank and adequately achieve the objectives of retribution, deterrence and denunciation will be an award of $750,000.00.

[456] I would therefore set aside the trial judge's awards of punitive damages and in their place award punitive damages in the following amounts:

i) The Barthe Estate: $750,000.00

ii) Craig Anthony Dunham: $750,000.00

iii) Lowell R. Weir and Blackwood Holdings Inc.: $750,000.00 in total

iv) Calvin Wadden: $750,000.00.

Costs on Appeal

[457] Here of course I am only dealing with the costs associated with bringing this "trilogy" of cases to appeal. I say nothing about the trial judge's costs decision

which is the subject of a separate appeal to this Court scheduled for hearing on September 14, 2015.

[458] It has long been settled law in this province that an award of solicitor-client costs is reserved for cases said to be "rare and exceptional". For example, in **Brown v. Metropolitan Authority et al.** (1996), 150 N.S.R. (2d) 43 (C.A.), Pugsley, J.A. said at p. 55:

> [94] While it is clear that this Court has the authority to award costs as between solicitor and client, it is also clear that this power is only exercised in rare and exceptional circumstances, to highlight the court's disapproval of the conduct of one of the parties in the litigation (**P.A. Wournell Contracting Ltd. et al. v. Allen** (1980) 37 N.S.R. (2d) 125).

See as well, **Campbell v. Lienaux et al.**, 2001 NSSC 44, aff'd on appeal 2002 NSCA 104; **Young v. Young**, [1993] 4 S.C.R. 3; **Winters v. Legal Services Society**, [1999] 3 S.C.R. 160; and **Minas Basin Holdings Ltd. v. Paul Bryant Enterprises Ltd.**, 2010 NSCA 17.

[459] The exceptional circumstances I have described throughout this decision would, in my view, justify an award of solicitor and client costs, plus reasonable disbursements, as agreed or taxed, to all of the successful claimants, from the time they first became involved in this appeal (whether in filing their own Notice of Appeal, or in filing their Notice of Cross-Appeal in answer to the Bank's appeal), to the date of this judgment. Recognizing that Mr. Wadden did not have a lawyer for the purposes of the appeal, I would award him substantial costs in the amount of $50,000, plus his reasonable disbursements, as agreed or taxed.

Summary of Results as They Relate to the Various Parties

[460] Because of the Bank's abuse of process, its pleadings are struck and its claims are forever stayed. As a consequence, the appeals are allowed in part.

[461] Insofar as the Barthe Estate is concerned, the finding that the late Michael Barthe ratified the fraudulent insiders' scheme to manipulate the KHI share price is overturned. The Bank is ordered to pay the Estate the amount of Mr. Barthe's second investment of $1,625,000.00, plus pre-judgment interest at the rate approved by the trial judge from May 15, 2001 to the date of this judgment. The Bank shall pay to the Estate punitive damages of $750,000.00 together with the Estate's costs on appeal on a solicitor and client basis.

[462] Insofar as the claim brought by Craig Anthony Dunham is concerned, the judge's findings and damage awards are upheld except for punitive damages, and the margin debt. I find that the entire margin debt is vitiated, including the amount of $318,603.96 for principal that had been exempted by Warner, J. On this record it is not possible to determine whether Mr. Dunham actually paid this amount of principal back to the Bank (in which case he would be entitled to recover pre-judgment interest on that sum) or whether it was simply treated as a set-off against what the Bank owed him after trial (in which case there would be no pre-judgment interest awarded because no interest could be claimed on a forgiven debt). Since counsel for the appellants failed to provide the Court with this information at the time of the appeal, it makes our reconstruction of these events difficult at best. If Mr. Dunham had paid back to the Bank the sum of $318,603.96, on this record it is not possible to determine precisely when that principal portion of Mr. Dunham's margin debt was first incurred. Accordingly, a somewhat arbitrary date would have to be fixed. In my view, the logical date to choose would be June 1, 2005, that being the start of the month when the Bank's National President affixed his signature to the secret settlement agreement his officials had negotiated. Accordingly, if Mr. Dunham never paid back the sum of $318,603.96 to the Bank because it was simply set-off against the Bank's liability post-trial, there was then no "loss" and there will be no award of pre-judgment interest. If, on the other hand, Mr. Dunham did pay $318,603.96 back to the Bank after trial as a result of Warner, J.'s directions, then I would order the Bank to return that amount to Mr. Dunham together with pre-judgment interest on that sum from June 1, 2005 to the date of this judgment, at the rate approved by the trial judge. The Bank is ordered to pay Mr. Dunham punitive damages of $750,000.00, together with his costs on appeal on a solicitor and client basis.

[463] Insofar as Mr. Weir and Blackwood's claims are concerned, the judge's findings and damage awards are upheld except for punitive damages, and the margin debt. I find that the entire margin debt is vitiated, including the amount for principal that had been exempted by Warner, J. As previously mentioned, the principal portion of Craig Dunham's margin debt is clear. However, I am unable to find any reference point in this massive record where either the trial judge or the parties stipulated the sum which accurately reflects the principal portion of the margin debt owed by Lowell Weir or Blackwood Holdings Incorporated. We know from ¶32 of the judge's reasons that the amount of the various margin accounts themselves was not contested. Obviously the principal would be something less. How much less, we do not know. Neither do we know whether these sums were ever paid back to the Bank by Mr. Weir and Blackwood, or

whether they were simply "set-off" against what the Bank owed them post-trial. Given these failings I am not prepared to guess whether Mr. Weir and Blackwood sustained such a "loss", nor fix an arbitrary date for calculating pre-judgment interest, if they did. Accordingly, I would decline to award these appellants any pre-judgment interest on whatever principal was owing in their respective margin accounts. The Bank is ordered to pay Mr. Weir and Blackwood Holdings Incorporated, punitive damages of $750,000.00, as well as their costs on appeal on a solicitor and client basis.

[464] Insofar as the claims of Calvin Wadden are concerned, the finding that Mr. Wadden was a conspirator is overturned, as are the Bank's awards based on the amount of the margin debt incurred by Mr. Wadden, as well as any indemnification for all third party claims which were imposed against Wadden in favour of the Bank. Mr. Wadden, should he choose to do so, will be entitled to pursue and seek to prove the quantum of his counterclaims against the Bank. The Bank is ordered to pay Mr. Wadden punitive damages in the amount of $750,000.00, together with costs on appeal in the amount of $50,000.00 plus reasonable disbursements, as agreed or taxed. Whether the success achieved by Mr. Wadden in this appeal has any impact upon the costs sanctions imposed against him by the trial judge in the costs decision and which is now the subject of an appeal to be heard by this Court on September 14, 2015 (wherein apparently Mr. Wadden has, to this point, not joined as a party) may well be a subject for which Mr. Wadden would wish to obtain professional legal advice.

Conclusion

[465] The hallmarks of any reputable system of justice are that it should be: impartial, independent, open, public, accessible, affordable, accountable, timely, and perhaps above all else, fair.

[466] Canadians have the right to expect that the integrity of the adjudicative process in this country's courts and tribunals will be preserved. In cases where fairness is not achieved, respect for the integrity of the administration of justice will be diminished. Fairness in this context is a multi-faceted concept whose dimensions can never be described with precision. But fairness must surely respect at least these fundamental concepts: the parties will know the case they have to meet; they will be given the opportunity to fully present their side; they can be confident in the knowledge that the dispute will be heard by an independent and impartial decision-maker; and decided upon the proper application of the law to

admissible evidence; after full, frank and timely disclosure; so that the parties to a dispute and the judges assigned to decide it, are not thwarted in their search for truth by the deliberate concealment of highly relevant evidence.

[467] If people are willing to have their disputes decided in open court, where their personal and professional lives will be put on public display, they need to know that the courts' own adjudicative processes can be trusted and will not be abused. Litigants will be less likely to put their faith in the administration of justice if they cannot be assured that their case will be dealt with fairly.

[468] Those who use our courts to resolve their disputes should feel confident in the knowledge that the process by which the litigation is conducted, is a fair one. Confidence in the administration of justice is critical to the public trust. Fortunately, in the vast majority of cases, such confidence will be well-founded. However, when exceptional circumstances occur which manifest litigation misconduct so egregious as to amount to an abuse of process, the court is required to intervene.

[469] This is such a rare and exceptional case. It does not reflect the fair and honourable way by which business or litigation is to be conducted in Nova Scotia. Because of the Bank's egregious misconduct the appellants were forced to endure more than 10 years of unwarranted litigation to say nothing of the monumental expense, inconvenience, delays, frustration and waste of time that entailed. The Bank's abuse of process in this case calls for the striking of its pleadings and a permanent stay of the proceedings insofar as the Bank's claims and defences are concerned, and warrants the level of punitive damages and other relief we have imposed.

[470] Only in this way can public confidence in the administration of justice be restored and this Court's unequivocal denunciation be recorded.

[471] And so I return to the question I posed at the outset (¶240, **supra**) which is to ask:

> ... whether the Bank's conduct has tainted the case to such a degree as to be manifestly unfair to another party to the litigation, or has brought the administration of justice into disrepute by impairing the adjudicative function of the courts and undermining public confidence in the legal process.

I take no pleasure in saying that on the facts of this case the answer is yes, on both counts.

Saunders, J.A.

Concurred in:

MacDonald, C.J.N.S.

Oland, J.A.