NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S., Freeman, and Roscoe, JJ.A.

Cite as: Westminer Canada Ltd. v. Amirault, 1994 NSCA 13

B E T W E E N:

WESTMINER CANADA LIMITED, WESTMINER CANADA HOLDINGS LIMITED, JAMES H. LALOR, PETER MALONEY, DONALD SNELL, WILLIAM B. BRAITHWAITE, ROBERT COUZIN and WESTERN MINING CORPORATION HOLDINGS LIMITED Appellants/ Respondents by cross-appeal	Claude R. Thomson, Q.C., Peter L. Roy, Catherine Wright and Thomas P. Donovan for the Appellants
- and -	
JOHN A. AMIRAULT, H. ROBERT HEMMING, COLIN J. MacDONALD, WILLIAM S. McCARTNEY and FRED HANSEN Respondents/ Appellants by cross-appeal	George W. MacDonald, Q.C. Michelle C. Awad and Charles F. Scott, for the Respondents
AND	
WESTMINER CANADA LIMITED, WESTMINER CANADA HOLDINGS LIMITED and WESTERN MINING CORPORATION HOLDINGS LIMITED Appellants/ Respondents by cross-appeal	
- and -	
JOHN A. AMIRAULT, H. ROBERT HEMMING, COLIN J. MacDONALD, WILLIAM S. McCARTNEY and FRED HANSEN Respondents/ Appellants by cross-appeal	
AND BETWEEN	

C.A. No. 02866

WESTMINER CANADA HOLDINGS LIMITED, WESTMINER CANADA LIMITED, JAMES H. LALOR, PETER MALONEY, DONALD SNELL, WILLIAM B. BRAITHWAITE, ROBERT COUZIN, WESTERN MINING CORPORATION HOLDINGS LIMITED, SIR ARVI PARBO, HUGH M. MORGAN, DONALD H. AITKEN, JOHN C. ANDERSON, SIR GEOFFREY BADGER, DAVID J. BRYDON, SIR HAROLD KNIGHT, DAME LEONIE KRAMER, DONALD M. MORLEY, ROY WOODALL and COLIN WISE	Claude R. Thomson, Q.C., Peter L. Roy, Catherine Wright and Thomas P. Donovan for the Appellants

	Appellant/ Respondents by cross-appeal	
- and -		
TERENCE D. COUGHLAN and JOHN A. GARNETT		David A. Miller, Q.C., Jonathan Stobie and D. Geoffrey Machum for the Respondents
	Respondents/ Appellants by cross-appeal	
AND		
WESTMINER CANADA LIMITED, WESTMINER CANADA HOLDINGS LIMITED and WESTERN MINING CORPORATION HOLDINGS LIMITED		
	Appellants/ Respondents by cross-appeal	Appeal Heard: November 29, 30, December 1, 2, 3 and 7, 1993
- and -		
TERENCE D. COUGHLAN and JOHN A. GARNETT		Judgment Delivered: January 18, 1994
	Respondents/ Appellants by cross-appeal	

THE COURT: Excepting certain variations from the orders of the trial judge relating to costs and pre-judgment interest, the appeal, the cross-appeals and the notices of contention are dismissed per reasons for judgment of Clarke, C.J.N.S., Freeman and Roscoe, JJ.A.

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The reasons for judgment were delivered by

THE COURT:

I Introduction

In late 1987 and early 1988 subsidiaries of Western Mining Corporation, a major Australian mining company seeking a presence on the Canadian gold mining scene, took over Seabright Resources Limited, a young company energetically developing mining properties in Nova Scotia, and the upshot was the longest and probably most expensive civil trial in Nova Scotia history.

After eighty-three days of trial testimony, four days of commission evidence, the filing of 1659 exhibits and 169 days of discovery involving the exchange of 100,000 documents, the learned trial judge, the Honourable D. Merlin Nunn of the Supreme Court of Nova Scotia, rejected the appellants' allegations of fraudulent behaviour by the Seabright directors and made strong findings in favour of the respondents on issues relating to their honesty. Those findings are the central issue in this appeal, although many other issues are raised.

The facts, including descriptions of the various actions involving the various parties that have been considered together in the trial judgment and in this appeal, are set forth in the decision of Justice Nunn reported as **Coughlan et al. v. Westminer Canada Limited et al.** (1993), 120 N.S.R. (2d) 91 and 332 A.P.R. 91. The "Coughlan" in the heading is Terence D. Coughlan, promoter and President of Seabright; he and Dr. John A. Garnett, the administrative vice president, are dealt with in the pleadings distinctly from the other directors, the "outside directors", John A. Amirault, H. Robert Hemming, Colin J. MacDonald, William S. McCartney and Fred Hansen, who were not executive officers.

Briefly, Seabright was incorporated and listed on the Toronto Stock Exchange in 1984. It added a promising property known as Beaver Dam to its mining properties in 1985 and 1986 and engaged M.P.H. Consulting Limited of Toronto to do diamond drill explorations. By early 1987 the M.P.H. reports indicated proven, probable and possible ore reserves at Beaver Dam totalling 3,000,000 tonnes at mineable grades of gold content. Reports by other consultants were optimistic as to the feasibility of a mine at Beaver Dam beginning production as early as May of 1987. Underground exploration disclosed that the geology was more complex than anticipated and additional exploration work was undertaken

in an effort to reconcile much lower mining and milling results with the M.P.H. grades. This was not considered unusual for a new mine and various factors such as ineffective sampling could have been responsible. The inconclusive results from the underground work were not published. The workforce at Beaver Dam was reduced in July, 1987, and plans for bringing the mine into production were postponed. These developments were well publicized. During the summer and fall of 1987 the geology became better understood and results of underground diamond drilling and other tests became more positive. The workforce was increased again. Seabright's technical staff of geologists and mining engineers regained confidence and during the fall of 1987 were highly optimistic that Beaver Dam would soon be a successful mine.

Westminer, through a brokerage house, sent Laurence Stephenson, a consultant geologist, on an espionage mission to Beaver Dam in November 1987. The technical staff talked frankly with him and he returned with a positive report, which was published as a news story so Westminer could not be accused of insider trading.

In September, 1987, Robertson & Associates, consultants renowned in the industry, were called in to evaluate the properties and to help prepare a major share offering to finance bringing Beaver Dam into production. Their report of November 12, 1987, while not discouraging as to Beaver Dam's future, suggested that the production decision be deferred four to six months to permit additional technical work to be done in support of the proposed prospectus.

A major bulk sample of 20,000 tonnes of mined material from Beaver Dam was begun November, 17, 1987, at a time of peak confidence in the future of Beaver Dam. The bulk sample was intended not only to provide additional technical data required for a share issue to finance the costs of bringing the property into production as a mine but, in the words of the trial judge, "this testing was considered to be the final word on gold content." Results of the bulk sample could not be evaluated until it had been completed, the mill cleaned up to disclose trapped gold, and assays performed on the materials produced; therefore no material changes in the perception of the ore reserves could occur in the meantime. Based on what they had been told by the technical staff, on which they were entitled to place complete reliance, the directors could await the results with considerable confidence.

A few days after the bulk sample began Pat Keohane, the Beaver Dam mine manager, presented a pessimistic memorandum casting doubt on the M.P.H. reserve estimates and Seabright's future which was considered at a directors meeting on November 24. This was the first indication received by the directors that confidence of the technical staff was eroding in the M.P.H. figures, and it surprised other members of the technical staff as well. The directors considered the memorandum a premature overreaction to initial bulk sample results and no action was taken on it. The bulk sample was expected to provide the answers, and the directors were already committed to it. Keohane was not called to testify.

The directors had approved an offering memorandum for the sale of additional shares dated November 18 and filed as part of the public record on December 2, 1987. This relied on the M.P.H. figures which were defined and explained; it stated that the consultants' reports were available for reference at the company office. Some earlier assertions by Seabright in the public domain were promotional and optimistic, perhaps overly so, but on close examination none involved misrepresentation of existing material facts nor seemed likely to mislead informed investors, particularly those experienced in the mining industry. Dr. Garnett, especially, had frankly stated in published interviews that Seabright had problems and everyone was working to overcome them. The offering memorandum constituted a statement on the public record of the material facts Seabright was representing to the public to invite shareholder investment at a time that proved most material.

This then was the underlying factual situation at the time the Westminer takeover was launched on December 15, 1987, when Hugh A. Morgan, President of the Australian parent company, made his initial visit to Coughlan and informed him of the takeover plan. By misfortune, imprudence or happenstance, the Westminer bid to take over Seabright occurred while the bulk sample test was in progress. Westminer officials knew about the bulk sample test which had been well publicized. Dr. Garnett had discussed it in an interview with the influential *Northern Miner* published December 21, 1987, and James Lalor, head of the team Westminer had sent to Canada to buy mining companies, had acknowledged its significance.

The closing date for Westminer's acquisition of shares, and the final date the Seabright directors were responsible for disclosing material information, was January 27, 1988, before the bulk sample test was completed in February, 1988. When it was completed, and the results were evaluated, it was finally clear that mineralization at Beaver Dam was of

too low a grade to support a mine. In mining parlance, "there was no ore at Beaver Dam," because "ore" by definition contains economically mineable quantities of gold.

By purchasing shares at the time it did, Westminer took Seabright as it stood, for better or worse, subject to the duty of its officers and directors to disclose material information. The Seabright directors tried to interest Westminer in making a bid for the assets rather than the shares, knowing this would delay matters until after the bulk sample test was completed and result in a more thorough examination of reserves. Share values had been depressed by the market crash of October, 1987, and Seabright directors thought Westminer was "stealing the company." They were reluctant to sell, and thought it would be to their advantage if Westminer paid a fair price for the assets. Westminer rejected this proposal out of hand. If the bulk sample met or exceeded expectations, Westminer had a bargain. As things turned out, Westminer had gambled and lost.

It appears that Westminer's real complaint lies not with the public record but with its own selective reading of the public record. Its acquisition team was too ready to believe rosy forecasts, and failed to make the hardheaded, businesslike evaluation of the available published data that the investment of nearly $100,000,000 would seem to demand.

Westminer officials were incensed, not because of the risk they took in buying a mine while results of a definitive test as to its worth remained unknown, but at the Seabright directors whom they blamed for cheating them. They accused the Seabright directors of knowing that Beaver Dam would not be a mine, and of concealing material information. They brought an action in Ontario claiming $60,000,000 damages for "fraud, deceit, conspiracy and negligent misrepresentation" against Coughlan and Garnett and negligent misrepresentation against the outside directors. Negligent misrepresentation was later amended to wilful misrepresentation; the significance of this will be discussed below. The plaintiffs, Westminer Canada Holdings Limited and Westminer Canada Limited, acknowledged they did not know whether any of the directors besides Coughlan and Garnett were involved in the alleged conspiracy. The plaintiffs claimed they had paid a total of $92,000,000 for shares worth $38,000,000, plus expenses of $3,000,000. It is noteworthy, however, that the Seabright directors appointed by Westminer following the takeover never published a statement of material change; this ceased to be a requirement after the company went private in the spring of 1988.

The Seabright directors countered with two actions in Nova Scotia, one claiming damages for being deprived of insurance coverage because the Ontario action was not served until just after the policy protecting them had expired, the other because Westminer had refused to indemnify them for losses resulting from the claim against them under a provision of the Seabright By-laws. The outside directors sued Westminer Canada Limited, with which Seabright had in the meantime been amalgamated, Westminer Canada Holdings Limited, their directors individually and Western Mining Corporation Holdings Limited. Mr. Coughlan and Dr. Garnett sued those defendants together with the directors of Western Mining Corporation Holdings Limited.

The Westminer defendants averred dishonesty on the part of the Seabright directors as a defence, and attached the statement of claim from the Ontario action. The trial judge, in deciding the insurance and indemnity actions in favour of the Seabright directors, and in finding Westminer defendants guilty of the tort of conspiracy to harm them, considered that he had decided the same issues, apart from damages, that were raised in the Ontario action, on the same evidence available for the Ontario action, which is still formally pending.

II Grounds of Appeal Relating to Findings of Fact

Westminer failed to prove its allegations of fraud and non-disclosure; clear findings of fact to the contrary were made by the trial judge. The Seabright directors, who professed to be as surprised as the Westminer officials at the collapse of the perceived Beaver Dam reserves, maintained their innocence of wrongdoing through five years of ruinously expensive litigation. After a most rigorous examination of every aspect of the Seabright operation, the trial judge concluded that the Seabright directors at material times were justified in their belief in the future of Beaver Dam, that they committed no fraud, nor did they fail to disclose any material information, and acted honestly and in good faith in the best interests of their company. The trial judge made numerous and helpful findings of fact, specifically related to supporting evidence.

His findings of fact were reinforced by equally strong findings as to credibility. After observing Mr. Coughlan for sixteen days on the witness stand, including nine days of cross-examination, the trial judge accepted his evidence in preference to that of

any of the Westminer witnesses. This was no arbitrary choice; he cited the specific aspects of each Westminer witness's testimony that had eroded his confidence.

These are matters of much importance to a court of appeal, which must rely heavily on the trial judge, particularly such an experienced one as Justice Nunn, not only as its eyes and ears on questions of fact, but as its sixth sense in evaluating the nuances that lead to conclusions as to the honesty and credibility of witnesses. None of the parties take issue with the well known principles of appellate review. The submissions on this point in the factum of the respondents Coughlan and Garnett set out authorities which are among those on which we rely:

> 349. The respondents submit that the Trial Judge was completely correct in addressing the issue of honesty and good faith as essentially a factual question. This approach is endorsed in the American case of **Plate v. Sun Diamond Growers of California** 275 Cal. Rptr. 667 (Cal. App. 1 Dist. 1990), wherein the Court of Appeal found as follows with respect to the standard of review of a trial court's determination that the corporate directors did not act in good faith and in the best interests of the corporation:
>
> > The question of whether a corporate agent...acted in good faith and for the best interests of the Corporation, appears to be an essentially factual question for the trial court. The trial court's factual findings, express or implied, must be upheld if supported by substantial evidence (see **Fed.-Mart Corp. v. Pell Enterprises Inc**. (1980) 111 Cal. App. (3d) 215, 221, 168 Cal. Rptr. 525). In reviewing the sufficiency of the evidence, we view the evidence in the light most favourable to the trial court's findings...(**Nestle v. City of Santa Monica** (1972) 6 Cal. (3d) 920, 925-925, 101 Cal. Rptr. 568, 496 page 480).
>
> 350. The respondents acknowledge that this Court has jurisdiction to re-examine such findings of fact by the Trial Judge; however, the authorities are also clear that the Appeal Court's jurisdiction in this regard has defined limits and, particularly, should not be exercised unless it can be clearly demonstrated that the Learned Trial Judge made some manifest or palpable and overriding error which affected his assessment of the facts. In the absence of such an error, it is not the Appeal Court's function to "substitute its assessment of the balance of probability for the findings of the judge who presided at trial." (**Stein et al v. The Ship "Kathy K" et al**, [1976] 62 D.L.R. (3d) 1 (S.C.C.).
>
> 351. The Supreme Court of Canada has on numerous occasions discussed the scope of appellate review, not only in relation to its own powers, but also in relation to first appellate courts. Madam Justice Wilson, in **Fletcher et al v. Manitoba Public Insurance Company,** [1990] 3 S.C.R. 191, referred to

statements set forth in a number of cases including **Stein v. The Ship "Kathy K"**, and **Lewis v. Todd,** and concluded at page 204:

> These authorities, in my view, make crystal clear the test for determining when it is appropriate for an appellate court to depart from a trial judge's findings of fact: appellate courts should only interfere where the trial judge has made a "palpable and overriding error which affected his assessment of the facts."... As this Court and the House of Lords have repeatedly emphasized, it is the trial judge who is in the best position to assess the credibility of the testimony. An appellate court should not depart from the trial judge's conclusions concerning the evidence "merely as a result of their own comparisons and criticisms of witnesses"
>
> . . .

353. It is submitted that the above statements and observations by Madam Justice Wilson are particularly appropriate to Mr. Justice Nunn's deliberations in this case.

355. Mr. Justice Macdonald of this Court, in the case of **Vitrerie laurentien Ltee et al v. Can-Euro Investments Ltd.** (1990), 97 N.S.R. (2d) 341 (C.A.) referred, at 360, to **Travelers Indemnity Co. v. Kehoe** (1985), 66 N.S.R. (2d) 434, where the Court of Appeal said, at 437:

> This and other appellate courts have said time after time that the credibility of witnesses is a matter peculiarly within the province of the trial judge. He has the distinct advantage, denied appeal court judges, of seeing and hearing the witnesses; of observing their demeanour and conduct, hearing their nuances of speech and subtlety of expression and generally is presented with those intangibles that so often must be weighted in determining whether or not a witness is truthful. These are the matters that are not capable of reflection in the written record and it is because of such factors that save strong and cogent reasons appellate tribunals are not justified in reversing a finding of credibility made by a trial judge. Particularly is that so where, as here, the case was heard by an experienced trial judge.

356. With respect to findings of credibility, Mr. Justice Matthews of our Court of Appeal in **Clayton v. Skrobotz** (1992), 110 N.S.R. (2d) 320 stated, ***inter alia***:

> The trial judge had the advantage, not given to us, of seeing and evaluating the witnesses and their testimony.
>
> There was persuasive evidence in support of the various findings of fact and the inference drawn by the trial judge. Our duty is not to retry the case. It is not necessary to recite the many authorities for the proposition that we should not

> disturb the findings of fact and conclusions drawn by the trial judge unless there was palpable and overriding error on the part of the trial judge. The trial judge must be shown to be plainly wrong.

We have thoroughly reviewed the record on this appeal and considered the submissions of the appellants in careful detail. We have concluded there was ample evidence upon which the trial judge could base his findings on the key issues of fraud and material disclosure. We have not been persuaded that the trial judge committed reversible error either in his evaluation of the facts nor in his expression of the law to those facts.

The Seabright directors acted honestly. They relied, and they were entitled to rely, on the technical information made available to them by the capable Seabright technical staff, reinforced as need arose by the reports of consultants. They were in receipt of legal advice as to their duties as directors and attempted to follow it, and they were guided by principles proven to be of a high moral standard. They were unjustly accused of fraud and material misrepresentation.

This conclusion disposes of the fundamental issues, that is to say, the issues related to fraud and wilful misrepresentation referred to in the following grounds of appeal:

> Ground 1:
>
> The learned trial judge erred in law by applying to his consideration of the law and the facts a fundamentally wrong principle, namely, that notwithstanding that the Public Record was false, the respondents had no obligation to disclose this fact and could not have been acting dishonestly, in bad faith or contrary to the best interests of the Corporation as long as they continued to profess their hope that Beaver Dam somehow would become a mine.

Ground 2:

By failing to find that the respondents acted dishonestly, in bad faith or contrary to the best interests of the Corporation by representing that they were not aware of any facts which tended to show a material change in the prospects of Seabright prior to the completion of the takeover.

Ground 7:

As to the whole of the said judgment:

(c) by failing to draw the proper inferences from material evidence central to the outcome of the judgment, including material evidence pertaining to:

(i) the Robertson Reports, written and oral, their contents and timing;

. . .

(iii) the pattern of disclosure followed by Seabright from its inception to March 1987 compared to its pattern of disclosure thereafter;

(iv) the respondents' public pronouncements, publications, and correspondence concerning Seabright by the respondents Coughlan and Garnett.

The falsity of the public record upon which the first ground is predicated is an allegation of the appellants, not a finding of the judge. On the analysis of the facts set out above, this allegation is unproven and this ground of appeal must fail.

With respect to the second ground, we concur with the trial judge that the respondents were not aware of any facts representing a material change in the prospects of Seabright. This ground must fail.

Ground 7 (c) relates to findings of fact made on the evidence. The appellants have not persuaded us that the trial judge made palpable errors justifying a reversal of his findings.

Grounds of appeal 1, 2 and 7 (c) are therefore dismissed.

III Patterson Kitz - Ground 7(e)

The appellants allege the trial judge erred "by accepting the evidence of a witness who was acting as counsel to one of the respondents". This ground relates to the evidence at trial of three solicitors, Dara Gordon, in particular, and Suzan Frazer and Janice Stairs, all of whom are members of the Halifax law firm of Patterson Kitz (PK).

After rendering his decision, the trial judge remained seized of jurisdiction to assess damages and tax items of solicitor and client costs that could not be agreed to by the parties. Included among the accounts presented for solicitor and client taxation by counsel of record for the respondents Coughlan and Garnett were professional accounts for services rendered by PK during the period from June 26, 1988 to March 27, 1993, approximating $222,000.00. In large measure these accounts represented legal services provided the respondent Coughlan.

The appellants contend this was the first indication they had that lawyers of PK were providing professional assistance to Coughlan during the course of the proceedings leading up to and including the trial. They further contend that because Gordon, Frazer and Stairs gave evidence at trial that was personally favourable to Coughlan, and referred to by the trial judge in his decision, they were then in a conflict of interest because they had a financial interest in the outcome of the trial. The appellants say that their evidence buttressed the decision rendered by the trial judge, that it should be struck and without it the trial judge could not have awarded Coughlan the damages made in his favour.

The record reveals that it was well known to all parties and their counsel that PK were the principal solicitors of Seabright, Seabrex and Coughlan and had been for many years. This was also known to the trial judge who in his decision at page 101, paragraph 33 (N.S.R.), referred to Gordon as having been "lead counsel" in the preparation of corporate documents for Seabright, and that she was assisted by Stairs and Frazer. He then wrote, "this firm continued as Seabright's advisor throughout the events here". (emphasis added)

In August, 1988, when the Ontario actions became known and the Nova Scotia actions were commenced, counsel of the appellants requested PK to provide documents relating to Seabright. PK determined it was in a conflict situation. Thereupon it retained Mr. S. Bruce Outhouse, Q.C., a senior Halifax solicitor in practice with a law firm

not connected with this litigation, for legal advice with respect to the solicitor and client conflict concerning the release of documents requested by counsel of the appellants. At or before that time, according to Frazer, PK withdrew from advising Coughlan with respect to the developing litigation. He retained the law firm of Stewart McKelvey Stirling Scales. The latter firm, as the record shows, was his counsel in the institution of the Nova Scotia actions and throughout all of these proceedings, including this appeal.

In a supplementary affidavit, sworn by Frazer, after trial, she deposed:

> Patterson Kitz never acted as advocates in this litigation. Patterson Kitz never acted as "counsel" respecting the litigation, i.e. Patterson Kitz have never advised Mr. Coughlan respecting the presentation of his case to this Court. Patterson Kitz declined to act as advocates or counsel because we anticipated that lawyers from Patterson Kitz would likely be witnesses. Upon service of the Originating Notice, Patterson Kitz considered the issue of legal representation and met with Mr. Pugsley so that Stewart McKelvey Stirling Scales would handle the proceeding from the outset, as appears on the three items listed beside August 3, 1988 in Exhibit "A" to my affidavit of July 7, 1993. I did not, prior to the conclusion of the trial, discuss the conduct of the trial with Mr. Coughlan and I am informed by Ms. Gordon and believe that, before the conclusion of the trial, Ms. Gordon did not discuss the conduct of the trial with Mr. Coughlan.
> [AB 43, p. 14551]

In Coughlan's reply, dated October, 1991, to the appellants' demand for particulars, he stated:

> Further accounts have been rendered by the law firms of Patterson Kitz, Halifax, and Borden Elliot, Toronto, and Stewart McKelvey Stirling Scales. Patterson Kitz has rendered accounts to Mr. Coughlan in connection with the Ontario Securities Commission proceedings. Patterson Kitz will be rendering further accounts relating to the Toronto Stock Exchange listing, as well as time spent by their representatives in preparation for and attendance at discovery examinations and providing background information and documents relating to the damage claims being advanced in these proceedings.
> [AB 28, p. 9686-7]

At trial, this reply was entered as Exhibit 1202 and Coughlan testified that it was accurate.

At the taxation on costs, Frazer testified in part as follows:

> At no time did we discuss the merits of the case.
> [AB 14, p. 4617-8]
>
> We were not acting [for] him or counselling him in any way, shape or form in connection with the litigation. We were not and are not retained by Westminer. We do not act for them in this matter. We had -- gave no advice on the merits of this case.
> [AB 14, p. 4627]
>
> We had no discussions with Mr. Coughlan on strategy relating to the trial. If that's your question, then I can tell you we had no discussions relating to the strategy of the trial or any issues. Any discussions I had on strategy with Mr. Coughlan dealt with financing strategies or his dealing with creditors and the Stewart McKelvey firm.
> [AB 14, p. 4641]

In Coughlan's discovery evidence, which was entered at trial, the following exchange took place between him and counsel of the appellants:

> 4633 Q Did you ever file a material change report with the Nova Scotia Securities Commission?
>
> A I would think copies of what were filed with Ontario would have been sent to Nova Scotia.
>
> 4634 Q Do you know that to be the case?
>
> A No, I'd have to check with legal counsel.
>
> 4635 Q Have you asked legal counsel?
>
> A <u>They won't discuss the case with me.</u>
>
> 4636 Q <u>Patterson Kitz are still your counsel on commercial matters?</u>
>
> A <u>Yes, they are.</u>
>
> 4637 Q <u>And Dara Gordon specifically is your lawyer on an on-going basis with respect to these matters?</u>
>
> A <u>Partially, yeah. There's another lawyer that's much more involved.</u>
>
> [AB 43, p. 14590] [emphasis added]

According to Frazer's affidavit of July 17, 1993, PK, during times material to its account, performed work for Coughlan in three areas being issues relating to solicitor and client privilege (to which reference has already been made), preparation of information concerning damage claims (appearing to have been mainly at the request of Stewart McKelvey) and advice and assistance concerning how he would and could finance the present litigation. She deposed, in part:

> Patterson Kitz has been and remains Mr. Coughlan's personal solicitors for most matters. Patterson Kitz did not act as counsel of record in this action because we expected that solicitors with Patterson Kitz would be witnesses. There were, however, three areas of legal work which were necessary for Mr. Coughlan to have performed in order to pursue this lawsuit for which it was more efficient and appropriate for Mr. Coughlan to employ Patterson Kitz than Stewart McKelvey Stirling Scales. These three areas were: (a) issues relating to solicitor/client privilege, (b) preparation of damages claim, and (c) financing of the litigation.
> [AB 42, p. 14460]

All of these matters bear heavily upon the arguments which developed on the taxation issues before the trial judge.

At the end the trial judge ruled the PK account could not be claimed as part of the solicitor and client award of costs. In so ruling, we find the trial judge committed no error.

When the trial judge reached the point in his decision where he discussed the award of general damages he proposed to make in favour of Coughlan, he quoted from the evidence given by Gordon with respect to her opinion and observations of the effect the allegations of fraud had on Coughlan. (See p. 214, para. 667 ff., N.S.R.). It is interesting to note that the trial judge begins paragraph 678 with the words, "His counsel, Dara Gordon ....". This indicates that through all the maze of evidence and exhibits, the trial judge had not lost sight of the long standing professional relationship between Gordon and Coughlan.

During the several post-decision hearings before the trial judge, upon the review of the PK account, he was confronted head-on by counsel of the appellants with respect to the propriety of Gordon, Frazer and Stairs giving evidence at trial on matters that related to the personal and financial life of Coughlan after it was disclosed by their accounts that they had not cut off professional communication with Coughlan in its entirety.

The trial judge responded:

> With regard to the main argument which was submitted, I don't think it's necessary for me to really refer to that. I don't want to comment on the ethical practices of any of the counsel involved. I do think it would have been appropriate if the Court has been advised during the trial that, yes, we are counsel for Mr. Coughlan and that we're aware of the canon of ethics and we should advise the Court of this. I would certainly have granted them the privilege of appearing as a witness because they had the information and it would be senseless to try and get somebody else to provide the information at the time. Had I been asked I certainly would have allowed it.
>
> Perhaps it was just an effort in the writing that I did refer to some of the comments that were made with regard to the effect of the matter on Mr. Coughlan in the decision and I certainly could have taken that from a number of other witnesses. Perhaps it was unfortunate that I chose one of the Patterson Kitz witnesses in that regard.

Upon a careful review of the relevant record we have concluded that the trial judge put this matter in proper perspective. In this long and complicated trial there could be no doubt but that PK through Gordon, in particular, and to a lesser extent Frazer and Stairs, had a long professional relationship with Coughlan. The reader of the decision can reasonably conclude from the language and references made by the trial judge that he was aware of that fact. It is also reasonable to conclude that an experienced trial judge, as Justice Nunn is, would take that relationship into account when determining the credibility of Gordon, Frazer and Stairs and the weight to be attached to their evidence. We agree with the observation he made in his post-decision ruling, that it would have been "appropriate" if he had been apprised of the nature of the relationship that existed from August, 1988 forward. So many matters, both technical and general, both relevant and otherwise, were pursued in the detailed questions put to witnesses during the course of the trial that one wonders how this escaped. In the end, however, we are satisfied as the trial judge stated, that from the evidence of several other witnesses he could have reached the same result. Therefore, in our opinion, his acceptance of the evidence of Gordon and his quoting from it does not materially or adversely affect the ultimate conclusions he reached with respect to Coughlan.

IV The Insurance and Indemnity Actions - Common Elements

Seabright Resources provided protection for its officers and directors in two ways, under its indemnification by-law and by maintaining a directors' and officers' liability

insurance policy. Following the start of the Ontario actions by Westminer Canada Limited and Westminer Canada Holdings Limited against the Seabright directors, four separate actions were commenced in Nova Scotia, two relating to insurance and two relating to indemnity. The outside directors of Seabright, Amirault, Hemming, MacDonald, McCartney and Hansen, brought actions against the two Canadian Westminer subsidiaries and their directors, Lalor, Maloney, Snell, Braithwaite and Couzin, and Western Mining Corporation Holdings Limited. Coughlan and Garnett sued those defendants and joined the directors of Western Mining Corporation Holdings Limited: Parbo, Morgan, Aitken, Anderson, Badger, Brydon, Knight, Kramer, Morley, Woodall and the senior Westminer counsel, Colin Wise.

Seabright was incorporated under the **Canadian Business Corporations Act** R.S.C. 1985, c. C-44, which under s. 124 authorizes companies to indemnify their officers and directors in the event of claims against them arising out of their performance of their duties to their company.

Seabright enacted By-law 25, which states:

> The Corporation shall indemnify the directors or officers of the Corporation, former directors or officers of the Corporation or any person who acts or acted at the Corporation's request as a director or officer of a body corporate of which the Corporation is or was a shareholder or creditor and his heirs and legal representatives against all costs, charges and expenses including an amount paid to settle an action or satisfy a judgment reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he has been made a party by reason of being or having been a director or officer of such Corporation or body corporate if:
>
> > (a) he acted honestly and in good faith with a view to the best interests of the Corporation; and
> >
> > (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful.
>
> The Corporation shall also indemnify such directors or officers who have been substantially successful in the defence of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the Corporation or body corporate against all costs, charges and expenses reasonably incurred by him in respect of such action or proceeding.

Seabright also carried a directors' and officers' liability and corporate reimbursement policy for a policy period ending August 1, 1988, to a limit of $1,000,000 less a $20,000 deductible. The trial judge has set out the relevant provisions at page 194 ff., (N.S.R.) of his judgment. The gist is that the insurers agreed to pay the directors and officers for losses resulting from claims against them for wrongful acts, to pay the company's losses for indemnifying the officers and directors in the same circumstances, to defend actions against directors and officers and to pay the costs of such defences. Excluded were claims for fines and penalties, punitive or exemplary damages, claims arising from insider trading situations, claims by the company for remuneration wrongly paid, claims resulting from the directors' or officers' dishonesty and claims initiated against them by the company.

The corporate status of Seabright at the time of the actions is relevant. The trial judge described it at page 197 (N.S.R.) of his reported judgment:

> To go back a step to set the scene, after the take-over closed on January 27, 1988, Seabright continued under its name until July 1, 1988, when it was amalgamated with several other companies under the name Westminer Canada Limited which was wholly owned by Westminer Canada Holdings Limited, both companies being named defendants in these actions. The remaining defendants in the S.H. 66230 action, Lalor, Maloney, Snell, Braithwaite and Couzin were the sole directors of both companies at the material times here. These same individuals had been directors of Seabright for some time before the amalgamation.

While Westminer Canada was the successor to Seabright, the trial judge held, justifiably, that exclusions in the by-law and insurance policy relating to actions by the company against former directors would not have deprived the Seabright directors of protection because they were also being sued by Westminer Canada Holdings, a separate corporate entity.

The Ontario action was launched July 29, 1988. Service was effected on Mr. Coughlan on August 2, 1988 and subsequently on the other Seabright directors. When he notified the insurers on August 3, he was advised that the directors were not covered because the policy had expired on August 1.

It is clear from the judgment and the evidence, as well as submissions of counsel, that Westminer had no intention of paying indemnity to the Seabright directors.

Coughlan and Garnett were accused of fraud from the outset but the Ontario action only alleged negligent misrepresentation against the outside directors. Negligence was covered by the indemnity insurance and it was not within the exclusions. This would have entitled the directors to call on the insurers to defend the Ontario action. It also gave rise to a circularity argument which could have resulted in the setting aside of the Ontario action on the ground that if Westminer succeeded against the Seabright directors, it would be bound to indemnify them for the claim under the Seabright indemnity by-law.

On December 16, 1988, the Ontario pleadings were amended to change "negligent misrepresentation" to "wilful misrepresentation", which in the context of this case was the equivalent of fraud. This purported to bring the action entirely within the insurance and indemnity exclusions. It also brought the issue of the Seabright directors' honesty to centre stage, and foreclosed recovery by Westminer against any directors on any ground that did not involve their fraudulent or dishonest conduct.

This was a further body blow to individuals whose professional stature, and thus their livelihoods, depended on their reputations for honesty and integrity. Westminer officials were unable in their testimony to point to any factual basis for making the more serious allegation. The trial judge found it had been a matter of strategy, an attempt to exclude the possibility of insurance coverage and to avoid the circularity argument respecting indemnity. The December 16 amendment and the timing of the service of the Ontario action will be revisited in considering the argument on the tort claims to determine whether depriving the defendants in a multi-million dollar lawsuit of insurance to pay for their defence is a matter distinct from and collateral to the honest aspiration of a plaintiff to be compensated for its loss.

A. The Insurance Actions - Liability

The trial judge reviewed Westminer's knowledge of the insurance policy and the knowledge of it by various key players. Of William Braithwaite, Westminer's Canadian counsel, who was involved both in inquiries as to the status of the directors' liability insurance and the launching of the Ontario action, he said at page 198:

> Braithwaite frankly admits that had he been aware of the policy even a week earlier, he would have taken the necessary steps to give notice to the insurers of the impending claim. In fact, however, he was aware.

The trial judge's analysis of the liability of the appellants with respect to the insurance begins at p. 199:

> Under the policy Westminer, the company, knowing of the intention to sue, should have given notice to the insurer as the policy makes the company the agent to give notice. It had a duty to do so which it breached. That breach, coupled with actual service of the Ontario action after the expiration of the policy, caused the plaintiffs in both these actions to suffer the loss of insurance coverage possibly to a very substantial amount. The intention to sue was known, the existence of the policy was known, at least by Western Mining, Westminer and several of the directors, and copies of the policy were in hand. Even as late as the date of the action and several days thereafter notice could have been given, yet it was not.
>
> While the defendant Westminer Holdings did not have the duty under the insurance policy to give notice, it was a party to the Ontario action, was proceeding in tandem with it, with the same directors including those who had knowledge of the policy and certainly all were aware of these types of policies and the benefits of them. In these circumstances, I am satisfied they owed a general duty of care to the plaintiffs. It knew or ought to have known that the plaintiffs here were entitled to the benefits of an insurance policy, knew or ought to have known that policy was due to lapse and failed to take any steps, quite deliberately, to see that notice was given to the insurer or to the plaintiffs within the policy period. This constitutes negligence. The damage to the plaintiffs was foreseeable, and in actuality substantial.
>
> Though I have found Westminer had breached its duty to give notice of the claim under the policy, I also find that it was negligent. It had a duty of care to these plaintiffs which it failed to meet. None of the individuals involved in these events were amateurs. They were all senior corporate officials with longstanding experience, except, of course, Braithwaite but he, as were they, was quite familiar with directors insurance. In fact, all were covered by similar policies. Once they became aware of the policy, in the circumstances here, their failure to act in the best interests of the plaintiffs, even though suing them, amounts to a breach of the duty of care owed to the plaintiffs arising out of their position as former directors and officers covered by the policy. The company must be imputed to have the knowledge of its senior officers and directors and must be held liable in negligence. Even without such imputation the company had the policy and its terms were obvious. It had the same duty of care which it failed to observe.
>
> So also with the Australian company, Western Mining. It had an insurance department which was aware of the policy and its terms and expiry date which did nothing to assure the plaintiffs would have the advantage of insurance coverage despite the fact that the Ontario lawsuit was being orchestrated, and directed by that company. Clearly, negligence must be attributed to it.

> Of the individual named defendants I find that Lalor, Maloney, Wise and Braithwaite were negligent in that they knew or ought to have known of the policy and/or the likelihood of the existence of a policy and they failed to make the necessary inquiries or take the necessary steps to protect the plaintiffs to whom they owed a duty of care once they became aware that either a policy existed or likely existed and a claim was to be made whereby the plaintiffs suffered a loss. Ordinarily they would not owe a duty of care to the plaintiffs but once they had knowledge of the policy, or ought to have, and were involved in the commencement of the lawsuit, they clearly did owe a duty of care to the plaintiffs and I find that they breached that duty.
>
> As to the other named defendants, there is no evidence which could support any finding of negligence against them. At the end of the plaintiffs, **Coughlan and Garnett** case, their counsel indicated no evidence was submitted against the named defendants, Parbo, Aitken, Anderson, Badger, Brydon, Knight, Woodall and Kramer, all members of the Western Mining Board of Directors and the actions against them are dismissed.

He further found that Westminer Canada Limited, referred to by him as Westminer, the company into which Seabright had been amalgamated, was liable to the former Seabright directors for breach of its fiduciary duties to notify the insurer when it became aware of the claim by Westminer Holdings Limited, and to which Westminer was a party. In so finding he held:

> Wilson, J. in **Frame v. Smith**, [1987] 2 S.C.R. 99; 78 N.R. 40, 23 O.A.C. 84, at p. 136 stated:
>
> > [T]here are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation of a new relationship would be appropriate and consistent.
> >
> > Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
> >
> > > (l) The fiduciary has scope for the exercise of some discretion or power;
> > >
> > > (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> > >
> > > (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the exercise or discretion.

Sopinka, J. in **International Corona Resources v. LAC Minerals Ltd.**, [1989] 2 S.C.R. 574; 101 N.R. 239; 36 O.A.C. 57; 61 D.L.R. (4th) 14; 69 O.R. (2d) 287; 35 E.T.R. 1, at 599, after citing with approval Wilson, J.'s statement of required characteristics, added:

> It is possible for a fiduciary relationship to be found although not all these characteristics are present, nor will the presence of these ingredients invariable identify the existence of a fiduciary relationship.
>
> The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability.
>
> . . . . .
>
> The necessity for this basic ingredient in a fiduciary relationship is underscored in professor Weinrib's statement, quoted in **Guerin v. The Queen**, [1984] 2 S.C.R. 335, at p. 384 that:
>
> > ... the hallmark of a fiduciary relationship is that the relative legal positions are such that one party is at the mercy of another's discretion.

Here the three characteristics Wilson, J. outlined are present. Westminer had the discretionary power which, in these circumstances, it could unilaterally exercise and the plaintiffs were peculiarly vulnerable to or at the mercy of the company's exercise of discretion. Sopinka, J.'s emphasis of the one indispensable feature is certainly present here as the plaintiffs were entirely dependent upon the company and certainly were vulnerable.

We will deal briefly with the grounds of appeal raised by the appellants that the learned trial judge erred as to the finding that the respondents were entitled to the benefit of insurance coverage:

> Ground 4(a):
>
> by holding that the appellants had a duty of care to the respondents to maintain or acquire insurance for the benefit of the respondents;

The trial judge made no such finding. The insurance policy was in existence at relevant times.

> Ground 4(b):

> by holding that the appellants had a duty of care to the respondents to see that notice of the claims against the respondents was given to the insurer or the respondents within the policy period;
>
> Ground 4(c):
>
> by holding that the appellants were negligent in failing to see that notice of the claims against the respondents was given to the insurer or the respondents within the policy period;

Seabright and its successor Westminer Canada was agent for the insured directors under the policy and had a duty to notify the insurer in the event it became aware of a claim against them. Westminer knew of the policy and of its duties under it; it knew of the impending claim, and the approaching expiry date. We agree with the trial judge that it was negligence, or worse, and a breach of the duty of care, not to notify the insurers.

> Ground 4(d):
>
> by failing to hold that the respondents were excluded from insurance coverage by reason of an absence of honest belief in the publicly represented status of the ore reserves of the Beaver Dam mine, indifference to the truth, wilful blindness and active non-disclosure of information;
>
> Ground 4(e):
>
> by failing to hold that the respondents were excluded from insurance coverage by reason of insider trading when they had knowledge of a material fact or material change in the affairs of Seabright which they knew had not been disclosed;

Given our conclusions with respect to grounds of appeal 1, 2 and 7(c), these grounds are without foundation.

> Ground 4(f):
>
> by failing to hold that the respondents would be excluded from insurance if the indemnification by-law is applicable;

This ground relates to a provision in the insurance policy that insurance is not payable to directors, otherwise entitled, who have been indemnified by the company. In that instance it is payable instead to the company. This is a safeguard against double recovery,

and in assigning damages flowing from the appellants' liability with respect to insurance and indemnity provisions, the trial judge avoids this trap. Damages issues are considered below.

Ground 4(g):

> by holding that the costs incurred by the respondents in relation to an application to stay proceedings in the Supreme Court of Ontario and ordered by the Supreme Court of Ontario to be paid by the respondents "in any event of the cause" are costs of defence payable under the policy of insurance;

This ground will be dealt with under our consideration of damages.

Ground 4(h):

> by holding, without any evidentiary foundation, that the policy of insurance would have continued to provide the benefit of a defence after the amendments to the Ontario statement of claim on December 16, 1988.

On this point the trial judge made the following observations at p. 201:

> As one would expect the argument put before me was that once the amendment was made all claims were outside the policy. No evidence was presented as to what position the insurer would take or that the problem was ever presented to the insurer. As well, no case has been presented, nor could I find one, dealing with the time this question is considered. Without the aid of authorities, I can only conclude that the proper time to make the determination of the obligation to defend in circumstances such as here is when the action is commenced and the statement of claim served. At this time, in these cases, I find that the statement of claim did contain a claim for which the policy provided coverage and the insurer would have had a duty to defend.
>
> From this point on one can only speculate as to what the insurer might or might not do. They might have tried to get out of the action after the amendment or, indeed might have had the action struck or they may have continued to defend throughout taking a non-waiver agreement from the Ontario defendants if fraud were proved. However, it is not appropriate to speculate.
>
> The Nova Scotia plaintiffs were deprived of an opportunity to have a defence provided and, having found them to have been negligently deprived by the defendants whom I have found to be negligent, they are entitled to recover in damages.

The evidentiary burden is on the person claiming an exclusion. The trial judge has found the burden was not met, and we have not been persuaded he erred in doing so.

Ground 4 of the notice of appeal, with the exception of ground 4(g) to be dealt with below, is dismissed.

B. The Indemnity Actions - Liability

As mentioned above, a director was entitled to indemnity under Seabright By-law 25 for losses resulting from legal proceedings provided that:

> (a) he acted honestly and in good faith with a view to the best interests of the Corporation; and
>
> (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful.

The By-law also provided:

> The Corporation shall also indemnify such directors or officers who have been substantially successful in the defence of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the Corporation or body corporate against all costs, charges and expenses reasonably incurred by him in respect of such action or proceeding.

The trial judge held at p. 204:

> Having already found no fraud on the part of the plaintiffs it is not difficult to determine whether the plaintiffs have met the required tests to entitle them to indemnification. Again it becomes a question of fact and, on the evidence before me, already reviewed, I find as a fact that the plaintiffs, and each of them, at all times acted honestly and in good faith with a view to the best interests of the corporation.
>
> In passing, though I have referred a number of times to the directors relying on information received, I should point out that s. 122 of the **Canada Business Corporations Act** sets out the duty of care of directors and officers and s. 123(4) endorses reliance in good faith as an exclusion of liability. Those sections provide in part:
>
> > 122.(1) Duty of care of directors and officers. - Every director and officer of a corporation in exercising his powers and discharging his duties shall

> (a) act honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
>
> 123.(4) Reliance on statements. - A director is not liable under s. 118, 119 or 122 if he relies in good faith on
>
> (a) financial statements of the corporation represented to him by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or
>
> (b) a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him.

I have found the plaintiffs have met the requirements of s. 122(a) and am satisfied they have acted properly in accordance with s. 122(b). As well the evidence is clear that Seabright had competent professional technical staff, competent legal advice and consultants of national reputation and that the plaintiffs, and each of them, did rely in good faith on the reports of these people which were provided to them. The heavy burden on the defendants to prove otherwise had not been met.

There can be no question that the plaintiffs are entitled to be indemnified by Westminer for all costs, charges and expenses paid in defence of the Ontario action as, though ordinarily not determined until the end of the action, in this case, as I have said, all the issues in the Ontario action, except damages if the Ontario action was to succeed, are an inherent part of these actions and my decision here, in reality, is a decision of all those issues. Having decided, in effect, against the Ontario plaintiffs on the key issues they would have been required to prove, the Nova Scotia plaintiffs, Ontario defendants, have been "substantially successful" in their defence.

I must add that it is no surprise that I am deciding issues that are fundamental to the Ontario action. Both the Ontario courts and our Court have referred to this in interlocutory decisions and counsel for all parties have agreed that such would be the case and certainly the case was presented to that end.

Issues arising out of the finding that the respondents are entitled to indemnification under the provisions of Seabright's By-laws and the provisions of the **Canada Business Corporations Act** are set out in ground 5 of the appellants' grounds of appeal. They argue that the trial judge erred as set out in each of the grounds of appeal considered below:

Ground 5(a):

> by failing to hold in accordance with the inferences necessarily to be drawn from the evidence adduced at trial, that the respondents were excluded from indemnification because they did not act honestly, in good faith or with a view to the best interests of the Corporation;

We agree with the trial judge that the respondents did act honestly, in good faith and with a view to the best interests of the Corporation.

Ground 5(b):

> by holding that the claims advanced against the respondents in the Supreme Court of Ontario were within the indemnification provided by the By-laws;

The appellants' factum understandably does not address this ground.

Ground 5(c):

> by holding that Seabright By-law 25 is lawful and valid;

The appellants argue that the **Canada Business Corporations Act** authorizes indemnification only when the test of acting honestly, in good faith and in the best interests of the corporation has been met: if the by-law mandates payment of indemnity before the test is met, it is contrary to the statute. They suggest that the test will not be met until the Ontario action is decided, and that ordering payment of indemnity before the Ontario action is concluded can only be predicated upon an interpretation of the by-law that puts it outside the statute. The trial judge was well aware of the conceptual difficulties created by a statement of defence in Nova Scotia incorporating the statement of claim from the Ontario action. He understood that the issues he decided were the same issues that were raised in Ontario. Once issues are decided in the Supreme Court of this province, doctrines of ***res judicata*** and issue estoppel arise with respect to those issues in the Ontario action. The same issues cannot be tried again in Ontario. The Ontario action has therefore been decided, and the Seabright directors have been found to have passed the test. Neither the by-law nor the trial judge's interpretation of it offend the **Canadian Business Corporations Act.**

Ground 5(d):

> by holding that the respondents are entitled to indemnification against all costs, charges and expenses reasonably incurred in connection with the action commenced in the Supreme Court of Ontario when that action is not yet complete;

As remarked with respect to Ground 5(c), the issues in the Ontario action have been decided. There will no doubt be an additional claim for indemnification with respect to the expenses of the formal disposition in Ontario.

Ground 5(e):

> by holding that the costs incurred by the respondents in relation to an application to stay proceedings in the Supreme Court of Ontario and ordered by the Supreme Court of Ontario to be paid by the respondents "in any event of the cause" are costs payable pursuant to the indemnification;

Ground 5(f):

> by holding that the defendants were required to pay the respondent Coughlan for the costs and agreed settlement of the independent investigation conducted by the Ontario Securities Commission.

These grounds will be dealt with in our consideration of costs and damages. We are otherwise satisfied that the trial judge committed no reversible error with respect to his conclusions as to the indemnity provisions. With the exception of grounds 5 (e) and (f), ground 5 is dismissed.

V The Tort Claims

A. Civil Conspiracy

Coupled with the insurance and indemnity actions were allegations by the Seabright directors that the Westminer defendants were guilty of the torts of inducing breach of contract, civil conspiracy and abuse of process. The trial judge found for the Seabright directors on the conspiracy issue, which is under appeal, and therefore considered it unnecessary to consider the other two torts. The respondents have raised induced breach of contract and abuse of process by way of notices of contention. The three tort issues are therefore before this Court.

The trial judge dealt separately with the conspiracy claims of Coughlan and Garnett, who had also sued the parent corporation, and those of the outside directors. In both sets of circumstances he found the tort of civil conspiracy had been proven against all corporate defendants. His conclusions rest upon the foundations of numerous findings of fact beginning at p. 205 of his reported decision which we find unnecessary to repeat verbatim, but upon which we rely, having considered the evidence in accordance with the principles of judicial review cited above and having found no palpable or overriding error on the part of the trial judge. It is nevertheless necessary to quote from the trial judgment at some length beginning at page 206 to set the findings with respect to civil conspiracy in their proper context:

> Before discussing the remedies sought a careful consideration must be made of the Ontario action and its purposes. The action itself claims damages of $60,000,000, an additional $10,000,000 as punitive and exemplary damages together with solicitor and client costs and pre-judgment interest. Morgan, in his testimony, indicated the action was brought for damages and for vindication of their conduct (his and the teams') in the acquisition, and, he also said the purpose was to "bring to account the Board of Seabright.
>
> The plaintiffs contend that the action was not for the purposes of obtaining damages, as there would be no hope of ever collecting such amounts, if awarded, but, in fact, was for a two-fold purpose, namely to save Morgan from having to account to his own Board and to punish the whole former Seabright Board. They fortify their contention regarding damages by indicating that, without actual evidence of dishonesty, these directors would be entitled to indemnification under the by-laws.
>
> Courts generally lean against interfering with one's right to commence an action and, indeed, rarely are faced with having to decide the purpose or motivation of an action. Generally speaking an action is commenced for the purpose of obtaining an award of damages and this Ontario action appears on its face to be just that. Yet, on the other hand, there are occasions where a court is called upon to make a determination that an action commenced is so questionable as to be wrongful and, in the exceptionable and unusual circumstances here, this is one of those rare occasions.
>
> While I hesitate to say that the bringing of the Ontario action was unlawful, recognizing a wide and almost unfettered right to do so, I am convinced in the unusual and particular circumstances of this case that the predominant purpose of the litigation was to injure the plaintiffs. Fraud and dishonesty are very serious allegations, not lightly made, and considering the negligence regarding the directors and officers insurance, the existence of the indemnity by-laws and the intention to deny indemnification, the lack of any evidence of fraud or dishonesty at the time the action was commenced, the raising of the allegation to fraud by the amendment without any reasonable evidence to prove it, the decision to take the action and utilize the discovery

procedure dropping the action "without much adverse consequence" if nothing discovered, let alone the enormous costs involved in time and money, show a callous disregard of the plaintiffs rights and a determination to cause them injury.

Having found as I do that the predominant purpose of the Ontario action against the outside directors was to injure it is appropriate to consider the allegation of civil conspiracy. In the most recent Canadian case in the Supreme Court of Canada reviewing the tort of conspiracy, **Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959; 117 N.R. 321; 4 C.C.L.T. (2d) 1; 43 C.P.C. (2d) 105; 49 B.C.L.R. (2d) 273; 74 D.L.R. (4th) 321, Wilson, J. reviewed the English cases and the decision of Estey, J., in **Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.**, [1983] l S.C.R. 452; 47 N.R. 191, and acknowledged that Canadian jurisprudence, though noting the English approach, has resulted in the law governing the tort of conspiracy being different in Canada. Justice Wilson then cites the following, at pages 985 and 986, indicating that this passage provides a useful summary of the current state of the law in Canada with respect to the tort of conspiracy: [Emphasis added]

> As Fridman has noted in **The Law of Torts in Canada**, vol. 2, at p. 265:
>
> > The difference between the English and Canadian formulations of the tort of conspiracy lies in the way the intent of the defendants is expressed. The language of Lord Diplock seems to indicate that the necessary intent should be actual. That of Estey, J. suggests that it may be possible for a court to infer an intent to injure from the circumstances even if the defendants deny they acted with any such intent.
>
> Fridman goes on to observe at pp. 265-66
>
> > In modern Canada, therefore, conspiracy as a tort comprehends three distinct situations. In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the predominating purpose of injuring the plaintiff. Second, there will be an actionable conspiracy if the defendants combine to act lawfully with the predominating purpose of injuring the plaintiff. Third, an actionable conspiracy will exist if defendants combine to act unlawfully, their conduct is directed towards the plaintiff (or the plaintiff and others), and the likelihood of injury to the plaintiff is known to the defendants or should have been known to them in the circumstances.

(The appellants point out that immediately following the above citation from Fridman, Wilson J. stated:

> In my view, this passage provides a useful summary of the current state of the law in Canada with respect to the tort of conspiracy. Whether it is "good law", it seems to me, it is not for the Court to consider in this proceeding where the issue is simply whether the plaintiffs' pleadings disclose a reasonable cause of action.

Wilson J.'s reservations appear to relate only to Fridman's first ground, when unlawful means are employed. Earlier she had stated the law with respect to the situation when lawful means are used "is not in doubt."

> If A and B agree to commit acts which would be lawful if done by either of them alone but which are done in combination and cause damage to C, no tortious conspiracy actionable at the suit of C exists unless the predominant purpose of A and B in making the agreement and carrying out the acts which cause the damage is to injure C and not to protect the lawful commercial interests of A and B. This proposition is established by five decisions at the highest level: **Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.**, [1892] A.C. 25; **Quinn v. Leathem**, [1901] A.C. 495; **Sorrell v. Smith**, [1925] A.C. 700; **Crofter Hand Woven Harris Tweed Co. Ltd. v. Vietch**, [1942] A.C. 435 and **Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)**, [1982] A.C. 173. [See: **Metall und Rhostoff A.G. v. Donaldson, Lufkin & Jenrette Inc.,** [1989] 3 W.L.R. 563, at p. 593, per Slade L.J.] [Emphasis added by Wilson J.]

Since **Hunt v. Carey** the House of Lords in **Lonrho Plc. v. Fayed**, [1992] 1 A.C. 448 overruled the **Metall** case in which Slade L.J., interpreting Lord Diplock's remarks in **Lonrho v. Shell**, had ruled that the tort of conspiracy to injure required proof in every case not merely of an intention to injure but also that the injury was the predominant purpose of the conspiracy. **Lonrho v. Fayed** involved an unlawful act, and Lord Bridge of Harwick held for the House of Lords that it was not fatal if the purpose to injure was not the predominant purpose of the conspiracy so long as it was one of the purposes. This has the effect of broadening the scope of the tort of conspiracy in Fridman's first description, while predominant purpose remains the test in the second description which the trial judge applied in the present appeal.)

The trial judge continued:

> This case falls squarely within the second category of Fridman's summary, once the acting in combination is determined, as I have already found the predominant purpose was to injure. While the law of tort does not recognize a claim against an individual defendant who has caused injury to the plaintiff, it does recognize a claim against more than one acting in combination as the tort of conspiracy.
>
> In the present case, the facts clearly indicate and I so find that the three corporate defendants, Western Mining, Westminer Canada and Westminer Holdings did act together and in concert and by agreement to commence the Ontario proceedings, for the predominant purpose of causing injury to the plaintiff directors. [Emphasis added] Despite that the commencement of the action constituted lawful means the elements of the tort are complete. The evidence of the actual injury is abundant. As Lord Cave stated in **Sorrell v. Smith**, [1925] A.C. 700 at p. 712:
>
> > A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.

With respect to Coughlan and Garnett, the trial judge noted that Westminer representatives had made a complaint to the Ontario Securities Commission which was settled by an agreement in which Mr. Coughlan was able to specifically deny any impropriety on his part as to the allegations forming the basis of the Ontario actions, but which resulted in severe restrictions on his business activities and required him to pay the Commission $40,000 to cover its costs of the inquiry. The trial judge observed at page 212:

> Clearly, the fact is readily established that the defendants, prior to commencing their actions, directly and deliberately caused the Ontario Securities Commission to conduct the inquiry. While it may be true that the Commission would have launched an inquiry on its own motion once it learned of the action, this activity of the defendants certainly appears to support the plaintiffs allegation that the real intent of the defendants was to injure Coughlan in every way they could.
>
> The next difference between Coughlan, Garnett and the others is that the original Ontario Statement of Claim alleges fraud against them as well as negligence and the amendment removing negligence was only significant as it related to insurance and indemnity, the benefits of which the defendants clearly intended to deprive the plaintiffs. However, as with the directors, there was no additional evidence obtained which would have substantiated the amendment.
>
> Concerning the allegation of conspiracy in these actions, the same problem presents itself as dealt with regarding the outside directors, i.e. whether or not the circumstances here establish the tort. As before I have no difficulty finding that there was an agreement between the three corporate defendants. The question to be determined is whether it was for an unlawful

purpose or was it for a lawful purpose with the predominating intent to cause injury.

Counsel for the plaintiffs has urged upon me that there is no other conclusion to be reached than that this multi-billion dollar Australian company set out deliberately and intentionally, with the two Canadian companies under its control, to crush the plaintiffs, causing them great injury, and with that as its predominant intent. Counsel contended there was no hope of ever recovering the damages claimed, which appears to be the reality, that the defendant plaintiffs in the Ontario action were dishonest as to the alleged reliance on the public record, and all the Australian witnesses were untruthful in key areas of their testimony. He also alleges the key witnesses were fully aware of the nature and effect of an allegation of fraud and were callous and uncaring of the rights of the plaintiffs. The purpose of the Ontario action, he alleges, was two-fold, to crush the plaintiffs here and to prolong and delay Morgan having to account to his Board of his Canadian acquisitions. Also referred to was the tremendous time, effort and costs involved which, he argues, was calculated to bring the plaintiffs to their knees and render them unable to defend whereby Morgan would have his vindication and be saved before his own Board by virtue of a default judgment.

Needless to say these arguments were vigorously denied. However, this is an exceedingly unusual situation and these positions have caused me great difficulty. I certainly am aware of one's rights to commence an action and also that resulting impoverishment of an opposite party is not necessarily actionable. These cases, nevertheless, have put into issue and require a determination as to whether there is, in these circumstances, an action brought for the predominating purpose of causing injury to these plaintiffs. It is an extremely difficult question and I have read and re-read the evidence and arguments on this point a number of times. I can only conclude on the facts that the plaintiffs position is accurate. [Emphasis added.] The whole of the three corporate defendants' conduct was not that which rings pure and clean as an honest attempt to use the courts to establish their rights and obtain an award of damages. They had no concern for the plaintiffs' insurance rights; they intended not to provide indemnity; they based their action on the premise that they relied upon the public record which was clearly shown to be false by their own witnesses in their direct testimony; they pursued the outside directors without evidence and, as I have found, predominantly to injure them; and, along the way, have been liable of the various torts which I have already found. It is surprising that, though Coughlan and Garnett remained with Seabright after the take-over, they were never asked about or confronted with any of the information which was offered in evidence. As well, certain key witnesses of the defendants, during their testimony at the trial were deceptive and untruthful as to the events and information on which they claimed to rely. Taking into account that the allegation here were of fraud and that everyone involved here understood the nature of proof required, on the one hand, and the effect of the allegation on those against whom it is made, on the other hand, with all the circumstances here, I am satisfied that the predominating intent was, indeed, to injure the plaintiffs and the injury, as expected, did occur.

> The result, therefore, is that the plaintiffs here established the tort of conspiracy against the three corporate defendants under the second situation of Fridman, ***supra***. I need not consider whether this conduct would fall within Fridman's first situation requiring acting unlawfully.
>
> My comments on inducing breach of contract in the section of the directors apply equally here and I so incorporate them here.

The appellants classify the type of conspiracy found by the trial judge as "simple motive" conspiracy and argue that it cannot apply in the context of civil proceedings because "all plaintiffs intend to cause injury to the parties against whom proceedings are brought. . . . To hold otherwise would expose all plaintiffs who join together to bring any action to liability in tort irrespective of the merits of the claims that they advance."

(While it may be debatable that all plaintiffs do intend to cause harm, it is important to note that is not the test the trial judge applied. He properly considered the predominant intent.)

The appellants continue in their factum:

> For this reason, the law has never, before the delivery of the Trial Judge's reasons in this action, countenanced a claim for conspiracy on the basis of the institution of and prosecution of civil proceedings. Indeed, with one exception, the law has always conferred absolute immunity upon parties to civil proceedings on the basis of public policy. While every action brings hardship to the persons against whom it is instituted, the law grants immunity to plaintiffs in the prosecution of civil proceedings because the interests of justice ultimately outweigh the inevitable hardships to defendants. The fundamental principle in this respect was articulated by Lord Pearce in **Rondel v. Worsley**, [1967] 3 All E.R. 993 (H. L.) (pp. 1024-1025), as follows:
>
> > The legal process inevitably creates hardships and it is not always easy to see what is the right balance. In attempting to do so, one must regard the interrelation of the various parts. It is a hardship that a man who has done no wrong should be subjected by a plaintiff to a baseless charge, in meeting which he will incur large expense. The charge may be reported largely in the newspapers and injure his reputation ... . But the basic hardship is inevitable and will always remain, namely, that any plaintiff can use the legal machine as a sounding board for untruthful allegations and cause harm, trouble and expense to an innocent defendant, and yet the law holds him (and the press who report the case) immune from paying damages for their untruth. Yet to remove this

> immunity would create a great injury to justice. Without it, the honest litigant might not dare to bring an honest claim for fear that if he fails he might be sued for damages.

Rondel v. Worsley upheld, on grounds of public policy, the immunity of counsel from being sued for professional negligence in the conduct of a case and preparation for it. The immunity was not extended to advisory work or work in drafting and revising documents; Lord Pearce's remarks were in his dissent on this latter point. **Rondel v. Worsley** does not reflect the present state of law in Canada respecting the liability of counsel and Krever J. (as he then was) specifically did not follow it in **Demarco v. Ungaro** (1979), 21 O.R. (2d) 673 (H.C.).

Much of the other authority cited by the appellants relates to the privilege conferring immunity on witnesses and others involved in the course of legal proceedings, particularly with respect to giving evidence, and like **Rondel v. Worsley**, it is of limited assistance in dealing with the matter in issue. It is noteworthy that the appellants have not cited authority on point with the present issue in this appeal: a finding of civil conspiracy by the lawful act of starting a civil action with the intention of destroying the defendants' reputations and resources predominant over an intention to recover damages.

The appellants' claim to an absolute, unqualified immunity both in bringing civil proceedings and in their conduct of them is too broad. As framed by the appellants, it was put to rest by the respondents' argument that absolute, unqualified immunity in bringing actions is inconsistent with well-known principles relating to malicious prosecution, which they argue has entered the civil arena, and abuse of process. Their point is that the appellants have not met the burden of establishing that public policy favouring access to the courts protects a legal proceeding brought with the predominating intention of causing harm.

The respondents cite **Speed Seal Products Ltd. v. Paddington**, [1986] 1 All E.R. 91 (C.A.), in which Fox, L.J. on behalf of the Court of Appeal stated at pp. 97-98:

> In **Goldsmith v. Sperrings Ltd**., [1977] 2 All E.R. at 574, [1977] 1 WLR 478 at 489 Lord Denning MR (in a dissenting judgment) said:
>
> > What may make it [the legal process] wrongful is the purpose for which it is used. If it is done in order to exert

> pressure so as to achieve an end which is improper in itself, then it is a wrong known to the law. This appears distinctly from the case which founded this tort. It is **Grainger v. Hill.**

And Scarman L.J. said ([1977] 2 All E.R. 566 at 582, [1977] 1 WLR 478 at 498):

> In the instant proceedings the defendants have to show that the plaintiff has an ulterior motive, seeks a collateral advantage for himself beyond what the law offers, is reaching out to effect an object not within the scope of the process: **Grainger v. Hill** . . ..

Both Lord Denning MR and Bridge L.J. cited the observations of Lord Evershen MR in **Re a debtor (No 757 of 1954), ex parte the debtor v. F. A. Dumont Ltd,** [1955] 2 All ER 65 at 78, [1955] Ch 600 at 623:

> The so-called "rule" in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist. . . .

The **American Second Restatement of the Law of Tort** (1977) at 682 states the following principle, under the heading "Abuse of Process":

> One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

The respondents cite numerous further authorities including the following: **Roy v. Prior,** [1971] A.C. 470 at 477; **Little v. Law Institute of Victoria**, [1990] V.R. 257 per Ormiston, J., dissenting at p 292; **Nelles v. Ontario** (1989), 60 D.L.R. (4th) 609; **Roncarelli v. Duplessis** (1959), 16 D.L.R. (2d) 6898 (S.C.C.); **Singh v. The Bank of British Columbia** (1990), (refusing to follow **Cabassi v. Vila** (1940), 64 C.L.R. 130, 47 A.L.R. 33); **Berry v. British Transport Commission**, [1961] 1 Q.B. 149 rev'd o.g. [1962] 1 Q.B. 306; **Churchill v. Siggers** (1854), 3 El. & Bl. 929, 118 E.R. 1389; **Wiffen v. Bailey and Romford Urban District Council**, [1915] 1 K.B. 600; **Grainger v. Hill** (1838), 4 Bing N.C. 212, 138 E.R. 769; **Speed Seal Products Ltd. v. Paddington,** [1985] 1 W.L.R. 1327 (C.A.); **Dorene Limited v. Suedes (Ireland) Limited,** [1981] I.R. 312; **Quartz Hill Consolidated Gold Mining Company v. Eyre** (1883), 11 Q.B.D. 674.

Malicious prosecution in regard to civil proceedings is recognized in England and the United States. John W. Wade, Dean and Distinguished Professor of Law, Emeritus, Vanderbilt University, writing in the Hofstra Law Review, Volume 14, No. 3, Spring, 1986, described its status in the United States as follows in an article entitled *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*:

> The courts have placed stringent restrictions upon this tort action. In some states, the restrictions are so stringent as to render the cause of action essentially unavailable. There is general agreement, however, that these restrictions can be reduced to five specific requirements, on all of which the plaintiff in the suit for malicious prosecution (the present plaintiff) has the burden of proof. They are: (1) the present defendant must have taken an active part in the initiation, continuation, or procurement of the original civil proceeding; (2) the original proceeding must have terminated in favour of the present plaintiff; (3) there must be damage of the type that the court regards as appropriate for an action of this nature; (4) there must be a lack of probable cause for the original action; and (5) there must have been "malice" in the bringing of the original action.

The same criteria have been recognized in England; see, e.g. **Speed Seal Ltd. v. Paddington**, [1985] 1 W.L.R. 1327 (C.A.) at 1333-4.

The tort of abuse of process is described in Flemming, **The Law of Torts** (1987), p. 592, as follows:

> Unlike malicious prosecution, the gist of this tort lies not in the wrongful procurement of legal process or the wrongful launching of criminal proceedings, but in the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to serve.

The more widely recognized tort of abuse of process involves use of a legal action in an attempt to achieve an ulterior purpose outside the ambit of the action, which at its simplest is to provide compensation for a wrong suffered. The process itself is harmed by misuse, typically some form of extortion. Without the element of a purpose external to the action, the tort of abuse of process cannot be found regardless of the baseness of the motives of the person bringing the action. This point is well documented in the factum of the appellants, which treats it as follows:

> In the leading case which established the tort of abuse of process, **Grainger v. Hill** (1838), 4 Bing. N.C. 212, the mortgagee of a vessel caused her owner to be threatened with arrest under civil process in order to compel

him to give up the ship's register to which the mortgagee was not entitled under the terms of the mortgage. He procured the issue of a writ of ***capias*** to recover the money lent, although repayment was not yet due, knowing that the mortgagor was unable to pay the debt or obtain bail. Yielding to the duress, the plaintiff gave up the register and was thereby prevented from making several profitable voyages. He was allowed to recover for this loss, without proof that the proceedings were destitute of reasonable and probable cause or had terminated in his favour. The crucial feature in this decision was not the issue of the writ of ***capias*** but the accompanying demand for the register which disclosed the real purpose behind the mortgagee's manoeuvre, namely to attain the register to which the mortgagee was not otherwise entitled.

Reference: **Grainger v. Hill** (1838) 4 Bing. N.C. 212.

Similarly, in **Guilford Industries Ltd. v. Hankinson Management Services Ltd. et al.** (1974), 40 D.L.R. (3d) 398 (B.C.S.C.) the plaintiff, which had filed a lien against the defendant's property, was found to have abused the process of the court, not because the lien claim was completely without legal foundation (although that was found to be the case), but because the court found that the lien was put on the defendant's property for the purpose of extracting from the defendant a favourable settlement in a totally unrelated dispute. The court termed this unlawful purpose "legal blackmail".

Reference: **Guilford Industries Ltd. v. Hankinson Management Services Ltd. et al**. (1974), 40 D.L.R. (3d) 398 (B.C.S.C.).

By contrast, where there is no element of legal "blackmail" or extortion in order to obtain something to which the plaintiff is not legally entitled, there can be no finding of abuse of process, even if the litigation in issue has caused the defendant injury. This is so even if the plaintiff commenced the action for the purpose of causing the injury suffered by the defendant.

The need for an ulterior or collateral purpose to coerce someone in some way *entirely outside the ambit of the legal claim on which the Court is asked to adjudicate* is made abundantly clear from the authorities quoted at length by the respondents Amirault et al. For instance, in the quotation at the top of page 244 of these appellants' factum, from **Pacific Aquafoods Ltd. v. C. P. Koch Ltd. et al.** (1988), 47 C.C.L.T. 214 (B.C.S.C.) per Meredith J. is the following:

> Short of wrongful purpose the plaintiff is not guilty of any tort. For instance, if it were shown that the plaintiff had something in mind beyond the legitimate resolution of the dispute, as for instance *pure revenge, or simply to damage the reputation of the defendant, it has not committed a tort*.

More specifically, it has been held that the following situations do not constitute an actionable abuse of process:

a) where the plaintiff's action is factually groundless, ill conceived, and bound to fail, and the bringing of the action is actuated by wrongful motives;

Reference: **Teledata Communications Inc. et al. v. Westburne Industrial Enterprises Ltd. et al.**, **supra** at p. 468-469.

b) where the plaintiff's action was not brought for the legitimate resolution of a dispute, but for revenge, or simply to damage the reputation of the defendant;

Reference: **Olympic Industries Inc. v. McNeill, Vancouver Registry No. C905135,** [1992] B.C.J. No. 755, April 7, 1992, Maczko J. (as yet unreported) at p. 28 - 29.

c) where the plaintiff's action has caused and will continue to cause serious financial loss to the defendant, even if the action was brought for the purpose of causing such financial loss;

Reference: **Atland Containers Ltd. v. Macs Corp. Ltd. et al.** (1975), 54 D.L.R. (3d) 363 (Ont. S.C.) at p. 367.

d) where the plaintiff dishonestly presents a false case for the purpose of advancing or sustaining his claim or defence;

Reference: **Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc. and Another**, [1989] 3 All E.R. 14 (C.A.) at p. 49.

e) where the plaintiff's action has the effect of antagonizing, impoverishing or intimidating a party, even when that result is intended by the party commencing the action;

Reference: **Poulos et al. v. Matovic et al.** (1989), 47 C.C.L.T. 207 (Ont. S.C.) at p. 209 - 210.

f) where the plaintiff s action was brought for the purpose of inducing settlement;

Reference: **Tsiopoulos v. Commercial Union Assurance Co. (**1987), 57 O.R. (2d) 117 (Ont. S.C.) at p. 122 - 123.

Abuse of process is an issue in the present appeal while malicious prosecution is not. Both of these torts have been considered here merely to illustrate what Lord Denning called the general rule: "court proceedings may not be used or threatened for the purpose of . . . some collateral advantage . . . and not for the purpose for which such proceedings are properly designed and exist." The use made of legal proceedings in the present case appears

clearly tortious. Which tort most aptly encompasses the circumstances is a matter of classification.

Fridman's second definition of civil conspiracy cited above and affirmed by Wilson J. in **Hunt v. Carey** is clearly applicable:

> Second, there will be an actionable conspiracy if the defendants combine to act lawfully with the predominating purpose of injuring the plaintiff.

However the principles expressed in Fridman's first definition, reviewed by recent cases in England on the tort of conspiracy (See e.g. **Lonrho v. Fayed)**, should not be overlooked:

> In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the predominating purpose of injuring the plaintiff.

Both descriptions relate to the same tort; they merely illustrate ways in which it can be committed.

The **Statute of Conspirators** dates from 1293 although conspiracy was known to the law even earlier. In **The History of Conspiracy and Abuse of Legal Procedure**, Percy Henry Winfield, Cambridge, 1921, the definition given is from the 1810 edition of **Statutes of the Realm**:

> Conspirators be they that do confeder or bind themselves by Oath, Covenant, or other Alliance, that every of them shall aid and bear the other falsely and maliciously to indite or cause to indite or falsely to move or maintain Pleas; . . .

Conspiracy appears to have become merged with abuse of process during the Middle Ages. Its modern incarnation dates from the **Mogul**, ***supra,*** case in 1892. In the meantime criminal conspiracy became distinct from civil conspiracy.

Criminal conspiracy to commit murder or other indictable offences under s. 465 of the **Criminal Code** does not require that an overt act be committed in furtherance of the objective. With respect to treason, s. 46(3) specifies that "the act of conspiring is an

overt act of treason." Civil conspiracy requires an overt act in addition to the conspiracy. Damages must be proven for the tort to be made out, and damages do not result unless something is done as a result of the conspiracy. That something, the overt act, may be perfectly innocent in itself, but its performance in the context of a conspiracy to harm creates a tort.

In **Midland Bank v. Green (No. 3),** [1979] 1 Ch. 496, Oliver J. refers to the development of the crime of conspiracy in the Star Chamber, noting **The Poulterer's Case** (1611) 9 Co. Rep. 55b, the first to hold that a mere conspiracy, though nothing was executed, was an offence. He continues at page 523 ff.:

> As Sir William Holdworth says in his **History of English Law**, vol. VIII, 2nd ed. (1937), pp. 393-394:
>
> > The fact that the conspiracy is the essence of the crime, while the damage is the essence of the tort, must make a great deal of difference in the rules applicable.... The crime consists in the conspiracy; but the damage is the gist of the action by the party injured by the conspiracy -- the damage, that is, flowing from the unlawful acts done by each and all of the conspirators in pursuance of their joint design. What we must look at, therefore, in order to establish a cause of action, is not so much the conspiracy, as the quality of the acts and the damage flowing therefrom.
>
> Nor is this distinction one which is to be found only in the works of historians and writers of textbooks. It was emphasised by Bowen L.J., in **Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.** (1889), 23 Q.B.D. 598, 616--the first of the line of cases establishing the modern tort of conspiracy--and by Lord Simon and Lord Wright in **Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch**, [1942] AC. 435, 439 and 461; and it is clearly and succinctly put by Salmon J. in **Marrinan v. Vibart,** [1963] 1 Q.B. 234, where he says, at pp. 238-239:
>
> > ... the gist of the tort of conspiracy is not the conspiratorial agreement alone, but that agreement plus the overt act causing damage. It is true that the crime of conspiracy is the very agreement of two or more persons to effect an unlawful purpose, and any overt acts done in pursuance of the agreement are merely evidence to prove the fact of the agreement. The tort of conspiracy, however, is complete only if the agreement is carried into effect so as to damage the plaintiff. Accordingly, the acts done in pursuance of the agreement are an integral part of the tort: **Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch**, [1942] A.C. 435.

This distinction is, as it seems to me, crucial both rationally and historically and it underlines a certain semantic confusion in the vocabulary of the law. The same word--"conspiracy"--is used to describe two diverse, though possibly overlapping, concepts, for that which is of the essence of a criminal conspiracy does not found tortious liability unless and until something further is done and unless and until damage occurs. It is true that in the **Crofter** case [1942] A.C. 435 Lord Wright, at p. 461, refers to "the conspiracy" as being "the gist of the action," but when that passage is examined it will be seen that he says this only in the context of a passage from the speech of Lord Macnaghten in **Quinn v. Leathem**, [1901] A.C. 495, where he says, at p. 510:

> . . . a conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of *combination or concerted action* could not be regarded as a legal wrong.

In *this* sense, Lord Wright said, "the conspiracy is the gist of the wrong." It is here, as it seems to me, that the key to the present problem lies. The concept of a civil conspiracy to injure has, as Lord Wright observed, developed in the period which has elapsed since the **Mogul** case 23 Q.B.D. 598 in 1889, and it is a concept which is concerned not with agreements--though no doubt some agreement express or implied lies at the root of any conspiracy--but with acts done in combination or concert and causing damage. Throughout the authorities it is upon the *combined or concerted action* that the emphasis is laid. One finds it in **Allen v. Flood**, [1898] A.C. 1; **Sweeney v. Coote**, [1907] A.C. 221; **Sorrell v. Smith**, [1925] A.C. 700 and in **Greenhalgh v. Mallard,** [1947] 2 All E.R. 255. In **Sorrell v. Smith**, [1925] A.C. 700 Lord Dunedin postulated the question, at p. 716:

> My Lords, the question at the root of such cases is in what kind of concerted action which brings injury to an individual as its result can the proceedings be restrained at law or damages given for the injury done?

And in **Greenhalgh v. Mallard**, [1947] 2 All E.R. 255 the matter is put thus by Evershed L.J., at p. 259:

> The essence of any claim is the fact of combination. If, therefore, in any case conspiracy is alleged, the subject of the litigation consists, in my view, of the acts done in combination, and whether it is alleged that these acts, lacking justification in their object, have caused damage to the plaintiff, or that, notwithstanding a legitimate purpose, unlawful means have been employed and the plaintiff has been consequently damaged, both the cause of action and the damage flowing therefrom are the same in each case.

In **Lonrho Plc. v. Fayed**, [1992] 1 A.C. 448 (H.L. (E.)) Lord Bridge of Harwich spoke at length on the distinction between conspiracies to cause harm by lawful means, and by unlawful means:

In **Rookes v. Barnard**, [1964] A.C. 1129, 1204, Lord Devlin said:

> There are, as is well known, two sorts of conspiracies, the **Quinn v. Leathem**, [1901] A.C. 495 type which employs only lawful means but aims at an unlawful end, and the type which employs unlawful means.
>
> Of these two types of tortious conspiracy the **Quinn v. Leathem** type, where no unlawful means are used, is now regarded as an anomaly for the reasons so clearly explained by Lord Diplock in **Lonrho v. Shell**, [1982] A.C. 173 in the following passage, at pp. 188-189:
>
> > Why should an act which causes economic loss to A but is not actionable at his suit if done by B alone become actionable because B did it pursuant to an agreement between B and C? An explanation given at the close of the nineteenth century by Bowen L.J. in the **Mogul** case when it was before the Court of Appeal (1889), 23 Q.B.D. 598, 616 was: "The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise." But to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or B.P. does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II. <u>The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today</u>. [our emphasis] It was applied by this House 80 years ago in **Quinn v. Leathem**, [1901] A.C. 495, and accepted as good law in the **Crofter** case [1942] A.C. 435, where it was made clear that injury to the plaintiff and not the self-interest of the defendants must be the predominant purpose of the agreement in execution of which the damage-causing acts were done.

But this reasoning has no relevance to the second type of conspiracy which employs unlawful means. Of this type Lord Devlin said in his speech in **Rookes v. Barnard**, [1964] A.C. 1129, 1204, immediately following the passage I have just cited: "In the latter type. . . the element of conspiracy is usually only of secondary importance since the unlawful means are actionable by themselves."

It is no doubt for the reason mentioned by Lord Devlin that there is no direct authority unless it be **Rookes v. Barnard** itself, establishing the negative proposition that the tort of conspiracy to injure by unlawful means may be established without proof that the intention to injure the plaintiff was the predominant purpose of the conspirators. But in the many cases where plaintiffs have asserted a conspiracy to injure, but have been unable to prove that any unlawful means were used, judgments in the Court of Appeal and speeches in your Lordships' House emphasising the requirement of a predominant purpose to injure have repeatedly included dicta indicating that this requirement does not apply where the means used to effect the conspirator's purpose are unlawful. I need do no more than cite some outstanding examples.

In **Ware and De Freville Ltd. v. Motor Trade Association,** [1921] 3 K.B. 40, 67, Scrutton L.J. said:

> I take the **Mogul** case [1892] A.C. 25 as deciding that a combination to do acts, the natural consequence of which was to injure another in his business, was not actionable, *if those acts were not otherwise unlawful,* such as assaults, or threats of assaults, and were done in furtherance of the trade interests of those combining.

In **Sorrell v. Smith**, [1925] A.C. 700, 712, Viscount Cave L.C. said:

> I deduce as material for the decision of the present case two propositions of law, which may be stated as follows:--(1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. (2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues. The distinction between the two classes of case is sometimes expressed by saying that in cases of the former class there is not, while in cases of the latter class there is, just cause or excuse for the action taken.

He added, at p. 714:

> The second proposition, or course, *assumes the absence of means which are in themselves unlawful,* such as violence or the threat of violence or fraud.

In **Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch**, [1942] A.C. 435, 445, Viscount Simon L.C. said:

> It is enough to say that if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (*no illegal means being employed*), it is not a tortious conspiracy, even though it causes damage to another person.

In the same case Lord Wright said, at pp. 461-462:

> The concept of a civil conspiracy to injure has been in the main developed in the course of the last half century, particularly since the great case of the **Mogul Steamship Co. v. McGregor & Co.,** [1892] A.C. 25. Its essential character is described by Lord Macnaghten in **Quinn v. Leathem,** [1901] A.C. 495, 510, basing himself on Lord Watson's words in **Allen v. Flood**, [1898] A.C. 1, 108: "a conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong." In this sense the conspiracy is the gist of the wrong, though damage is necessary to complete the cause of action. . . . The rule may seem anomalous, so far as it holds that conduct by two may be actionable if it causes damage, whereas the same conduct done by one, causing the same damage, would give no redress. In effect the plaintiff's right is that he should not be damnified by a conspiracy to injure him, and it is in the fact of the conspiracy that the unlawfulness resides. *It is a different matter if the conspiracy is to do acts in themselves wrongful*, such as to deceive or defraud, to commit violence, or to conduct a strike or lock-out by means of conduct prohibited by the **Conspiracy and Protection of Property Act 1875**, or which contravenes the **Trade Disputes and Trade Unions Act 1927**.

The emphasis added in each of these passages is mine.

The reasoning in these passages is both clear and cogent. Where the conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show

that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.

. . .

Lord Denning M.R. said (in **Lonrho v. Shell**, [1982] A.C. 173):

> So this point of law arises directly: Is an agreement to do an unlawful act actionable at the suit of anyone who suffers damage from it which is reasonably foreseeable? Even though the agreement is not directed at him, nor done with intent to injure him? In discussing this point of law I put aside the many modern cases on conspiracy--in which there is an agreement by two or more to do a *lawful* act. It is now settled by the House of Lords that such an agreement is actionable if it is done with the predominant motive of injuring the plaintiff and does in fact injure him: see **Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch**, [1942] A.C. 435, where Lord Simon, L.C. said, at p. 445: "Liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortious conspiracy." Here we are concerned with a different problem altogether. It is an agreement by two or more to do an *unlawful* act. ...I think there is a cause of action when it is remembered that the tort is a conspiracy *to injure*. I would suggest that a conspiracy to do an *unlawful* act--when there is no intent to injure the plaintiff and it is not aimed or directed at him--is not actionable, even though he is damaged thereby. But if there is an intent to injure him then it is actionable. The intent to injure may not be the predominant motive. It may be mixed with other motives. In this context, when the agreement is to do an *unlawful* act, we do not get into the "quagmire of mixed motives," as Lord Simon L.C. described them in the **Crofters** case at p. 445. It is sufficient if the conspiracy is aimed or directed at the plaintiff, and it can reasonably be foreseen that it may injure him, and does in fact injure him. That is what Parker J. thought. I agree with him.

. . .

In the **Metall** case [1990] 1 Q.B. 391 Slade L.J. delivering the judgment of the court, whilst expressly disclaiming any intention to construe Lord Diplock's speech as if it were a statute, nevertheless subjected it to a detailed textual analysis leading to the conclusion that it laid down a rule of law that the tort of conspiracy to injure required proof in every case not merely of an intention to injure the plaintiff but also that injury to the plaintiff was the predominant purpose of the conspiracy.

My Lords, I am quite unable to accept that Lord Diplock or the other members of the Appellate Committee concurring with him, of whom I was

> one, intended the decision in **Lonrho v. Shell**, [1982] A.C. 173 to effect, ***sub silentio***, such a significant change in the law as it had been previously understood. The House, as is clear from the parties' printed cases, which we have been shown, had never been invited to take such a step. Moreover, to do so would have been directly contrary to the view of Lord Denning M.R. expressed in the judgment which the House was affirming and inconsistent with the dicta in what Lord Diplock described, at p. 188, as "Viscount Simon L.C.'s now classic speech in **Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch**, [1942] A.C. 435, 439." I would overrule the **Metall** case in this respect.

Returning to the present case it will be recalled that the trial judge made this key finding:

> In the present case, the facts clearly indicate and I so find that the three corporate defendants, Western Mining, Westminer Canada and Westminer Holdings did act together and in concert and by agreement to commence the Ontario proceedings, for the predominant purpose of causing injury to the plaintiff directors. Despite that the commencement of the action constituted lawful means the elements of the tort are complete. The evidence of the actual injury is abundant.

In their grounds of appeal the appellants allege the trial judge erred, as to the finding of civil conspiracy against the appellants:

> Ground 6(a):
>
> by holding, based on inferences which cannot be reasonably drawn from the evidence, that the predominant purpose of the Ontario litigation was to injure the respondents;
>
> Ground 6(b):
>
> by holding that there can be a conspiracy among a parent corporation and its two subsidiaries;

In response to the respondents' notices of contention the appellants raised the further issue that the conspiracy finding could not be sustained because they were protected by immunity in bringing the Ontario action. That was a new ground of appeal not previously raised, and the respondents objected that it was improperly brought at that stage. While there is merit in that submission, we considered the question of immunity of sufficient importance that we extended the appeal hearing an extra day to hear argument on the issue, relying on **Civil Procedure Rule 62.23**. The immunity issue has been dealt with above.

The present appeal is distinguished by the unequivocal factual findings of the trial judge making it obvious that the conduct of the appellants toward the respondents was tortious. They rushed to acquire Seabright with blind optimism after a selective perusal of the public record and a positive report by their own expert who received the same information as the Seabright directors, ignoring the critical bulk sample test they knew was in progress. Then they sought to cast the entire blame for their rash purchase on the Seabright directors when they discovered there was no ore at Beaver Dam. Whether from embarrassment, an effort to postpone the day when Mr. Morgan had to account to his own board of directors for the folly, or from motives of sheer revenge, the wrath of the mighty Western Mining Company was directed at the individuals who had comprised Seabright with unrelenting tenacity and devastating financial consequences. As the trial judge remarked, it was a most unusual case. Despite, or perhaps partially because of, attempts by the Westminer appellants to cloak their vengeful conduct in the garb of legal proceedings, their behaviour was clearly tortious. It is obvious from the evidence that this manifested itself in an overriding intention, predominating over every other consideration, to avenge themselves on the Seabright directors, to cause them harm. It is similarly obvious that the Westminer companies, their officers and directors, worked together in close association, in concert; that is, they conspired together. It may be fairly said that the Westminer appellants had worked themselves into a kind of ongoing state of conspiracy animated by a preponderating desire to cause harm to the Seabright directors that required only specific acts causing damage to crystallize into torts; these acts, lawful and unlawful, were performed as occasions for them presented themselves. The first opportunity of which they availed themselves was to report Coughlan and Garnett to the Ontario Securities Commission. Against the background found by the trial judge this may well have been enough to ground a finding of civil conspiracy in itself, although he appears to have considered it merely as a supporting fact in finding conspiracy based on the Ontario action.

The trial judge did not consider the Ontario action standing alone, and he was clearly aware that it was unusual to consider a civil action tortious. He stated at page 207:

> While I hesitate to say that the bringing of the Ontario action was unlawful, recognizing a wide and almost unfettered right to do so, I am convinced in the unusual and particular circumstances of this case that the predominant purpose of the litigation was to injure the plaintiffs. Fraud and dishonesty are very serious allegations, not lightly made, and considering the negligence regarding the directors and officers insurance, the existence of the

> indemnity by-laws and the intention to deny indemnification, the lack of any evidence of fraud or dishonesty at the time the action was commenced, the raising of the allegation to fraud by the amendment without any reasonable evidence to prove it, the decision to take the action and utilize the discovery procedure dropping the action "without much adverse consequence" if nothing discovered, let alone the enormous costs involved in time and money, show a callous disregard of the plaintiffs rights and a determination to cause them injury.

The bringing of the Ontario action, and the amendment specifying fraud, were the most serious of the Westminer acts undertaken against the Seabright directors, and the clearest example of lawful acts engaged to an unlawful end. But this was only one basis among several available for making a finding of civil conspiracy. The manoeuvre to deprive the Seabright directors of an insured defence to the Ontario action, for example, was sufficient to fulfil all the requirements for civil conspiracy by an unlawful act. It would be to close one's eyes to the facts to suppose that the matters at issue between the parties were limited to the appellants' reasonable quest for damages and the respondents' concern with being called upon to pay them. As the trial judge made clear in his findings, the desire to cause harm outweighed the appellants' hope of recovery of damages. The clear intention of the appellants was to brand the Seabright directors with allegations of fraud which were unanswerable until the case was concluded. To drive the point home Westminer issued a press release calling attention to the allegations in 1988; ever since, the Seabright directors, professional men dependent on their reputations for honesty, have been under a cloud of suspicion having the most serious consequences for their professional and personal lives. They were faced with undertaking a multi-million dollar defence without the benefit of insurance. If they had been forced to discontinue by the expense, they could never have cleared their names, and the Westminer officials would have had an excuse for their rash purchase. Finding the appellants liable to damages for civil conspiracy was not only sound at law and upon the facts, but it was an appropriate means of doing substantial justice. The tort of civil conspiracy, including both lawful and unlawful acts by the Westminer appellants, comprehensively embraces the circumstances. It is a remedy tailored to the situation.

The inferences drawn by the trial judge can be reasonably drawn from the evidence. In our opinion he committed no reversible error of law. Ground 6(b) was withdrawn. These grounds of appeal are dismissed.

B. Inducing Breach of Contract

The trial judge found:

> Having found the defendants liable under the tort of conspiracy it is unnecessary for me to consider the claim of inducing breach of contract alleged against Western Mining and Western Holdings, a claim based upon the allegation that these two defendants knowingly and intentionally interfered with an alleged contractual right the plaintiffs had with Westminer whereby Westminer was to provide indemnity to them under the by-laws. In support the plaintiff relied upon **Lumley v. Gye** (1853), 1198 E.R. 749, **D.C. Thomson and Co. Ltd. v. Deakin** (1952), Ch. 646, and **Posluns v. Toronto Stock Exchange** (1964), 46 D.L.R. (2d) 210, affirmed on appeal by both the Ontario Court of Appeal and the Supreme Court of Canada. Had I not found the tort of conspiracy proved, rendering this claim academic, I might very well have again found in favour of the plaintiffs under this heading as all elements of the tort appear to have been established.

The respondents have brought the following ground of contention:

> The respondents contend that Mr. Justice Nunn could have found in favour of the respondents by finding that the appellants had committed the tort of inducing breach of contract.

The description of the tort of inducing breach of contract in the present circumstances includes the description of the tort of civil conspiracy committed by the unlawful means of inducing breach of contract. It was only necessary for the respondents to prove the tort of civil conspiracy once against the appellants. Civil conspiracy is the same tort whether committed by lawful or unlawful means; it was not necessary for the trial judge to find two torts occupying the same ground, and it is understandable that the trial judge was reluctant to make a second finding in which the tort of civil conspiracy was implicit.

In **Ward v. Lewis**, [1954] 1 All E.R. 55 (C.A.) at page 56, Denning L.J. said:

> . . . It is important to remember that when a tort has been committed by two or more persons an allegation of a prior conspiracy to commit the tort adds nothing. The prior agreement merges in the tort. A party is not allowed to gain an added advantage by charging conspiracy when the agreement has become merged in the tort. . . . simple ground that the conspiracy adds nothing when the tort has in fact been committed.

While it is true that on the authorities it is the conspiracy that merges with the tort, not vice versa, what matters is that a party injured by the tort of another receive an appropriate remedy in tort. This is not a case in which an allegation of conspiracy is added to a more specific underlying tort to gain an advantage; this is a case in which the underlying

tort is the conspiracy to cause harm. The Ontario action and its amendment, like the induced breach of contract, are separate acts causing harm, but they are manifestations of the same tort of conspiracy. Given the circumstances, the trial judge was entitled to exercise a certain discretion as to which of the acts of Westminer he treated as free-standing torts, and which he included within the tort of conspiracy. He clearly chose to include inducing the breach of contract within that latter category, and we are unable to say, having considered the evidence, the law and the submissions of counsel, that he erred in doing so.

The appellants argued, citing authority, that a right created by a company's by-laws is not a contract. This narrow ground is dealt with by the respondents' authorities.

The seminal case on induced breach of contract was **Lumley v. Gye** (1853), 2 El. & Bl. 216, 118 E.R. 749, (Q.B.) in which the defendant induced an opera singer to break her contract to sing only at the plaintiff's theatre. At p. 233-4 El. & Bl. Compton J. said:

> . . . He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract.

The House of Lords dealt with the issue in **Quinn v. Leathem**, [1901] A.C. 495. At p. 510 Lord Macnaghten approved of the decision in **Lumley v. Gye** and said:

> . . . a violation of a legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.

This statement of Lord Macnaghten was quoted with approval in **Newell v. Baker**, [1950] S.C.R. 385.

In a concurring judgment in **Quinn v. Leathem**, Lord Linley stated at p. 535:

> If the above reasoning is correct, **Lumley v. Gye** was rightly decided, as I am of the opinion it clearly was. Further, the principle involved in it cannot be confined to the inducement to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him.

In Fleming, **The Law of Torts**, 4th ed., (The Law Book Company Limited: Australia, 1971) at p. 603-4 the author refers to **Lumley v. Gye** and says:

> Since then the action has been actively promoted by the courts. Leaving behind its original link with contracts of personal service, it now applies to every kind of contractual relation, including purely commercial. Viewed as an illustration of the wider principle that unjustified "violation of a legal right committed knowingly is a cause of action", it is now wide enough to include even civil rights existing independently of contract.

In the absence of the finding of civil conspiracy, the respondents would have established the tort of inducing a breach of a legal right. We are not of the opinion the trial judge erred in considering it to have been subsumed in the conspiracy finding. This ground of contention is dismissed.

C. Abuse of Process

The trial judge found:

> Though the tort of abuse of process is also alleged it is unnecessary for me to deal with it other than to say it is a separate tort distinct from the tort of malicious prosecution with its own list of essential requirements, namely:
>
> 1. The defendant must have used the legal process;
>
> 2. He must have done so for a purpose other than that which the process in question was designed to serve, that is, for a collateral and illicit purpose;
>
> 3. He must have done some definite act or made some definite threat in furtherance of the purpose; and
>
> 4. Some measure of special damage must be shown,
>
> and I am not able to conclude that the third ingredient has been proved. If it should turn out that I am wrong in this regard, I have no doubt that all the other ingredients have been proved by the plaintiffs.

The respondents have brought the following ground of contention:

> The respondents contend that Mr. Justice Nunn could have found in favour of the respondents by finding that the appellants had committed the tort of abuse of process.

Had we been in the position of the trial judge it is possible we would have inclined to the view that the intention of the Westminer appellants to harm the Seabright directors was so flagrant that it took on a life of its own as a collateral purpose or definite act outside the ambit of the Ontario action. We would have found difficulty in distinguishing between depriving a shipowner of his ship's register from the motive of greed (cf. **Grainger v. Hill**) and depriving honest men of their reputations and fortunes from the motive of vengeance. However we are not prepared to say the trial judge was in error in doubting that a definite act was made out. Again he considered that all of the circumstances relating to the allegation of abuse of process were subsumed in his finding of conspiracy, and no hardship results from this finding. The authorities cited above, and countless other pronouncements of this Court, make it clear that it is not our function to retry the case nor to substitute our views for those of the trial judge, particularly an experienced judge so thoroughly familiar with the facts and so well acquainted with each witness.

We dismiss this ground of contention.

VI Damages

A. General Damages

The trial judge awarded the respondents general damages for conspiracy as follows:

Coughlan	-	$1,000,000
Garnett	-	50,000
Amirault	-	200,000
Hemming	-	200,000
MacDonald	-	200,000
McCartney	-	200,000
Hansen	-	200,000

The trial judge also ordered that pre-judgment interest on each of these amounts be paid at the rate of 11% per annum from September 7, 1988 to May 14, 1993. The total paid by the appellants as interest on these damages amounts to $1,059,906.85.

The appellants appeal the awards of general damages to all respondents except Garnett (ground 6(cd)). The outside directors, Amirault, Hemming, MacDonald, and Hansen cross-appeal on the issue of the general damages (ground 3). The cross-appeal of the general damage award by McCartney was withdrawn during the hearing of the appeal.

The appellants submit that the awards are "inordinately high" and that the principles of reasonableness and moderation established in **Andrews v. Grand and Toy Alberta Ltd.**, [1978] 2 S.C.R. 229, **Teno v. Arnold**, [1978] 2 S.C.R. 287 and **Thornton v. Prince George Board of Trustees**, [1978] 2 S.C.R. 267, the so-called "trilogy", should be applied to substantially lower the award to Coughlan and to reduce "to some degree" those of the outside directors.

The outside directors submit that their general damage awards are too low and should be in the same amount as that awarded to Coughlan, that is one million dollars.

The trial judge began his discussion on damages at page 209 (N.S.R.) as follows:

> As to damages and lest it be lost in the magnitude of this decision I cannot help but quote from a passage from Finch, J. in **D.K. Investments Ltd. v. S.W.S. Investments Ltd. et al (1984), 59 B.C.L.R. 333 (B.C.S.C.), aff'd (1986), 6 B.C.L.R. (2d) 29 (B.C.C.A.)** leave to appeal to S.C.C. refused **(1986), 75 N.S.R. 159,** a case submitted by the plaintiffs on the tort of abuse of process, at page 339:
>
> > I do not think that a special order as to costs is adequate to compensate the defendant for the plaintiff's tortious conduct. The wrong is not only against the court, but as well against the defendant. A less tenacious litigant than the defendant might long since have given up the fight. But the defendant should not be deprived of a remedy because he chose to insist on his legal rights. Tevie Smith is to be commended for having the courage to call a much more powerful adversary to account and he is to be compensated, insofar as a damage award can, for having been put through a lawsuit which has lasted for over 2½ years, a trial which lasted 10 days, and an ordeal which has put him to the brink of financial disaster. Had the plaintiff honoured its original commitment, none of these things would have ensued.
>
> While the tort of abuse of process has an element of a wrong against the court which may have affected Finch, J.'s approach, his comments on tenacity, calling a more powerful adversary to account, the length of time of

> the lawsuit and the trial and the brink of financial disaster certainly will be appropriate as I consider the damage assessment in this case.
>
> As to damages under the indemnity claim, the plaintiffs are entitled to be indemnified by Westminer Canada against all costs, charges, and expenses incurred and to be incurred in the Ontario action. I shall leave that calculation to be agreed upon by counsel at the time of taking out the order in this action and if they cannot agree then representations can be made to me at that time.
>
> Damages for the tort of conspiracy are "at large" and I have no doubt that each of the plaintiffs have been grievously injured in their reputation at large in the business community and in their personal lives.
>
> Referring to the passage by Finch, J., clearly these plaintiffs had to be tenacious to persist through their defence to these allegations. With Western Mining having assets in excess of $6,000,000,000. it was truly a David and Goliath situation. They have been put through a lawsuit extending over 4½ years and a trial that consumed eight months, an ordeal that brought most of them to the brink of financial disaster.
>
> Calculating damages in these actions is difficult. Each of the plaintiffs have testified that they have suffered greatly as a result of the action brought against them. Their counsel has emphasized that only a large award is appropriate in these circumstances by way of general damages and also has requested aggravated and punitive damages.

At page 211 (N.S.R.), after reviewing the individual circumstances of the outside directors and how the lawsuit had affected them, he said:

> It would be extremely difficult, if not impossible, to try to make individual assessments of general damages in these circumstances. Each has been grievously harmed as a result of the allegations of fraud against them in every aspect of their lives, business, professional, social and personal as well as physical. I accept that such is the case. There certainly is an element of callous disregard of these plaintiffs shown by the defendants. I have been urged by the plaintiffs and their counsel that justice demands a substantial award of damages and I am in agreement that such is the case. I think the only appropriate way to deal with the individual plaintiffs in the circumstances of this case is equally with regard to general damages. Therefore I assess general damages for each of the plaintiffs in the amount of $200,000.00. This amount, in some circumstances may be looked upon as high but I am convinced, in the circumstances here, it is quite reasonable.

The trial judge found that there were many significant differences between the damages suffered by the outside directors and Coughlan and Garnett. Dealing first with Coughlan, he found that the Ontario Securities Commission inquiry, initiated as a result of

the appellants complaint, severely restricted Coughlan's business activities. He found that this was an additional action taken by the appellants to injure Coughlan in every way they could. Another difference was that the Ontario action alleged fraud from the first instance against Coughlan and Garnett. The trial judge rationalized his lower damage award to Garnett on the basis that he only claimed damage to his reputation and costs, and "there is not the evidence of injury for him as there is for the other plaintiffs". The Garnett award has not been appealed or cross-appealed. Coughlan's claimed general damages for:

> emotional and psychological stress, the inability to function as required in his normal work environment, the diminishment of his ability to obtain employment opportunities of the nature and quality available prior to commencement of the Ontario claim and prior to these proceedings, inability to effectively participate in financial markets in a manner available to him prior to these proceedings, loss of reputation and standing in the community.

The trial judge accepted the evidence that the lawsuit had a profound effect on Coughlan, causing among other things great stress, shame, frustration and that "all he had built up was lost and would never be regained." He found that the lawsuit played a major part in the breakdown of his marriage and caused personality changes. He found that "his career is ruined and his personal life indelibly scarred".

The test that applies when an appeal court is considering whether an award of damages should be changed was recently reiterated by Matthews, J.A. in **Mailman v. Dartmouth Yacht Club**, (1992), 114 N.S.R. 442 at page 442:

> The appellant frankly acknowledges the heavy burden upon her enunciated by the Privy Council in **Nance v. British Columbia Electric Railway Company Ltd.**, [1951] A.C. 601 at p. 613 in this fashion:
>
> What principles should be observed by an appellate court in deciding whether it is justified in disturbing the finding of the court of first instance as to the quantum of damages; more particularly when the finding is that of a jury, as in the present case.
>
> . . .
>
> The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as

> by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (**Flint v. Lovell**, [1935] 1 K.B. 354), approved by the House of Lords in **Davies v. Powell Duffryn Associated Collieries, Ld.**, [1942] A.C. 601. The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly "out of all proportion" (per Lord Wright, **Davies v. Powell Duffryn Associated Collieries, Ld**., [1942] A.C. 601.
>
> Those principles have been consistently applied since **Nance**.

It is clear that in this case the trial judge awarded these damages for both pecuniary and non-pecuniary losses. He did not attempt to specify how much of each award reflected compensation for the various types of losses each respondent suffered. He found that the respondents were "grievously harmed ... in every aspect of their lives, business, professional, social and personal as well as physical." The awards are all inclusive intending to compensate for such diverse injuries as loss of sleep, loss of reputation, loss of business opportunities, increased stress within family units, loss of billable time from their professions, loss of friendships, and changes in personality. The trial judge also intended the damages to reflect a measure of aggravated damages.

The trilogy of Supreme Court of Canada cases relied on by the appellants, apply only to non-pecuniary damages for pain and suffering in personal injury cases. This is clear from the following excerpts from the decision of Dickson, J. in **Andrews, *supra***, at page 261:

> The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. Money can provide for proper care: this is the reason that I think the paramount concern of the courts when awarding damages for personal injuries should be to assure that there will be adequate future care.
>
> However, if the principle of the paramountcy of care is accepted, then it follows that there is more room for the consideration of other policy factors in the assessment of damages for non-pecuniary losses. In particular, this is the area where the social burden of large awards deserves considerable weight. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into

> monetary terms. This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest.
>
> . . .
>
> If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.

Since the awards made in this case are obviously for more than non-pecuniary losses the limit established by the trilogy is not applicable. The appellants submit as well that the principles of "reasonableness and moderation" established in the trilogy should be applied to these awards to greatly reduce them.

The awards settled by the trial judge are substantial but in relation to the total amount claimed by the appellants in the Ontario action are relatively small. There is no doubt that the respondents suffered greatly in all aspects of their lives for five years as a result of what the trial judge termed "callous disregard" of the respondents, their rights and their reputations. Coughlan has suffered much more than the outside directors because of the factors noted by the trial judge and also because Seabright was his life. He was the one most responsible for its initial development and for its success in attracting investors. He did not have another profession or full time employment as did the outside directors. He was regarded by others to be the main player in Seabright and its public spokesperson. The allegations of fraud against him were undoubtedly more serious and more damaging since he was cast as the "ringleader" by Westminer. The Ontario statement of claim lists eight distinct acts by Coughlan and Garnett purportedly in furtherance of the fraudulent conspiracy. Many of his friends, relatives and business associates lost money as a result of the allegations against him and he felt he would never regain the trust of those people.

We are unable to find that the trial judge proceeded on a wrong principle, that he took irrelevant factors into account or that any of the awards are so inordinately low or high that they are wholly erroneous. There is no error in law. There are valid reasons for the

difference in the levels of damages as between Coughlan and the outside directors. We would not interfere with any of the general damage awards.

B. McCartney - General Damages

The appellants advance a separate ground of appeal with respect to the award of general damages to McCartney, who, as noted above, was also one of the outside directors. They assert the trial judge erred by awarding him damages contrary to s. 4(c) of the **Survival of Actions Act**, R.S.N.S. 1989, c. 453. They say the damages are not for actual pecuniary loss to his estate but rather are for "pain and suffering" which is not recoverable under s. 4(c).

Mr. McCartney lived in Toronto. He was elected a director of Seabright on August 4, 1983. The evidence reveals that throughout his business life he was involved in successful commercial ventures. He was born in 1904 and died from cancer in September, 1991.

Anticipating his death, his evidence was taken on commission by the trial judge at his home in Toronto. It extended over several days during which he was examined and cross-examined at considerable length and in minute detail. That the trial judge was impressed by both the honesty of Mr. McCartney and the loss he suffered as a result of these actions is evident from the comments in his decision at page 211 (N.S.R.), paragraphs 655 and 656.

Although not specifically referred to by the trial judge but yet underlying his award is the following excerpt from the evidence of Mr. McCartney taken on commission:

> 243 Q. Mr. McCartney, I want you to tell His Lordship as best you can what impact it has had on you, the fact that you have been publicly charged as being a fraud, a cheat. Would you tell His Lordship what effect that has had on you?
>
> A. That's a long story.
>
> 244 Q. You tell him as best you can.
>
> A. First, I start out in an attempt to live an honourable life which I think I have done. Now along comes somebody from a foreign country and says you have committed or assisted in the commitment of a $50 million fraud. Now this rumour alone permeates your whole lifetime, all your friends, all your acquaintances, any board you may

> be on and it's an insidious thing. Nobody comes to you and says are you a fraud or did you commit fraud. There's no way you can get at it until we stand before His Lordship. That's two or three years away, maybe more.
>
> Now, how am I with honour going to sit on a board and besmirch the respectability of all the men who are sitting beside me if I am facing a charge of fraud for $50 million? In good conscience you can't do that. So this closes off then really all my corporate life. For short periods of time I was on boards but the minute the thing got established I disappeared.
>
> I think it has affected my personal life that I don't or can't see. I do not know medically. I do not believe I would be here today in this bed if it were not for this. A constant worry that ultimately you stand at risk in a whole lifetime of work collapsing. [Appeal Book, Vol. 43, p. 14670]

While pain and suffering may have closed off Mr. McCartney's physical life, there was evidence before the trial judge, and upon which he could rely, that the actions which are at the heart of this appeal closed off McCartney's corporate and commercial life. We are persuaded that it is to the latter that the trial judge was referring when he found the respondents were "grievously harmed in every aspect of their lives ...". In his general categorization he included "business, professional" which relate to the evidence before him and support his award to McCartney for actual pecuniary loss as best the trial judge was able to assess.

The matter of the application of the **Survival of Actions Act** was first placed in issue by the appellants in this appeal. It was not raised at trial which began March 2, 1992, some six months after McCartney died, and continued to October 30, 1992, thirteen months after he died. That McCartney was dead was known to counsel and the trial judge. References were made to his death during the trial and in the decision of the trial judge. There was an abundance of opportunity to amend the pleadings, but no application was made. Considering the meticulous manner in which the trial was conducted, the evidence adduced and the issues canvassed by the several participating and experienced counsel, it is difficult for us to conceive that it was an oversight that should now be rectified by amending the pleadings.

In any event, and for the reasons given, it is our opinion that the trial judge did not err in his award of general damages to McCartney.

C. Cavalier

Coughlan, in his cross-appeal, contends that the trial judge erred in denying his claim for damages "for diminution of the value of his investment in Cavalier Capital Corporation". MacDonald, Hansen, Hemming and McCartney cross-appeal on the ground that the trial judge erred in denying their claims for the damages they suffered,

> . . . as a direct consequence of the wrongful commencement of the Ontario Action by the appellants against [them] which wrongful commencement had the direct result, ***inter alia***, of preventing Cavalier Capital Corporation from being listed as a public company on a recognized Canadian Stock Exchange, thereby causing [them] to suffer losses.

In the spring of 1988 Coughlan was the driving force in the acquisition of Cavalier Energy Limited, a subsidiary of Dome Petroleum Limited. He caused Cavalier Capital Corporation (Cavalier) to be incorporated for this purpose. The purchase price was $24.2 million. It was his intention to take Cavalier public with a listing on the Toronto stock exchange through an underwriting by Wood Gundy which, from the sale of Cavalier shares, capital in the range of $25 million to $30 million would flow to the treasury. The influx of capital would then be used to retire the debt obligations created to finance the purchase of Cavalier Energy.

The funds required to purchase Energy were obtained from the National Bank. It included about $15 million secured by letters of credit. Again, largely inspired by Coughlan, approximately 35 individuals and companies provided the letters of credit in support of Cavalier's borrowing from National. These persons included those who have lodged these cross-appeals in the following amounts:

TDCO, a family holding company controlled by Coughlan	$2,000,000
McCartney	$2,000,000
Hansen	$1,600,000
Hemming	$500,000
MacDonald	$400,000

The claims for damages which arise through these cross-appeals were advanced at trial. The underlying circumstances upon which they were based were described by the trial judge together with his reasons for disallowing them. Although the excerpt is lengthy for the purposes of this decision, it is useful to quote from the decision of Justice Nunn beginning at p. 216:

> Cavalier is a story in itself. Essentially the evidence is that Coughlan and others, particularly some of the other directors in these actions, became involved in another corporation, Cavalier, after the takeover and before the Ontario lawsuit. Cavalier acquired some western Canadian oil and gas properties. Coughlan again the promoter, began to prepare an initial Public Offering for Cavalier Capital Corporation in May, 1988 and a Public Offering dated July 22, 1988 (Ex. 1198) was filed with the various security commissions on July 25th, with the expectation that it would proceed in the normal course. Wood Gundy had entered an agreement (Ex. 1371) to act as lead underwriter and indicated that at the time the units were to be offered they would enter a formal underwriting agreement to "take down" the whole issue at a fixed price, i. e. an underwritten deal as opposed to a best efforts deal and a much better arrangement for the offering company.
>
> The proceeds of this issue would be approximately $30,000,000 part of which would be used to pay off existing bank indebtedness, which in turn, would release the main investors' letters of credit which was securing the Company's indebtedness. That is, those initial investors, Coughlan and some of the other directors in these actions, would recover their security and otherwise continue in Cavalier's activities.
>
> The Ontario lawsuit was commenced following which Wood Gundy backed out first of an underwriting deal and later of even a best efforts deal. By letter, dated August 22, 1988 (Ex. 1199) Wood Gundy advised Cavalier, while noting the market for these initial offerings had not been good since the market crash, that the lawsuit brought into question the integrity of the directors of Cavalier and attacks the heart of the marketing effort for this company on an initial public offering in an already difficult market. The letter concludes with:
>
> > The result of the launching of the lawsuit is to substantially diminish the demand for Capital's securities in the Nova Scotia market, thus virtually eliminating any demand for the securities outside of Nova Scotia ... .
>
> To summarize, the evidence indicates that the regulatory authorities would not approve the offerings, considerable negotiations following but the authorities objected to the constitution of the Board of Directors and, though Coughlan was prepared to resign, his own Board could not agree as Coughlan was the promoter and without him they were not prepared to continue. I need not relate all the intervening events. Eventually, the Ontario Securities Commission inquiry was launched and, with the settlement agreement

concluded, Cavalier proceeded with filing another preliminary prospectus dated April 26, 1990 (Ex. 1200) but the Ontario Securities Commission required more disclosure of the lawsuit and Coughlan's resignation. Further negotiations took place until August at which time the request for Coughlan's resignation was withdrawn. Then, however, the Toronto Stock Exchange, in order to grant a listing agreement, wanted Coughlan's resignation as a director and officer and all his shares placed in escrow, despite the Ontario Securities Exchange settlement agreement. Cavalier was again in an impossible position. Ultimately the underwriter withdrew by letter dated November 6, 1990 (Ex. 1380). Appeals to the Toronto Stock Exchange were unsuccessful.

Finally, Cavalier sought protection under the **Companies Creditors' Arrangement Act** (Ex. 1381) and unable to obtain a plan of arrangement under that **Act** the company was put into receivership and, at the time of trial, it was anticipated that liquidation would leave nothing for unsecured creditors or shareholders. The security given by letters of credit was lost.

Coughlan, through his investment companies (family trust companies) had invested $3,550,000 in Cavalier, all of which had been lost.

Coughlan alleges this loss is directly attributable to the Ontario lawsuit. The evidence certainly establishes that the lawsuit played a great role in Cavalier's difficulties and was the certain and only reason for its difficulties with the regulatory authorities.

However, there were other factors of uncertainty, even if the offerings were approved. An underwritten deal with Wood Gundy was not a certainty and may not have occurred. The market was not favourable and though there was some recovery by 1990, it still was fluctuating and not too favourable for initial offerings. There could be no assurance the issues would be sold. Problems, unassociated with financing, occurred to the companies properties which could be significant.

All in all, I am not satisfied that damages should be awarded under this head. It cannot be said that these losses are directly attributable to the lawsuit. Though it, indeed, contributed to the loss, its contribution is incapable of calculation and the actual loss may be too remote to be considered. This claim is, therefore denied.

Referring to the claims of the respondents other then Coughlan, the trial judge wrote, at p. 211, para. 658:

Hemming, Hanson and MacDonald claim as special damages for monies lost in an investment in Cavalier Corporation. This was a company acquired by Coughlan and these three, with a large portion to the funds they had obtained from their sale into the bid of Seabright stock, after the sale but before the action. They claim on the basis that the expected progress of this company was quickly prevented by the claim of fraud against Coughlan as the Ontario Securities Commission made it impossible for a public offering to go ahead and, as a result, the company went bankrupt and they each suffered

> heavy loss. . . . In any event, I can not accept that the special damages claimed have been proven. In my mind, they are too remote and, although the loss was real, it cannot be attributed solely to the defendants as there are too many other intervening factors. Therefore, all claims for special damages relating to Cavalier Corporation are denied.

The thrust of the strong and vigorous arguments mounted by the respondents in their cross-appeal is that the Ontario action, begun by Westminer, brought down Cavalier with the resulting financial losses which each of these men suffered. They rely upon the decision of the Supreme Court of Canada in **Canadian National Railway Co. v. Norsk Pacific Steamship Co.**, [1992] 1 S.C.R. 1021, (1992) 137 N.R. 241. There Justice McLachlin stated at p. 1152-3 (S.C.R.):

> In summary, it is my view that the authorities suggest that pure economic loss is ***prima facie*** recoverable where, in addition to negligence and foreseeable loss, there is sufficient proximity between the negligent act and the loss. Proximity is the controlling concept which avoids the spectre of unlimited liability. Proximity may be established by a variety of factors, depending on the nature of the case. To date, sufficient proximity has been found in the case of negligent misstatements where there is an undertaking and correlative reliance (**Hedley Byrne**); where there is a duty to warn (**Rivtow**); and where a statute imposes a responsibility on a municipality toward the owners and occupiers of land (**Kamloops**). But the categories are not closed. As more cases are decided, we can expect further definition on what factors give rise to liability for pure economic loss in particular categories of cases. In determining whether liability should be extended to a new situation, courts will have regard to the factors traditionally relevant to proximity such as the relationship between the parties, physical propinquity, assumed or imposed obligations and close causal connection. And they will insist on sufficient special factors to avoid the imposition of indeterminate and unreasonable liability. The result will be a principled, yet flexible, approach to tort liability for pure economic loss. It will allow recovery where recovery is justified, while excluding indeterminate and inappropriate liability, and it will permit the coherent development of the law in accordance with the approach initiated in England by **Hedley Byrne** and followed in Canada in **Rivtow, Kamloops** and **Hofstrand**.

It is the position of the cross-appellants that they should recover their economic losses because the Ontario action was the wrong committed by Westminer, that Westminer should have foreseen the cross-appellants as victims of its negligence and that the wrongful act of Westminer was the proximate cause of the losses they suffered. There can be little doubt but that the Ontario action played a role in the difficulties encountered by Cavalier. The extent of that role is the vexing issue that confronted Justice Nunn at trial and us on appeal.

Justice Nunn observed that "even if the offerings were approved" . . . "there were other factors of uncertainty". A review of the evidence reveals, among others, the following:

1. At the time Wood Gundy indicated its likely withdrawal from the underwriting it had a contractual right to do so for other unspecified reasons even though it professed the Ontario action had a bearing upon the integrity of Coughlan in the marketplace and presumably this would adversely affect the marketability of the share offering.

2. The share price for the Cavalier offering had not been established. Without that, it was unknown whether it would fetch a favourable response.

3. At various stages during the course of the attempts over two to three years to go to the market three underwriters were involved, namely, Wood Gundy Inc., Levesque Beaubien and J.D. Mack Limited. Apart from the evidence of Frazer and references made by the cross-appellants in their evidence and the introduction of letters and documents, no evidence was called from persons among the underwriters, principally Wood Gundy, who were directly involved in the decisions made by the underwriters. It would have been helpful to the trial judge to have heard from such persons so that he could weigh and consider their evidence on what chances there were for the underwriting to proceed in any event. Did they, for example, consider the offering was doomed solely or principally as a result of the Ontario action? What part, in their opinions, did the other factors, about to be described, play in creating an unfavourable climate for the proposed offering? The answers to these important questions are not clear from the record.

4. The market crash on October 19, 1987 had a significant and adverse bearing on the ability of new corporate ventures to raise new capital throughout Canada and particularly in Nova Scotia. This condition continued through 1988 which was the period vital to the corporate offering proposed by Cavalier. The evidence at trial indicates there were no successful new venture offering prospectuses out of Nova Scotia for some considerable time after the October 1987 bump.

5. Frazer testified that Cavalier developed problems related to water in its oil wells and difficulties with some of its management team, more particularly its president. It was not clear to the trial judge to what extent, if any, these were "factors of uncertainty".

6. The evidence supports the statement made in the preliminary prospectus of July 22, 1988 that it was the responsibility of Cavalier to repay the loan to National Bank upon the expiry of the letters of credit on October 12, 1988. Because Cavalier was unable to do so, the cross-appellants (and presumably others who had given letters of credit and are not parties to these proceedings) became involved in a restructuring of their interests in Cavalier. They purchased debentures at the face value of $1,000 each and common shares of Cavalier at $6.90 each, in varying amounts, the proceeds from which were used by Cavalier to pay down the loans from National and correspondingly reduce the face value of the letters of credit. To the extent that they participated, the respondents thus reduced the principal sums of their letters of credit to investments in Cavalier. It appears that from October 12, 1988 and into 1990 Cavalier continued to sell 9¾% debentures at $1,000 par. It confirmed to the Ontario Securities Commission on April 26, 1990 that the face value of the debentures was their fair market value. During these same times the net asset value of the common shares were reported to be in the range of $6.90 or more.

7. The trial judge was told the respondents were required to respond to their letters of credit. The exact dates on which they were required to respond and the exact amounts they were eventually required to pay are difficult to discern from the evidence.

8. Coughlan had one share in Cavalier. The investment, and the alleged loss, of Coughlan is reflected through the interests of TDCO Holdings Limited. TDCO was a family holding company in turn owned by three numbered companies of Nova Scotia incorporation. In these circumstances was the trial judge required to pierce several corporate veils to ascertain the true nature of Coughlan's personal loss or simply accept that the alleged loss was attributable to Coughlan in his personal capacity? Put another way, who

> suffered the loss Coughlan asserts - Coughlan personally or a corporate entity not a party to these proceedings?

The litany recited above reflects some of the salient concerns revealed by the evidence. At the risk of repetition we return to the words of the trial judge at p. 218:

> However, there were other factors of uncertainty, even if the offerings were approved. An underwritten deal with Wood Gundy was not a certainty and may not have occurred. The market was not favourable and though there was some recovery by 1990, it still was fluctuating and not too favourable for initial offerings. There could be no assurance the issues would be sold. Problems, unassociated with financing, occurred to the companies properties which could be significant.

It is the duty of this Court to review but not retry. Time and again in a variety of phrases this Court has repeated the oft quoted words of Ritchie J. in the decision of the Supreme Court of Canada in **Stein Estate et al. v. The Ship "Kathy K" et al**., [1976] 62 D.L.R. (3d) 1 at p. 5:

> These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.

As indicated at the outset, the submissions advanced by the respondents are matters of serious concern in pondering whether, in the words of Justice McLachlin, "there is sufficient proximity between the negligent act and the loss". In **Rhodenizer v. Rhodenizer** (1953), 31 M.P.R. 127, MacDonald J. stated at p. 159:

> In whatever form the rule is put it requires the appellant to prove that the trial judge was wrong. (**Feindel v. Gunn** (1915), 49 N.S.R. 383). In the result, if the appellant merely raises a doubt or the Court merely feels it would have come to a contrary conclusion, the appeal will fail, but if the appellant shows a total absence of factual foundation of the judge's conclusion (e.g. **Daniels v. Baker** (1937), 12 M.P.R. 120); or a preponderance of probabilities in his favour, he will succeed. (**Simpson v. London, Midland & Scottish Ry. Co.,** ***supra***; **Spencer v. Irving Oil**, [1952] 2 D.L.R. 437).

This brings us back to the reasons delivered by Justice Nunn to ask whether the respondents have proved that he was wrong - that he made palpable and overriding errors that affected his assessment of the facts - that he misconstrued the evidence and made findings for which there is little or no evidence in support. That we might have come to a contrary result is not enough.

We have reached the conclusion that the trial judge did not err in his finding that the uncertain factors disclosed by the evidence supported his result. Accordingly these two grounds of cross-appeal, relating to claims for losses suffered through the financing of Cavalier, are dismissed.

D. Punitive Damages

Both sets of respondents cross-appeal on the ground that the trial judge erred by not awarding punitive or aggravated damages. The trial judge declined to award as a separate head an amount representing punitive or aggravated damages on the basis that the awards of general damages were large. The respondents submit that the trial judge used many of the descriptions of behaviour that usually warrant an order of punitive damages, such as "deliberate", "callous", "wrongful", "uncaring", "deceptive" and "untruthful", and that he should have punished that behaviour by an award of punitive damages.

In **Remedies in Tort**, Rainaldi, Vol. 4, page 27-47, the following passage sets out the purpose of punitive damages:

> An award of punitive damages is based on the defendant's conduct rather than the plaintiff's loss. These damages are awarded to: (i) punish the wrongdoer; (ii) deter the tortfeasor or others from committing a similar act; or (iii) prevent the wrongdoer from acquiring undue profit from his unlawful act.

In **Vorvis v. Insurance Corporation of British Columbia**, [1989] 1 S.C.R. 1085, MacIntyre, J. explained the difference between punitive and aggravated damages as follows: (at pages 1098-1099)

> Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will frequently cover conduct which could be the subject of punitive damages, but the role of aggravated damages remains compensatory.
>
> . . .
>
> Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.

At page 1108 - 1109, MacIntyre, J.A. approved the following statement of this Court in **Warner v. Arsenault** (1982), 53 N.S.R. (2d) 146:

> Exemplary or punitive damages may be awarded where the defendant's conduct is such as to merit punishment. This may be exemplified, by malice, fraud or cruelty as well as other abusive and insolent acts toward the victim. The purpose of the award is to vindicate the strength of the law and to demonstrate to the offender that the law will not tolerate conduct which wilfully disregards the rights of others.

Other cases where punitive damages have been ordered suggest that in addition to punishing the wrong-doer and deterring others the award is made to ensure that the offender does not profit from the wrong. See for example: **Claiborne Industries Ltd. v. National Bank of Canada** (1989), 59 D.L.R. (4th) 533 (Ont.C.A.).

Where the other damage awards are substantial it has been held that there is no valid reason for an additional or exemplary award, as indicated in the following passage from **Walker v. CFTO Ltd.**, (1987), 37 D.L.R. (4th) 224 (Ont.C.A.) at page 241:

> The question in these cases should be whether in light of the full compensatory award any need remains for the court to mark its disapproval of the defendant's conduct by an exemplary imposition. Compensatory damages can themselves operate as punishment and deterrence. If they adequately satisfy the goals sought to be achieved by exemplary damages, there is then no valid reason for levying a penalty against the defendant by way of exemplary damages. To do so is simply to over-compensate the plaintiff and provide him or her with duplicate monetary recovery. This unjustifiable result should be guarded against, and particularly so in defamation actions where, viewed realistically, it is difficult and often impossible to exclude punitive considerations from a compensatory assessment.

In this case there is no evidence that the appellants profited by their participation in the civil conspiracy. In addition, the awards at trial for general damages, costs and pre-judgment interest are approximately ten million dollars, certainly sufficient to deter others from engaging in similar conduct. The size of the awards are adequate to compensate for any aggravated damages suffered by the respondents and to punish the actions of the appellants. The trial judge did not err by refusing an order for either punitive or aggravated damages. The cross-appeals in relation to this matter are dismissed.

E. Coughlan - Lost Future Income

The respondent Coughlan cross-appeals the denial by the trial judge of his claim for lost future income. His claim in that respect was $2,728,858., based on an actuarial report using an annual income of $250,000. The submission on appeal is that since the trial judge found that Coughlan's career is ruined, he ought to be compensated for loss of future income.

As indicated above, the trial judge included pecuniary losses in his general damage award. We have confirmed the higher award to Coughlan on the basis that, among other things, his career has suffered more than the outside directors. The evidence does not support an additional award for lost future income and we would not disturb the trial judge's decision in this respect.

VII COSTS

A. Solicitor and client costs on the trial

The appellants appeal the trial judge's decision to award the respondents their costs of the trial on a solicitor and client basis. However this argument was made dependent on their success on the questions of the trial judge's findings regarding honesty and good faith, the entitlement to insurance and indemnity and the tort of conspiracy. Since the appellants have not been successful on any of those arguments, it is not necessary to deal with this ground of appeal. Had it been necessary, this Court would not disturb the trial decision in this respect. His comments in the following passage at page 218 are unassailable:

> The plaintiffs in each of these actions are entitled to recover costs and on a solicitor client basis. The character of the allegations involved here, fraud and dishonestly, and the circumstances here of the length of time of the outstanding allegations, their national publicity, the length and extent of the pre-trial processes and the trial itself, the findings I have made regarding injury to reputations and the lack of any real proof of fraud or dishonesty all contribute to making this a proper situation to award costs on a solicitor client basis as, in my opinion, this does constitute one of those "rare and exceptional" cases wherein such awards are, and should, be made.

B. Should the costs of the Nova Scotia action be included as part of the indemnity award?

The trial judge decided that the respondents were entitled to indemnification pursuant to Seabright's By-law 25 which is repeated:

> The Corporation shall indemnify the directors or officers of the Corporation, former directors or officers of the Corporation or any person who acts or acted at the Corporation's request as a director or officer of a body corporate of which the Corporation is or was a shareholder or creditor and his heirs and legal representatives against all costs, charges and expenses including an amount paid to settle an amount or satisfy a judgment reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he has been made a party by reason of being or having been a director or officer of such Corporation or body corporate if:
>
> (a) he acted honestly and in good faith with a view to the best interests of the Corporation; and
>
> (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful.

> The Corporation shall also indemnify such directors or officers who have been substantially successful in the defence of a civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the Corporation or body corporate against all costs, charges and expenses reasonably incurred by him in respect of such action or proceeding.

The trial judge found that the respondents were by virtue of this by-law entitled to be reimbursed their expenses of defending the Ontario action. He declined, however, to include the solicitor and client costs of the Nova Scotia action as part of the indemnity award. The respondents cross-appeal that part of the decision.

In his written decision the trial judge said at page 205:

> There can be no question that the plaintiffs are entitled to be indemnified by Westminer for all costs, charges and expenses paid in defence of the Ontario action as, though ordinarily not determined until the end of the action, in this case, as I have said, all the issues in the Ontario action, except damages if the Ontario action was to succeed, are an inherent part of these actions and my decision here, in reality, is a decision of all those issues. Having decided, in effect, against the Ontario plaintiffs on the key issues they would have been required to prove, the Nova Scotia plaintiffs, Ontario defendants, have been " substantially successful" in their defence.
>
> I must add that it is no surprise that I am deciding issues that are fundamental to the Ontario action. Both the Ontario courts and our Court have referred to this in interlocutory decisions and counsel for all parties have agreed that such would be the case and certainly the case was presented to that end.

However, at the post-trial hearing respecting the form of the order, the trial judge seemed to retreat from his earlier statements when he said (A.B. 13, page 4338):

> THE COURT: Well, I've been thinking about this, and I'm going to make a few comments to you, I suppose by way of directions. I think it would be stretching my decision to include all the costs and charges and expenses reasonably incurred in the within proceedings in the indemnity. I think the indemnity was an indemnity... What I thought I did was I indemnified, granted the indemnity as the plaintiffs would have been entitled to under the Ontario action. And that's all that's included in that part of the order. I intended to compensate the plaintiffs for their costs in the Nova Scotia actions by way of the award of solicitor and client costs. So I think any order should, on indemnification against Westminer, be for all costs, charges and expenses reasonably incurred and to be incurred in connection with the Ontario action. If somebody decides differently, at some point, on appeal or whatever, that's another matter. But that's what I would limit that to.

The significance of this ruling is that the costs of the Nova Scotia action were not subject to pre-judgment interest.

The appellants submit that the Nova Scotia costs should not be included in the indemnity award because the by-law only covers cases where the directors have an action brought against them. They say it does not apply where the directors are the plaintiffs. It is argued that since the Ontario action is still pending and has not been decided or dismissed, it cannot be said that the defence was substantially successful. Nor can it be argued that the commencement of the actions in Nova Scotia was a defence to the Ontario action.

The by-law, in the last paragraph refers to the "defence" of an action, but the first paragraph says "costs ...reasonably incurred... **in respect of**... any ... action... to which he has been made a party...". The trial judge did not answer the question whether the costs of the actions in Nova Scotia were reasonably incurred in respect of an action to which the directors were made a party. He asked the question at the post-trial hearing (A.B. 13, page 4328) but appears to have been side- tracked onto other issues before answering it.

The words "in respect of" have been given a very broad interpretation. In **Nowegijick v. The Queen**, [1983] 1 S.C.R. 29 at page 39, Dickson, J. said:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

There is no question that the Nova Scotia actions were connected to and commenced as a direct result of the Ontario action. Obviously, the Nova Scotia actions would not have been commenced in the absence of the Ontario action. Another important factor in this aspect of the case is that the appellants effectively incorporated by reference the Ontario action into the Nova Scotia actions by attaching their Ontario statement of claim to their defences in Nova Scotia.

Counsel have not cited any Canadian authority for the proposition that expenses incurred to enforce a right of indemnity are covered by the indemnity, but there is American authority to that effect. (See **Professional Insurance Co. v. Barry** 303 N.Y.S.2d

556 (N.Y.S.C., 1969).) Considering that indemnification means: "to save harmless; to secure against loss or damage ... to make good; to compensate ..." (see **Black's Law Dictionary**, 4th ed.), it is logical and sensible that the expenses of obtaining indemnification should be covered by the indemnification. In this case, the incorporation of the Ontario claims of fraud into the Nova Scotia action greatly increased the length and cost of the Nova Scotia trial as explained by the trial judge in the following passage at page 182:

> It is clear that by trying these Nova Scotia actions I am not trying the Ontario action. Nevertheless, the defences filed by the defendants denies all the claims of the plaintiffs, pleads the matters raised in the Ontario action in defence and the defences filed contain the actual Ontario Statement of Claim. It is also clear that all parties were aware that the key issues of the Ontario action would be key issues in these actions and decisions made here would fall under the ***"res judicata"*** doctrine when the Ontario action would be heard.
>
> In fact, I have heard virtually all the evidence that would be available when the Ontario action comes to trial.
>
> On the matter of evidence, I must point out that I have heard evidence in extreme detail on virtually everything done by Seabright, its directors and senior technical people from the inception of the company, including virtually every piece of paper generated in Seabright. Indeed, it was the defence to these actions which generated most of the evidence. I say this not to attribute fault but to indicate that the four actions here, on their own, would not have been very complicated but because of the fraud, conspiracy, negligent misrepresentation and insider trading allegation both sides introduced months of testimony relating to these issues. While it appears to be putting the cart before the horse, I propose to decide these issues before tackling the two sets of claims in these actions.

In order to fully indemnify the respondents for all costs and expenses reasonably incurred in respect of the actions to which they were made parties, it is necessary that the costs awarded to them for their success in the Nova Scotia action be included as part of the indemnity. This ground of the cross-appeal is allowed.

C. The costs of the Ontario application to stay proceedings

The appellant's grounds of appeal 4(g), 5(e) and 9(c) are that the trial judge erred as follows:

Ground 4:

As to the finding that the respondents were entitled to the benefit of insurance coverage:

> (g) by holding that the costs incurred by the respondents in relation to an application to stay proceedings in the Supreme Court of Ontario and ordered by the Supreme Court of Ontario to be paid by the respondents in any event of the cause are costs of defence payable under the policy of insurance;

Ground 5:

As to the finding that the respondents are entitled to indemnification under the provisions of Seabright s By-laws and the provisions of the **Canada Business Corporations Act**:

(e) by holding that the costs incurred by the respondents in relation to an application to stay proceedings in the Supreme Court of Ontario and ordered by the Supreme Court of Ontario to be paid by the respondents "in any event of the cause" are costs payable pursuant to the indemnification;

Ground 9:

As to the award of solicitor/client costs:

> (c) by failing to offset against the award of solicitor/client costs the costs incurred by the respondents in relation to an application to stay proceedings in the Supreme Court of Ontario and ordered by the Supreme Court of Ontario to be paid by the respondents "in any event of the cause";

The respondents brought an application to stay the proceedings in Ontario. That application was granted by order of Senior Master Sedgwick dated February 19, 1990. That decision was reversed on appeal to the Divisional Court by order dated November 21, 1990. That order provided costs to the appellants in this matter "in any event of the cause." Justice Nunn decided at the post-trial hearing that those costs were to be included as part of the indemnity award to the respondents. The appellants now submit that the trial judge erred by overruling a final and conclusive order of a foreign court of competent jurisdiction.

The order of Justice Nunn does not attempt to reverse the order of the Divisional Court of Ontario. He expressly recognized its validity in the course of the argument on the point when he said (A.B. 13, page 4342):

> They may have to pay it to you and you have to pay it back to them, under the indemnification. See, the Ontario court was not dealing with any

> indemnification issues at all. And that's not an unusual type of order. But the indemnification is for all costs, expenses and so on incurred in the defence of it, and that's the costs.
>
> . . .
>
> . . . I think that the indemnification, the indemnification goes beyond the court order.

In order for an indemnity to be full, it must extend to costs ordered against the party covered by the indemnity. The costs ordered against the respondents are clearly expenses and charges within the language of the by-law. The grounds of appeal relating to the costs of the Ontario stay application are without merit and are dismissed.

D. Costs and Expenses of the Ontario Securities Commission Investigation

The appellants list as ground of appeal 5(f) that the trial judge erred:

> by holding that the defendants were required to pay the respondent Coughlan for the costs and agreed settlement of the independent investigation conducted by the Ontario Securities Commission.

No written or oral argument was addressed to this issue so it is assumed that it is withdrawn.

The respondent Coughlan raised as a ground of contention:

> Issue (g) Whether this Court should affirm the award of special damages for expenses incurred by the respondent Coughlan in relation to the Ontario Securities Commission proceedings on the further grounds that such expenses are recoverable in the indemnity award.

At page 216 (N.S.R.) the trial judge dealt with the claim for the Ontario Securities Commission expenses as follows:

> There are also claims for special damages on Coughlan's behalf. I will deal with each.
>
> ...
>
> 2. Claim for the fees, disbursements and expenses, including the settlement payment, relating to the investigation of the Ontario Securities Commission as a consequence of the instigation of the inquiry by representatives of the defendants.

> This is a valid claim and Coughlan is entitled to recover such amounts from the corporate defendants. I will leave the final calculation of these amounts to be agreed upon by counsel and, failing agreement, I will hear counsel at the time of taking out the orders in these actions and fix the actual amounts.

At the post-trial hearings he assessed those amounts at $280,351.82 plus pre-judgment interest. It appears that the claim was advanced as a claim for special damages rather than a claim for indemnification. In any event, since the trial judge awarded pre-judgment interest on the amount, and since the foundation for the award, that is the finding of conspiracy, has been upheld by this Court, we find that it is a moot issue and therefore not necessary to deal with it.

E. Election Between Costs and Damages

The respondents Coughlan and Garnett have raised as a ground of the cross-appeal the following issue:

> Issue (k): Whether the Trial Judge erred by requiring the cross-appellants to elect between the award of costs on a solicitor/client basis and the awards of damages and indemnity as the exclusive source of recovery for those portions of their legal expenses which, on the evidence, were recoverable both as costs and as damages or indemnity (Cross-Appeal Ground 4)

Given the finding in section VII B herein, that the costs of the Nova Scotia action are included in the indemnity award, it is not necessary to deal with this argument.

F. Costs Against Individual Defendants

The trial judge awarded costs on a solicitor and client basis against both the corporate and individual appellants, the latter being Lalor, Maloney, Wise and Braithwaite. Whereas he found these individuals liable in negligence and the corporate appellants liable in civil conspiracy it is alleged that he erred in the orders on costs.

The appellants rely on the decision of this Court in **Lockhart v. MacDonald** (1980), 42 N.S.R. (2d) 29 wherein Chief Justice MacKeigan observed that the defendant MacDonald whose conduct was "reprehensible" should not be subject to solicitor and client costs where he was found guilty of negligence. The Chief Justice continued at p. 58, "this is not the kind of very rare and exceptional case where solicitor and client costs should be

ordered". Therein is the key phrase to which this Court has usually referred when considering an award of solicitor and client costs: "rare and exceptional" circumstances.

Here is what Justice Nunn said, p. 218:

> The plaintiffs in each of these actions are entitled to recover costs and on a solicitor client basis. The character of the allegations involved here, fraud and dishonesty, and the circumstances here of the length of time of the outstanding allegations, their national publicity, the length and extent of the pretrial processes and the trial itself, the findings I have made regarding injury to reputations and the lack of any real proof of fraud or dishonesty all contribute to making this a proper situation to award costs on a solicitor client basis as, in my opinion, this does constitute one of those "rare and exceptional" cases wherein such awards are, and should, be made.

The pleadings reveal that the individual appellants joined with the corporate appellants in common defences to the Nova Scotia actions. They alleged the respondents were guilty of fraud and dishonest conduct. They appended to their defences the statement of claim advanced in the Ontario action. They collectively pled these serious allegations against the respondents which the trial judge found were unwarranted and which finding we in this decision confirm.

Bearing in mind the substantial measure of discretion which a trial judge may exercise in the award of costs and considering the reasons that the trial judge has given for the award he made in this respect, we are unable to say that Justice Nunn erred in the exercise of his discretion. The reasons he gave are founded on circumstances that are indeed "rare and exceptional". We find no cause to interfere with the award of the trial judge.

G. Costs to Successful Individual Defendants

The Nova Scotia action brought by Coughlan and Garnett alleging negligence and conspiracy included Snell, Couzin, Parbo, Morgan, Aitken, Anderson, Badger, Brydon, Kramer, Morley and Woodall. The Nova Scotia action was brought by the outside directors against Snell, Couzin and the corporate defendants.

Justice Nunn dismissed the actions against these individuals "without costs". The ground of appeal is that he erred "by failing to award these individual appellants their costs of successfully defending the actions against them".

Both the Rule and the principle underlying it were stated by Hart J.A. of this Court in **Horsnell et al. v. Bent** (1978), 8 C.P.C. 318 at p. 321:

> Under the Civil Procedure Rules of this province the costs of a proceeding shall follow the event unless the Court otherwise orders, and those costs are always in the discretion of the Court. See Rr. 63.02 to 63.03.
>
> The discretion of the Court must, however, be exercised judicially.

On occasion this Court has considered whether the discretion of a trial judge has been exercised judicially where no costs have been awarded a successful litigant. An example is **Davis v. Lively and Davis & Lively Land Development Ltd.**, (1980), 43 N.S.R. (2d) 700 where Cooper J.A. wrote at p. 702:

> The first ground of appeal raised by the appellants is that the learned trial judge erred in law in not awarding costs to Cecil Lively as "a successful defendant in these proceedings". Madam Justice Glube addressed herself to this matter as follows:
>
> > Although I have found that Cecil Lively is not personally liable for the amount of $25,069 the facts show that it was reasonable to join him as a party. I exercise my discretion and do not award Cecil Lively costs.
>
> It is beyond dispute that an award of costs is in the discretion of the court - see Civil Procedure Rule 63.02(1). It is also well understood that in the ordinary course a successful party is entitled to his costs against the unsuccessful litigant.
>
> Clearly, however, the court has power to order otherwise upon proper grounds. The question then becomes, did the learned trial judge exercise her discretion not to allow costs to Cecil Lively upon proper grounds? In my opinion, this question must be answered in the affirmative.

In the instant case the record shows that these individuals joined in the defence of the actions filed by the corporate appellants. They were represented by the same counsel as the corporate appellants. We have not been directed to any evidence that indicates any one of them was obliged to pay any legal costs or personally satisfy financial obligations of any kind. It appears that their involvement was entirely related to their capacities as officers and directors of the appellant corporations and that they were not being joined in the actions in their personal capacities. However, given the circumstances that existed at the time the Nova Scotia actions were commenced, we cannot say that it was unreasonable for the respondents to have joined these directors and officers of the corporate appellants. It is

the mix of all these factors which, in our opinion, caused Justice Nunn to exercise his discretion in the manner he did. In so doing he did not exceed the limits of judicial discretion.

VIII Pre-judgment Interest

A. On General Damage Awards

The appellants submit that the trial judge erred by awarding the respondents pre-judgment interest on the general damage awards. It is submitted that the awards "inherently include an inflationary component" since the trial judge took into account the on-going pain and suffering of the respondents up to the time of his decision. The appellants rely on the following passage from **Bush v. Air Canada** (1992), 109 N.S.R. (2d) 91 (N.S.C.A.) for this argument (at page 105):

> A double recovery should be avoided in the exercise of a trial judge's discretion under ss. 41(i) and (k) of the **Judicature Act**, ***supra***. The conclusion must be that to the extent that inflation was taken into account for the period between the accrual of the cause of action and the trial, the judge should then adjust the interest rate so that it is not taken into account for a second time. This exercise should be carried out in fixing the rate and requires an examination of the award to determine whether inflation from the date the cause of action arose has been taken into account. Judges should take particular care in cases where a long period of time has elapsed between the time the cause of action arose and the assessment of damages. It is in these cases where one can more often say with confidence that the award has grown by inflation from what it would have been at the time from which interest starts to run. In many cases, a judge may not be able to say with any degree of certainty that an inflation factor has been built into the award. In these cases when the second step is taken, a commercial rate of interest would generally be appropriate. Where, however, a judge is satisfied that inflation has been built in, a rate such as the discount rate of 2½% per annum is appropriate. If the trial judge does not do this, a double recovery results to the plaintiff. An injustice is therefore done which requires interference by an appeal court with such an exercise of discretion.

The appellants further submit that by using 11% as the pre-judgment interest rate, the trial judge included an inflationary component which results in double recovery. They argue that the discount rate of 2.5% should have been used which would reduce the judgment by $819,009.00.

This argument cannot succeed for several reasons. First, the appellants agreed that 11% was the appropriate interest rate at the post-trial hearings. Second, the trial judge did not indicate that an inflationary factor was built into the general damage awards. **Bush v. Air Canada** makes it clear that if no inflationary factor is included a commercial rate of interest is appropriate. Third, these awards, as indicated above, are not for "pain and suffering". They are compensation for a variety of injuries, including pecuniary losses.

B. On The Indemnity Award and Costs of Nova Scotia Action

The respondents cross-appeal the trial judge's decision not to award pre-judgment interest on the indemnity award and the costs of the Nova Scotia action. Those costs, we have concluded, should have been included in the indemnity award. The authority for ordering pre-judgment interest is found in s. 41(i) of the **Judicature Act**, R.S.N.S., 1989 c. 240:

> . . . in any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;

The first question to be answered is whether the indemnity award is properly characterized as "recovery of any debt or damages". The appellants argue that the indemnity award is in the nature of costs and should not bear pre-judgment interest. They say the amount due did not crystallize before the trial and in fact it will not until the Ontario action is disposed of, and therefore no interest is due. **Blair v. Consolidated Enfield Corporation**, unreported, October 6, 1993, (Ont. C.A.) is cited in support of this argument. In **Blair**, the Ontario Court of Appeal did not award interest on the costs and expenses incurred in the action to obtain indemnity. However there is no mention of interest in the judgment, so it does not appear to have been an issue in that case. As well, since Blair represented himself, he would not have made any payments towards his own legal costs during the course of the proceeding as the respondents herein have.

In **B.P. Exploration Co. v. Hunt (No. 2)** [1982] 1 All E.R. 925 the House of Lords was considering whether pre-judgment interest was payable pursuant to **The Law Reform (Miscellaneous Provisions) Act 1934**. The provisions of that **Act** are almost identical to s. 41(i) of the **Judicature Act**. It was argued before the Queen's Bench Justice that the court had no power to order pre-judgment interest:

> . . . primarily on the ground that interest can only be awarded from the time the sum in question becomes due, and in the case of a claim under the [Frustrated Contracts] **Act** [1943] no sum can be due until the court makes its award. (page 966)

Lord Brandon on behalf of the House of Lords said at page 992:

> . . . in my opinion the words "any debt or damages", in the context in which they occur, are very wide, so that they cover any sum of money which is recoverable by one party from another, either at common law or in equity or under a statute of the kind here concerned.

The trial judge in **B.P**., Goff, J., had ordered pre-judgment interest to be paid from the date "that Mr. Hunt first became fully aware of B.P.'s intention to bring a claim against him." The House of Lords upheld that decision.

In this case the right to be indemnified pursuant to the by-law arose on the date the respondents were sued in Ontario. From that date on, the respondents were entitled to be indemnified for each expense and cost incurred as the payment was made. Although there was no way of knowing on that date the quantification of the indemnity award, it was an obligation to pay as of that date. The concept of indemnity as debt is strengthened by the following passage from **Halsbury's,** 4th edition:

> In law an action on a contract of indemnity does not normally lie until the promisee has paid the third person's claim. Where he has paid, the amount so paid constitutes a debt due to him from the promisor which save in certain circumstances, he may recover with interest in an action. (volume 20, page 173)

Halsbury cites **Ex Parte Bishop** (1880), 15 Ch. D. 400(A.C.) for this proposition. There, Cotton, L.J. said at page 421:

> . . . If there had been no authority on the point, the matter would have been possibly more doubtful, but in several cases interest has been allowed on payments made both under express and implied contracts to indemnity. In **Petre v. Duncombe**, under a covenant by way of indemnity to a surety, interest was allowed by way of damages upon payments which had been made by the surety, it being held that on a contract to indemnify the person to be indemnified should be put in the same position as if the man who had contracted to indemnify him had in fact done what he had contracted to do, that is, had paid the money at the proper time. And Vice-Chancellor Kindersley, in a very careful judgment in **Hitchman v. Stewart**, came to the same conclusion where there was only an implied contract by co-sureties to indemnify or repay another co-surety the amount which he had paid in excess of his fair proportion. There the Vice-Chancellor allowed interest, on the ground that there was an implied contract to indemnify, following the old case of **Lawson v. Wright**, where the point does not appear to have been argued, but interest was allowed under somewhat similar circumstances. That decision of Vice-Chancellor Kindersley's has been followed in the recent case of **In re Swan's Estate**, where the Court of Appeal in Ireland allowed interest under similar circumstances on the same principle on an

> implied contract to indemnify. Having regard to these authorities, and to the consideration that where there is a contract to indemnify, express or implied, the person who is to be indemnified ought to be put in the same position as if the act against which he is to be indemnified had been done by the person who is to indemnify him at the time when it ought to have been done, we are of opinion that the proof for interest ought to be admitted. That, of course, will be for interest up to the date of the adjudication.

The indemnity award is a debt that is subject to the provisions of s. 41 of the J**udicature Act**. There is no valid reason for denying pre-judgment interest on the award. The purpose of pre-judgment interest is as explained by La Forest, J.A. in **John Maryon International Ltd. v. New Brunswick Telephone Co., Ltd.** (1982), 141 D.L.R. (3d) 193 (N.B.C.A.) at 238-9:

> . . . Damages are intended to place a person, so far as money can do it, in the same position as if the wrong of which he complains had not occurred. Now it is obvious that a person who suffers $100 worth of damage in 1974 cannot be adequately compensated by awarding him that amount in 1982 . . . So it was to preserve the fruits of a litigant's judgment that the courts were empowered to award interest. Speaking of the English Act of 1934, Lord Wright had this to say in **Riches v. Westminster Bank Ltd.**, [1947] A.C. 390 at p. 400:
>
> . . . the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation.
>
> More recently, Lord Wilberforce indicated that interest on judgments "was intended to compensate for being kept out of the 'real' value of money": see **Pickett v. British Rail Engineering Ltd.**, [1979] 1 All E.R. 774 at p. 782. It would seem to follow that in commercial matters at any rate interest should ordinarily be awarded. Lord Denning M.R. expressed a similar sentiment in **Panchaud Freres v. Pagnon and Fratelli**, [1974] 1 Lloyd's Rep. 394 at p. 411, as follows:
>
> > In a commercial transaction, if the plaintiff has been out of his money for a period, the usual order is that the defendant should pay interest for the time for which the sum has been outstanding. No exception should be made except for good reason.
>
> There may, it is true, be exceptions to the rule. That is why (along with the need for precise computation of interest) a discretion is given to the courts. But that discretion must, as it seems to me, be exercised in accordance with the purposes of the statute giving the power. Otherwise the judge cannot be said to be acting judicially. His discretion must be related to

> the task of putting the plaintiff in the same position, so far as money is concerned, as he would have been if he had not suffered the loss.

In this case it is necessary to award pre-judgment interest on the indemnity award in order to fully compensate the respondents. Accordingly, the decision and order of the trial judge is varied to provide that interest shall be payable at the rate of 11% per annum from the date of each payment of costs and expenses included in the indemnity award to the date of the Order for Judgment, May 14, 1993. The matter of pre-judgment interest on amounts assessed after that date is dealt with below in section VIII C.

With respect to ground of appeal 9(d), the allowance made by the trial judge for interest on monies borrowed by the respondents shall be deducted from the amount of pre-judgment interest to avoid double recovery.

C. Date pre-judgment interest ceases

The respondents Coughlan and Garnett cross-appeal the trial judge's decision respecting the cut-off date for pre-judgment interest. They submit that the trial judge erred by concluding that pre-judgment interest ran only to the date of the Order for Judgment dated May 14, 1993 and not to date of the final order, the Order Taxing Costs and Assessing Damages, dated August 4, 1993. The outside directors have not appealed this finding.

Section 41(i) of the **Judicature Act** says pre-judgment interest is payable to "the date of judgment after trial". The **Interest on Judgments Act**, R.S.N.S., 1989 c. 233, says that interest on judgment debts "shall be calculated from the time of the rendering of the verdict or the giving of the judgment...". The respondents argue that since some of the amounts ordered payable by the May order were not assessed until August that pre-judgment interest continues to accrue. The respondents rely on **Erco Industries Limited v. Allendale Mutual Insurance Co**. (No. 2) (1984), 48 O.R. (2d) 17 (Ont. H.C.) and **Emil Anderson Construction Co. v. British Columbia Railway Company** (1988), 31 B.C.L.R. (2d) 223 (S.C.).

The **Erco Industries** case is not that helpful since as indicated on page 21 thereof, the Ontario **Judicature Act** provided a discretion to the trial judge "to allow interest ... for a period other than that provided" in respect of pre-judgment interest, and in respect

of post-judgment interest, to "fix a date other than the date of judgment from which interest is to run".

In the **Emil Anderson** case, it does not appear that an order for judgment was issued until all matters were disposed of. As well, the parties agreed that the claims that were quantified on the later date did bear pre-judgment interest until that date.

In this case there was a final determination of the amounts of the general damage awards on May 14, 1993. There was a verdict and judgment in respect of those amounts as of that date and there should be no doubt that the pre-judgment interest on those amounts ceased on that date. However, with respect to the amounts left to assessed, no final order had been rendered. The plaintiffs could not have entered judgment and execution on that date because the amounts were not yet fixed.

Civil Procedure Rule 33.01 provides that on a trial the court may:

> (a) assess the damages, in whole or in part, and give judgment for the damages so assessed;
> ...
>
> (c) grant liberty to any party to have the court subsequently assess all or any damages and give judgment **with damages to be so assessed**; [emphasis added]

Rule 33.01(3) states:

> A judgment given under paragraph (1) shall be deemed to be final, subject however to any right of appeal, unless liberty is reserved to assess all or any of the damages, or judgment is given with damages to be assessed.

The order of May 14, 1993 said:

> That this Court remains seized of the issue of costs and damages herein for the purpose of hearing an Application by the plaintiffs to tax the quantum of solicitor-client costs and determine the quantum to be paid to the Plaintiffs by the Defendants in accordance with paragraphs B, C, D, and E, herein.

The order of May 14, 1993 therefore was not a **final** judgment in respect of those items still to be assessed. Pre-judgment interest should continue until the amounts were assessed on August 4, 1993. The cross-appeal by the respondents Coughlan and Garnett on this matter is allowed.

IX CONCLUSION

A. Costs of the appeal

The respondents have been entirely successful on the matters raised by the appellants on appeal but there has been divided success on the matters raised by the cross-appeals and notices of contention. The comments of the trial judge quoted above regarding those rare cases when solicitor and client costs are warranted are applicable to appeals as well. The false allegations of fraud against the respondents continued during the hearing of the appeal. In addition the concept of full indemnity continues until the matters are finally disposed of. The respondents would, if there had been no cross-appeal, have been entitled to their full solicitor and client costs. However, since the respondents were unsuccessful in certain aspects of their cross-appeals, the appellants are entitled to a set-off of an amount representing one-half of reasonable party and party costs on an appeal of this magnitude. If the parties are unable to agree to the amounts of costs they shall be fixed by the Court on the hearing to settle the final orders.

B. Conclusion

1. The costs awarded the respondents on their success in the Nova Scotia actions are included as part of the indemnity award.

2. All respondents are granted pre-judgment interest on the indemnity award at the rate of 11% per annum from the date of each payment of costs and expenses included in the indemnity award to the date of the order for judgment being May 14, 1993. From May 15, 1993 to August 4, 1993 the respondents Coughlan and Garnett shall receive pre-judgment interest on the indemnity award at the rate of 11% per annum.

3. In all other respects the appeal is dismissed, the cross-appeals are dismissed and the notices of contention are dismissed.

4. The respondents shall have their costs of the appeal on a solicitor and client basis, less a set-off of an amount representing one-half party and party costs to the appellants, which amounts shall be fixed, if not agreed upon, on the hearing of the application to settle the order.

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Clarke, C.J.N.S.

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Freeman, J.A.

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Roscoe, J.A.