NOVA SCOTIA COURT OF APPEAL
Citation: *Fraser v. Westminer Canada Ltd.*,
2003 NSCA 76

Date: 20030722
Docket: CA 189520
Registry: Halifax

Between:

Sumner M. Fraser, Sumner Capital Limited, William Kitchen, William Mundle, Dr. James Collins, Michael Bradshaw, Dr. Michael Cook, Gloria Coughlan, James Coughlan, Stephen Coyle,in his capacity as the representative of the Estate of Gerald Coyle, Allan Dand, Murray Edwards, James Hartling, Hector Jacques, Harry Kennedy, Doug McCallum, Gerald McCarvill, Roland MacDonald, John Panneton, Robert Peters, Andrew Saulnier, and Dr. Allistair Thomson, and Francis Hutt and Dennis Conolly in their capacities as the representatives of the Estate of Robert Dauphinee, and Joyce Prest in her capacity as the representative of the Estate of Reg Prest and Bryman Enterprises Ltd., a body corporate

Appellants

v.

Westminer Canada Limited, Westminer Holdings Limited, Western Mining Corporation Holdings Limited, James H. Lalor, Peter Maloney, William J. Braithwaite and Colin Wise

Respondents

Judges: Glube, C.J.N.S.; Cromwell and Hamilton, JJ.A.

Appeal Heard: June 16 and 17, 2003, in Halifax, Nova Scotia

Held: **Appeal dismissed per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Hamilton, J.A. concurring.**

Counsel: Douglas Caldwell, Q.C., Dennis James, and Robert Pineo for the appellants
Thomas P. Donovan, Q.C., Peter L. Roy, and Richard S. Niedermayer and Michael J. Messenger, for the respondents

<u>Reasons for judgment</u>:

I. INTRODUCTION:

[1] The respondent corporations intentionally inflicted economic harm on the promoter of a business venture. The unintended but foreseeable result was that the appellants, who were investors in that venture, also suffered economic loss. The appellants sued the respondents in negligence. They lost at trial because the judge ruled that the respondents owed them no duty of care. (The promoter is not a party to these proceedings.)

[2] The appellants now appeal. The principal question they raise is whether the judge at trial was wrong to decide that those, like the corporate respondents, who intentionally inflict economic injury on one party have no duty to take care for other parties, like the appellants, who suffer unintended but foreseeable economic loss as a result.

[3] For the reasons that follow, I have concluded that the judge did not err when he decided that the respondents owed no duty of care to the appellants. While I have considerable sympathy for the appellants, to find in their favour in this case would be to say that everyone has a duty of care to anyone whom they foresee will suffer adverse economic consequences as a result of their careless actions. This has never been and cannot become our law. Such a rule would be impractical and intolerable because the potential for liability would be virtually limitless.

[4] Cases like this one involving economic harm generally have ripple effects reaching far beyond the immediate parties to the underlying wrongful act. The law's approach to defining the duty of care in such cases has been pragmatic, recognizing that a line must be drawn that will sometimes exclude claims by those who have been injured by the wrongdoer's negligence. The line limiting the duty of care has been drawn by requiring two elements to be present before a duty of care will be imposed with respect to purely economic harm. In my view, neither of these elements is present in this case.

[5] First, there must be "something more" to the relationship between the plaintiff and the defendant than the fact that the defendant could foresee the risk of harm to the plaintiff. That "something more" is missing here. Second, a duty of

care will generally not be recognized where to do so would give rise to liability for an indeterminate amount for an indeterminate time and to an indeterminate class. That sort of indeterminate liability would be the result of recognizing the duty of care which the appellants assert in this case. Like the trial judge, I can see no principled basis on which to permit these appellants to recover that would not have the effect of imposing an unduly oppressive duty of care in other, less sympathetic situations.

[6] I would dismiss the appeal.

II. OVERVIEW:

[7] In brief overview, the facts of the case are these.

[8] The appellants were investors in the acquisition of a publicly traded, junior oil and gas company, Cavalier Energy Limited ("Energy"). (Energy owned a controlling interest in another publicly traded company, Western Resources Minerals Limited.) Specifically, they are 24 members of what was known as the "core group" of investors who, through letters of credit and otherwise, secured over $6 million of a larger loan from the National Bank which was obtained to finance the acquisition. (Where it is not necessary to distinguish between the Cavalier entities, I will refer simply to "Cavalier".)

[9] The moving force behind this acquisition was Terrence Coughlan, who is not one of the appellants and was not a party to this action. To summarize, the acquisition proceeded as follows. Mr. Coughlan incorporated an Alberta company, which came to be called Cavalier Capital Corporation ("Capital"). It acquired all the shares of Energy for about $24 million. Capital obtained loans from the National Bank to help finance the acquisition. One of these loans was secured in part by bank letters of credit, some of which, as mentioned, were provided by the appellants. (Some of the appellants made other forms of investment and the form of investment of some of the appellants changed over time, but I put these details to the side for the moment.) The plan was to take Energy private, amalgamate it with Capital and then take the amalgamated company public. The bank debt and therefore the letters of credit which secured it were to be retired by the funds generated through the initial public offering.

[10] Before he became involved in Cavalier, Mr. Coughlan had been president of a small Nova Scotia gold mining company, Seabright Resources Inc. Early in 1988, that company had been taken over by a company controlled by Western Mining Corporation Holdings Limited. (As nothing turns, for present purposes, on the distinctions among the various Western entities, I shall refer to them from now on simply as "Westminer" unless the context otherwise requires. I should also note for clarity that Western Mining is distinct from and unrelated to Western Resources referred to earlier.)

[11] Westminer's investment in Seabright quickly proved to be an embarrassing disaster. Seabright's gold mines were not viable. Westminer's reaction to this unhappy discovery was both prompt and vigorous. It complained about Mr. Coughlan to the Ontario Securities Commission, started a law suit in Ontario against the former directors of Seabright, including, of course, Mr. Coughlan, and made a public announcement concerning the suit. The suit alleged dishonesty and securities law violations on the part of Mr. Coughlan and the other Seabright directors: fraud, civil conspiracy, failure to disclose material changes and insider trading. The gist of the action (known as the Ontario action) was that the former Seabright directors had known that the Seabright mines were of dubious potential and had failed to disclose this to Westminer at the time of its takeover of Seabright. The action directly challenged the honesty and integrity of Mr. Coughlan and the other Seabright directors. (In the end, Westminer's Ontario action did not proceed and Mr. Coughlan and the other former directors successfully sued Westminer in Nova Scotia for various claims, including civil conspiracy to injure. Mr. Coughlan and the former Seabright directors are not parties to the present action.)

[12] Westminer's Ontario action was commenced just as Cavalier, Mr. Coughlan's new venture, was about to make the planned initial public offering. The success of the public offering was dependent on Mr. Couglans's efforts, abilities and integrity. As the appellants put it, from the point of view of attracting investors, Cavalier was the steak but Mr. Coughlan the sizzle. Of course, the allegations of fraud made against him in Westminer's Ontario action, the investigation by the Securities Commission and the attendant publicity struck a serious blow to that. In the event, the planned public offering fell apart, Cavalier became insolvent and the Cavalier investors lost their investments. (The circumstances of each appellant's investment and alleged loss is set out in the trial judge's reasons, reported at (2001), 199 N.S.R. (2d) 1, at paras. 240 - 263. While

the Ontario action was not the only thing that contributed to Cavalier's demise, it was, as the judge found, one of the contributing factors.)

[13] The appellants who, as noted, were Cavalier investors, blamed Westminer's allegations against Mr. Coughlan for making it impractical to proceed with the planned public offering and the resulting loss of their investments. They sued Westminer for civil conspiracy, unlawful interference with economic relations and negligence. Their action was dismissed after trial and they now appeal, but only in relation to the dismissal of their negligence claim and issues relating to remedy should their appeal on liability succeed.

III. TRIAL JUDGE'S FINDINGS:

1. Overview:

[14] The trial judge, Moir, J., found that the appellants' claims based on conspiracy to injure failed because Westminer did not intend to injure the appellants but rather intended only to injure the former Seabright directors. The same lack of intent in relation to the appellants led to the judge's dismissal of the appellants' claim in interference with economic relations. It bears repeating that the trial judge found – and his conclusion is not challenged on appeal – that Westminer did not intentionally inflict economic injury on any of the appellants.

[15] Although finding that the respondents were not liable to the appellants, the trial judge properly and helpfully went on to make provisional findings concerning the issues of causation and damages that would have to be addressed in the event of a successful appeal from his dismissal of the action.

[16] The trial judge addressed the issue of causation as if Westminer's allegations against Mr. Coughlan and the former Seabright directors had been actionable by the appellants. Had they been, he would have found that Westminer's actions caused the appellants' loss in the sense that, but for, among other things, Westminer's allegations against Mr. Coughlan, the appellants' shares in Cavalier, which they received as compensation for the risks they undertook in raising the letters of credit or putting up cash, would have become liquidable in October of 1988 for at least the face value of those shares: Moir, J. at para. 267.

[17] The judge also made findings in relation to mitigation and contingencies in his provisional assessment of damages. In view of my conclusion on the liability issue, I will not address the issues relating to damages.

[18] I return, then, to the judge's decision respecting the appellants' claim in negligence. As noted, the basis of the appellants' claim in negligence was (and is) that Westminer had a duty of care to them because they are persons who would foreseeably suffer harm as a result of Westminer's intentional tort against Mr. Coughlan. Consideration of that claim required the judge to address two main issues. The first was whether Westminer had committed an intentional tort against Mr. Coughlan. Assuming it had, the second issue was whether Westminer had a duty of care to the appellants who, they say, were the identifiable and foreseeable, although unintended victims of that intentional tort. The trial judge answered the first of these questions in the affirmative but the second in the negative. I will review these conclusions in turn.

2. Intentional Tort Against Couglan:

[19] The first question is whether Westminer committed an intentional tort against Mr. Coughlan. That issue, as between Westminer and all the former Seabright directors, including, of course, Mr. Coughlan, was extensively litigated in earlier Nova Scotia proceedings brought by Mr. Coughlan and the other Seabright directors and was finally determined against Westminer: see **Coughlan v. Westminer** (1993), 120 N.S.R. (2d) 91 (S.C.T.D.) affirmed in relevant respects at (1994), 127 N.S.R. (2d) 241 (C.A.). It will be convenient to refer to those earlier proceedings now as they provide necessary background for the trial judge's conclusions in the present case.

2.1 The Earlier Proceedings by Coughlan et al:

[20] I have already mentioned Westminer's Ontario action alleging fraud and other breaches of duty on the part of Mr. Coughlan and the other Seabright directors in relation to Westminer's takeover of Seabright. In response to Westminer's Ontario action, the former Seabright directors started four actions in Nova Scotia against Westminer and various individuals. To simplify, those actions claimed that Westminer had acted wrongly towards the former directors in various ways, including negligence in relation to expired directors' insurance, breach of a duty to indemnify them under Seabright's by-laws, breach of fiduciary duty in

relation to directors' indemnity insurance and conspiracy to injure. Most relevant for present purposes is the claim against Westminer for conspiracy to injure the Seabright directors, particularly Mr. Coughlan.

[21] The trial judge in that litigation, Nunn, J., found that in starting the Ontario action, the Westminer companies (namely the corporate respondents on the present appeal, Western Mining, Westminer Canada and Westminer Holdings) acted together and in concert for the predominant purpose of injuring the former Seabright directors, that Westminer's Ontario action was commenced with callous disregard of the former directors' rights and with a determination to cause them injury. (I note that this finding related only to the three Westminer companies and not to the individual defendants in that action.) Nunn, J.'s conclusion was upheld (and indeed expanded) on appeal to this Court, which summed up the matter in the following way:

> **[107]** 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.

[22] In those earlier actions tried by Nunn, J., the former Seabright directors claimed, among other things, damages for the losses they suffered as a result of Cavalier's failure. Nunn, J. dismissed this aspect of their claim, holding that: "It cannot be said that these losses are directly attributable to [Westminer's Ontario action]. Though it, indeed, contributed to the loss, its contribution is incapable of calculation and the actual loss may be too remote to be considered.": at para. 694. This result was upheld by this Court: para. 160.

2.2 Findings in the Present Action:

[23] With that background from the earlier litigation, I now return to the findings of Moir, J. in the present case. The difference in parties between the earlier and the present actions resulted in the relitigation, in the context of the appellants' claims, of the issue of whether Westminer's conduct toward the former Seabright directors had been wrongful. On this issue, Moir, J., reached essentially the same conclusions as had Nunn, J. in the earlier litigation. Moir, J. found as follows:

> **[216]** ... I have reached the same conclusion as had Justice Nunn: <u>the defendant corporations employed means that may have been lawful but they were deployed with the predominating purpose of injuring the former directors in order to conceal from public scrutiny the carelessness of Westminer and its senior management. The means for achieving this purpose included the suit and the public announcement, and I attach much significance to the latter because it went far beyond announcing the suit. I am mindful also of the approaches made to the OSC, allowing the insurance policy to lapse and the amendment alleging fraud.</u>
>
> **[217]** ... <u>[Westminer's] motive was to cast blame on others so as to deflect scrutiny of Westminer's own actions and judgments. The intent, the purpose and the direction of the actions taken because of this motive were to inflict injury on others who could suffer the blame. Those others were the former directors of Seabright</u> ...
>
> (Emphasis added)

[24] Moir, J.'s findings on Westminer's actions towards Seabright were essentially the same as those of Nunn, J. in the earlier proceedings. However, Moir, J's findings with respect to whether Westminer caused the Cavalier losses were different. As noted earlier, Moir, J. found that but for Westminer's conduct (among other things), the appellants would have been released from their letters of

credit (or would have had their cash advances returned) and had shares in Cavalier that would have been liquidable.

3. Duty of Care:

[25] Having found that the Westminer corporations (but not the individual defendants) had committed an intentional tort against Mr. Coughlan, Moir, J. turned to the second of the two main issues before him. That issue was whether, by virtue of that intentional tort and the foreseeability of the risk of harm it created to Cavalier investors, Westminer had a duty of care towards Cavalier investors like the appellants who, the judge found, were foreseeable, though unintended, victims of the same acts. The judge's findings on this issue are detailed and must be reviewed in depth as they form the underpinning of the appeal.

[26] The harm of which the appellants complain is a pure economic loss – it was a financial loss which was not causally consequent upon physical injury to them or their property. The trial judge, noting the appellants' concession that their claim was novel, applied the two part "**Anns**/**Kamloops**" test for whether a duty of care exists in negligence. That test, which is derived from the House of Lords decision in **Anns v. Merton London Burough Council**, [1978] A.C. 728 (H.L.(E.)) at 751; [1977] 2 All E.R. 492 at 498 as slightly modified by the Supreme Court of Canada in **Kamloops (City) v. Nielson**, [1984] 2 S.C.R. 2 at 10 is as follows:

> (1) is there a sufficiently close relationship between the parties ... so that, in the reasonable contemplation of the alleged wrongdoer, carelessness on its part might cause damage to that person? If so,
>
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of person to whom it is owed or (c) the damages to which a breach of it might give rise?

[27] In taking this approach, the trial judge relied on the analysis mandated by the Supreme Court of Canada in **Martel Building Ltd. v. Canada**, [2000] 2 S.C.R. 860. He noted that the defendants (respondents on appeal) did not argue that the duty of care alleged by the appellants fell within the presumption against recovery applying to cases of contractual relational economic loss: para. 230. He therefore approached the case as one in which a new category of recoverable pure economic loss was in issue for which the **Anns/Kamloops** test should be used. The effect of this approach was to subject the proposed duty of care to "added scrutiny relative to other claims in negligence" because all negligence claims for pure economic

loss should be carefully scrutinized (para. 230), but not to treat the claim as one which is presumptively barred.

3.1 **Anns/Kamloops** Test: First Branch:

[28] Dealing with the first branch of the **Anns/Kamloops** test, the trial judge found that there was a sufficiently close relationship between Westminer and the appellants such that, in Westminer's reasonable contemplation, intentionally making unfounded allegations against Mr. Coughlan would cause damage to them. Simply put, the judge found that the harm suffered by the appellants was reasonably foreseeable to the respondents. He summarized his detailed findings of fact leading to this conclusion as follows:

> **[231]** In 1988, Westminer knew Mr. Coughlan to have a following of investors with cash. Except for Mr. Hansen and Mr. McCartney, the identity of these investors and the amounts they had for investment were unknown. <u>Westminer was aware that Mr. Coughlan's initial plans involved establishing a publicly traded, junior resource company with the financial assistance of his following of investors. That knowledge became altered and refined when Westminer learned of the acquisition of Cavalier Energy and when it received the detail of information found in the circular issued by the then directors of Cavalier Energy following the take-over bid and when it learned that Cavalier Energy was being taken private. It knew that the acquisition had been financed by two bank loans and that there were letters of credit issued in respect of one of them. It knew the cost of acquisition to have been $25 million and it knew that some money had been put up or put at risk by Coughlan, Hansen and McCartney, which it estimated at $10 million. While I find that Westminer knew it to be likely that others in Mr. Coughlan's following either had invested or would be given an opportunity to invest in something associated with the business of Cavalier Energy, in July or August 1988, Westminer did not know whether other investors had already put money into or put money at risk for the private corporation or whether they would be invited to do so at a later time or whether they would be invited to invest at a time when the corporation would seek to go public</u>. One in the position of Westminer would know it was possible others had invested already, but other possibilities would equally present themselves. As to the nature of the business, Westminer knew Mr. Coughlan to be interested in junior resource ventures, it knew Cavalier Energy to be a junior oil and gas corporation and it knew certain details of the corporation's present operations and status as disclosed through the directors circular. However, it also knew that there was a parent corporation. It did not know whether Cavalier Energy was the only business involved or whether other businesses had been founded or acquired under the parent. And, it did not know the immediate plans or activities of the parent, whether it would continue the business of Cavalier Energy as it then appeared or whether it was seeking to expand the business through significant purchases of assets, through acquisitions

> or through mergers. A person in the position of Westminer would know it was possible that some of Mr. Coughlan's followers had invested in the business of Cavalier Energy as such or in combination with other like businesses, but the possibility would equally appear that the investors were to be given an opportunity to invest in future. <u>As regards foreseeable risk, Westminer had information that Mr. Coughlan was promoting a junior oil and gas business, it must have known Mr. Coughlan would also be involved in the management of the business, and it had to know that access to the public markets would be in the offing. The initiation of a junior oil and gas venture, either as a continuation of Cavalier Energy without the financial resources and management style of a large corporation like Dome or as a new business of which Cavalier Energy was to be a stepping stone, would be vulnerable to the health and reputation of its main promoter and manager. A person in the position of Westminer would see that serious damage to the business reputation of Mr. Coughlan could result in damage to whatever venture he was promoting, not only by damaging whatever corporations he was leading but also by damaging the opportunities of any investors to realize on their investments through the public markets. It was reasonably foreseeable that private investors had put up money or had put money at risk in a junior oil and gas business being initiated by Mr. Coughlan, and it was reasonably foreseeable that serious damage to Mr. Coughlan's business reputation would cause loss to those investors</u>. ...
>
> (Emphasis added)

[29] Having found that the risk of harm to people like the appellants was foreseeable, he concluded that the first step of the **Anns/Kamloops** test was satisfied and a *prima facie* duty of care existed.

3.2 **Anns/Kamloops** Test: Second Branch:

[30] The judge then turned to the second step, namely, whether there were considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which a breach of it may give rise. He concluded that the potential for indeterminate liability precluded the existence of a duty of care because such a duty would result in the indeterminacy of both the number of persons to whom it would be owed and the potential damages flowing from its breach. He summed up this conclusion as follows:

> **[233]** ... <u>The proposed duty of care would be owed on account of actions taken against the CEO and intended promoter of a private corporation with plans to go public in the offing</u>. Though the number of shareholders in the private company would be limited by the securities laws of several provinces, <u>the duty</u>

> encompasses creditors and, I would say, it cannot logically be contained to creditors who invest with a view to taking shares, but would have to extend to those who invest as senior creditors by way of loans as well as junior creditors whose loans are nearer to equity. Similarly, the extent of investment encompassed by the proposed duty of care is indeterminate. While the business was that of a junior oil and gas company, the extent of the business was not fixed and investment, by equity or loan, may have been becoming greater than the Cavalier Energy purchase price could describe.

(Emphasis added)

[31] While the judge based his rejection of a duty of care on its potential for indeterminate liability, he noted that there were two other sorts of relevant policy considerations which also tended to negate the duty of care advanced by the appellants. These were, first, that it would be inappropriate to graft liability in negligence on to the primary liability for an intentional tort and second, that the duty contended for would, if recognized, conflict with well-established legal policies.

[32] On the first of these policy concerns, the judge said:

> **[232]** ... [T]he plaintiffs ... say there is a duty upon those who sue in fraud, complain to securities regulators, et cetera, in order to do harm to persons in positions like that of Mr. Coughlan. The assertion contains this: those who set about to commit civil conspiracy or to interfere with economic relations must take care not to harm third parties who would forseeably suffer loss along with the intended victim of the intentional tort. Defamation, conspiracy, unlawful interference with economic relations and other intentional torts all carry their own limits of liability. Perhaps those limits should be expanded in some cases, perhaps not. But, it seems to me that the questions of policy that would arise should be confronted directly in light of the law surrounding an applicable intentional tort rather than indirectly by grafting negligence onto an intentional tort.

(Emphasis added)

[33] As for the second area of policy concern, the judge said this at para. 232:

> ... the concerns involve access to the civil justice system, candid reports to investigative authorities and freedom of speech. As the Court of Appeal said in the Seabright case, the most serious accusations against Westminer concerned the institution of proceedings in Ontario and the amendment of the statement of claim to allege fraud against the outside directors. As indicated by Justice Nunn at para. 633 of his decision and by the discussion of immunity beginning at para. 85 of the

> decision of the Court of Appeal, concerns respecting access to the system of civil justice have been expressed even in reference to intentional torts grounded on the malicious institution of a civil action. The policy in favour of access indicates caution, if not preclusion, where the institution of civil proceedings grounds a claim in negligence. I have found that the approaches made to the OSC and, for the purposes of the present action, permitting directors and officers insurance to lapse, were indicative of Westminer's animus against the former directors, but they were not the cause of any loss to the present plaintiffs. If the approaches to the OSC were more prominent for the present issue, I would suggest that the laws of defamation providing absolute privilege for certain reports to public authorities indicate one policy reason that may preclude a duty of care in making such reports. Further, the freedom of expression, as limited by the law of defamation, should be considered to the extent that Westminer's public announcement grounds the present claim in negligence.

(Emphasis added)

3.3 Disposition of Negligence Claims at Trial:

[34] Accordingly, the judge dismissed the appellants' negligence claim on the basis that the *prima facie* duty of care which he found to exist under the first branch of the **Anns/Kamloops** test was precluded by the policy consideration of indeterminate liability.

IV. ISSUES:

[35] The key issues on the appeal relate to the duty of care. The appellants challenge the judge's finding that the duty is precluded because of potentially indeterminate liability. The respondents support the judge's conclusion on this point, but say his rejection of a duty of care is equally supportable on the basis that, contrary to the judge's view, there was not a sufficiently close relationship between the parties to satisfy the first branch of the **Anns/Kamloops** test. The respondents also contend that even if, contrary to the judge's conclusion, a duty of care is found to exist, they did not breach it.

[36] In addition to their attack on the judge's findings respecting the duty of care, the appellants challenge his provisional findings in relation to mitigation and contingencies, while the respondents support his conclusions on these points.

[37] It follows that the issues raised by the appeal and the respondents' notice of contention are these:

1. Did the judge err in finding that a *prima facie* duty of care arose under the first branch of the **Anns/Kamloops** test?
2. Did the judge err in precluding a duty of care on the basis of the potential for indeterminate liability?
3. If there was a duty of care, should the action fail because there was no breach of that duty?
4. Did the judge err in finding that the investments made by the appellants following the respondents' wrongful acts were not mitigating acts?
5. Did the judge err in reducing the damages he provisionally assessed on the basis of certain negative contingencies?

V. ANALYSIS:

[38] The key issue concerns the duty of care. The relevant questions on appeal are issues 1 and 2 listed above, namely whether, as the respondents say, the judge erred in finding a *prima facie* duty of care and, as the appellants submit, whether he erred in precluding a duty of care by virtue of the policy consideration of indeterminate liability. While a finding against the appellants on either of these questions would dispose of the appeal, the two are interrelated and I will address both in detail.

1. Duty of Care:

1.1. General Principles Relating to Negligence Claims for Pure Economic Loss:

[39] As noted, the appellants claim here is for pure economic loss allegedly suffered as a result of the respondents' negligence. A loss is a pure economic loss when it is not accompanied by physical injury or property damage: **Martel** at para. 34.

[40] It will be helpful to say a word about the nature of duties of care in negligence generally and the special reluctance of the law to recognize negligence claims for pure economic loss.

[41] Negligence is the failure to take reasonable care for those to whom one owes a duty of care. Unlike most other torts, negligence is not defined by reference to a particular type of activity or harm. The scope of protection afforded by negligence suits is thus virtually unlimited: John G. Fleming, *The Law of Torts*, 9th ed. (LBC Information Services, 1998), at 149. It is necessary, therefore, to impose limits on liability in negligence. As *Fleming* put it, to impose liability "... for any loss suffered by anyone as the result of carelessness would [be to impose] too severe and indiscriminate a restriction on individual freedom of action by exposing the actor to the prospect of unpredictable liability. Hence, the pervasive problem in ... negligence is that of limitation of liability." (at p. 150)

[42] The most important of the limits on liability is the requirement that negligence is not actionable unless the defendant owes a duty of care to the plaintiff. As Lord Atkin put it in **Donoghue v. Stevenson**, [1932] A.C. 562 at 580:

> There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances . . . The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

(Emphasis added)

[43] While Lord Atkin's remarks focus on the nature of the relationship between the parties that will give rise to a duty of care, the underlying policy concern is that the concept of the duty of care must serve as a check on the potentially unlimited scope of liability in negligence. In order for it to do so, the proposed duty of care must be assessed not only in relation to the specific facts of the particular case, but also in light of the implications for other cases if such a duty of care were to be imposed. In other words, the proposed duty of care must be considered not just as between the parties to the present case, but in light of the various sorts of situations in which the duty, if adopted, would apply.

[44] Negligence law has been particularly reluctant to permit recovery where the plaintiff's loss is purely economic and not consequent upon physical harm or

property damage. Traditionally, the common law did not allow recovery of economic loss in negligence cases at all: **Martel** at para. 36. The policy basis of this traditional rule was primarily that the burden of compensating anyone other than the party most directly injured was unduly oppressive because of the wide array of repercussions of such injuries on all with whom that party had family, business or other relationships: *Fleming*, *supra* at 196.

[45] This traditional rule against recovery of pure economic loss in negligence has been reconsidered so that, in a limited number of cases, it has been recognized that damages for pure economic loss resulting from negligence may be recovered. However, in such cases, the threshold question of whether or not to recognize a duty of care receives added scrutiny for the same reasons that such claims were at one time generally barred. That added scrutiny takes two forms. First, there is especially careful attention to the rule that mere foreseeability of the risk of harm by the defendant is not sufficient to found a duty of care. Second, even if a duty of care arises, it may be limited or negated entirely for reasons of policy extraneous to the particular situation between the parties to the suit.

[46] This added scrutiny is based on four concerns: that economic interests are less compelling of protection than bodily security or proprietary interests; that recognition of economic loss raises the concern of indeterminate liability; that such claims often arise in a commercial context and are often the result of a business risk best guarded against by the party on whom they fall through such means as insurance; and that recognition of such claims would tend to encourage a multiplicity of actions: **Martel** at para. 37.

[47] Five categories of cases in which negligence claims for pure economic losses may be recoverable have been identified by the Supreme Court of Canada: **Martel** at para. 38. With one exception, these categories are merely analytical tools and the two part **Anns/Kamloops** test is to be used to determine whether a duty of care should be found to exist in a given case, with the categories used to provide greater structure to the varied factual situations that may arise: **Martel** at para. 45.

[48] However, within the fifth category, which relates to “ relational economic loss”, there is a particular type of case in which a duty of care is presumptively excluded. This excluded type of case is called “contractual relational economic loss” which means economic loss suffered via a plaintiff’s contractual relationship

with a third party to whom the defendant is already liable for property damage: **Martel** at para. 41. Such claims are presumptively excluded unless the case falls within one of three categories of exceptional cases recognized by the Supreme Court of Canada or unless a new exception to the presumptive exclusion is developed for sound policy reasons: **Martel** at paras. 42 - 45.

[49] Where a claim: (i) does not fit into one of the five categories of economic loss in which a duty of care has been recognized; (ii) does not fit within the presumptive exclusion relating to contractual relational economic loss; or (iii) if it is alleged that the case falls within any of the categories other than contractual relational economic loss, the **Anns/Kamloops** approach should be applied: **Martel** at paras. 46 - 47.

[50] The present case is not one of contractual relational economic loss because it does not involve a loss suffered via a plaintiff's contractual relationship with a third party to whom the defendant is already liable for property damage; there was no contract between the appellants and Mr. Coughlan and there was no property damage involved. That being so, I think that the trial judge was right to move directly to consideration of the **Anns/Kamloops** test.

[51] The two part **Anns/Kamloops** test is concerned, at the first step, with foreseeability of the risk of harm and the relationship between the defendant and the plaintiffs. These latter considerations are known collectively as the requirement of "proximity". At the second, the test is concerned with whether any *prima facie* duty of care identified at the first step should be limited or precluded for policy reasons.

[52] The trial judge, as noted, found the first branch of the test was satisfied and the respondents contend that he was wrong to reach that conclusion. The judge further found that the duty should be precluded at the second stage of the analysis on policy grounds and the appellants challenge that conclusion. Critical to that conclusion on the second branch of the test was his finding that there was no logical way to distinguish the claims of these appellants from an indeterminate number of others who could claim on the basis of the proposed duty of care. It follows, if that is so, that if the duty were recognized, both the number of potential claimants and the amount of the potential losses would be indeterminate.

[53] Consideration of these issues requires the analysis of three matters. First, the nature of the duty which the appellants assert must be clearly defined. Second, given that the risk of harm to the appellants was foreseeable to the respondent corporations, the issue of whether there was sufficient proximity between them must be addressed. This issue concerns the first step in the **Anns/Kamloops** analysis. Third, if both foreseeability and proximity are present in the particular fact situation of the case, the broader policy question of the impact of establishing the proposed duty of care must be assessed. This issue relates to the second step of the **Anns/Kamloops** analysis.

[54] As McLachlin, J. pointed out in **Canadian National Railway Co. v. Norsk Pacific Steamship Co.**, [1992] 1 S.C.R. 1021 at para. 48, the concepts of proximity and indeterminate liability are closely linked. While subsequent cases require some refinement of her assertion that “proximity is the controlling concept which avoids the spectre of unlimited liability”, it remains true that proximity plays an important role in avoiding indeterminate liability. However, as more recent law has made clear, proximity is to be considered at the first step of the **Anns/Kamloops** test while the broader policy consideration of indeterminate liability is to be considered at the second. The Court has also emphasized, though, that what counts most is that “... the proper balancing of the factors relevant to a duty of care are considered ... ” regardless of the “stage” of the **Anns/Kamloops** test at which this is done: **Cooper v. Hobart**, [2001] 3 S.C.R. 537 at para. 27

[55] For this reason, I think it best to examine both steps of the **Anns/Kamloops** analysis. I will do so after setting out the duty of care proposed by the appellants.

1.2 The Duty of Care Proposed by the Appellants:

[56] The appellants put forward two different approaches to the duty of care in this case. They say first that their situation is analogous to relational economic loss and that the duty should be defined as follows: a defendant who intentionally injures a person’s business reputation will have a duty of care in negligence to all others whom the defendant could reasonably foresee would be injured as result of the intentional conduct.

[57] With great respect, I do not think that this version of the proposed duty of care merits any further detailed analysis. It amounts to an assertion of a duty of care with respect to economic loss based simply and solely on the foreseeability of such loss. As the Supreme Court clearly stated in **Cooper**, **supra**, foreseeability of harm alone is not enough to found a duty of care.

[58] The second version of the duty advanced by the appellants would have us create a new class of cases in which a duty should be owed where pure economic loss is foreseeable. The proposed duty is this: one who intentionally injures another person in reputation, economic interests or contractual relations owes a duty of care to all others engaged with that person in a joint or common venture and who the wrongdoer could reasonably foresee would be injured along with that person as a result of the intentional conduct. The appellants say they were, in effect, in a common venture with Mr. Coughlan and constituted a closed, ascertainable and known class of persons. This, they argue, is sufficient to establish both proximity at the first branch of the **Anns/Kamloops** test and to guard against the spectre of indeterminate liability at the second step.

[59] With the duty of care as proposed by the appellants clarified, I turn to the two steps of the **Anns/Kamloops** analysis.

1.3 Foreseeability and Proximity:

[60] The first step in the **Anns/Kamloops** analysis is concerned with whether a *prima facie* duty should be recognized by virtue of the relationship between the parties.

[61] The Supreme Court has provided detailed guidance on the content and application of the test at this first stage in **Cooper, supra,** at paras. 30 - 35 and I will quote extensively from that part of the judgment:

> 30 ... At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the <u>relationship</u> between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If

foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. ...

31 On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.

32 On the first point, it seems clear that the word "proximity" in connection with negligence has from the outset and throughout its history been used to describe the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed. "Proximity" is the term used to describe the "close and direct" relationship that Lord Atkin described as necessary to grounding a duty of care in *Donoghue v. Stevenson, supra,* at pp. 580-81:

> Who then, in law is my neighbour? The answer seems to be -- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.
>
> ...
>
> I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. [Emphasis added.]

33 As this Court stated in *Hercules Managements Ltd. v. Ernst & Young,* [1997] 2 S.C.R. 165, at para. 24, *per* **La Forest J.**:

> The label "proximity", as it was used by Lord Wilberforce in *Anns, supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an

> obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs. [Emphasis added.]

34 Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

35 The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic. As stated by McLachlin J. (as she then was) in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1151: "[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (cited with approval in *Hercules Managements*, *supra*, at para. 23). Lord Goff made the same point in *Davis v. Radcliffe*, [1990] 2 All E.R. 536 (P.C.), at p. 540:

> ... it is not desirable, at least in the present stage of development of the law, to attempt to state in broad general propositions the circumstances in which such proximity may or may not be held to exist. On the contrary, following the expression of opinion by Brennan J in *Sutherland Shire Council v. Heyman* (1985) 60 ALR 1 at 43-44, it is considered preferable that 'the law should develop categories of negligence incrementally and by analogy with established categories'.

(Double underlining mine)

[62] In the present case, the judge concerned himself only with foreseeability of harm when he applied the first branch of the **Anns**/**Kamloops** test. Although he stated his conclusion on this issue in terms of the relationship between the respondents and the appellants, it is clear from a review of his detailed findings that he was concerned only with foreseeability of harm, not with the question of proximity of the parties. The judge's critical finding was stated in terms of what was in the reasonable contemplation of Westminer, based on his findings as to what Westminer knew or could reasonably be taken to have known. As he put it "... there was a sufficiently close relationship between the Westminer companies and the Cavalier investors that, in the reasonable contemplation of Westminer, carelessness in making serious allegations against Mr. Coughlan would cause damage to the investors. ..." (at para. 231; emphasis added). This approach is quite

understandable given that the judgments of the Supreme Court of Canada in **Cooper** (and its companion case of **Edwards v. Law Society of Upper Canada**, [2001] 3 S.C.R. 562) were not available to him when he gave his judgment.

[63] In light of **Cooper**, however, it is apparent that this analysis must now be viewed as incomplete. As set out in **Cooper**, the first step of the **Anns/Kamloops** test must now be understood as requiring a finding of both foreseeability of harm and proximity of the parties. This clarification of the law since the trial judge's reasons were released requires us now to hold that he erred in law by failing to address the issue of proximity in applying the first branch of the **Anns/Kamloops** test. It is, therefore, necessary for us to determine in light of the trial judge's detailed findings of fact whether the legal test of proximity was met here.

[64] The respondents submit that the judge's findings of fact at trial do not support the conclusion that the proximity aspect of the first step of the test had been met. The appellants, on the other hand, submit that proximity was present on these facts, stressing that the class of persons to whom the appellants belong was known to Westminer and that they were, in effect, involved in a common venture with Mr. Coughlan, the intended victim of Westminer's wrongdoing.

[65] Before continuing with the legal analysis, it will be helpful to give a more detailed account of the appellants' involvement in the Cavalier venture. Although the individual situations of the appellants, both with respect to the nature of their investments and their response to Cavalier's financial difficulties, vary somewhat, I will review the facts in detail with respect to one of the appellants in order to give a sense of the situation of the appellants generally.

[66] The appellant, Andrew Saulnier, was in the food business for 25 years before selling his interests in 1991 and becoming involved in the building supply business. He had not been an investor in Seabright and was introduced to the Cavalier opportunity by his former business partner, Mr. Edwards. Prior to Mr. Saulnier's involvement with Cavalier, he did not know Mr. Coughlan personally.

[67] Mr. Saulnier's understanding was that he would be asked to put up a letter of credit as part of the Cavalier venture and that it would be in place for "three to six months, maybe nine months." (Transcript page 5112) He was to receive a 30% return on his investment over that period of time and it would be turned into shares which he would have been able to sell on the market. (Transcript page 5112).

[68] Some time in April of 1988, Mr. Saulnier signed a subscription agreement with Mr. Coughlan's numbered Alberta company which became Cavalier Capital. There was no contractual relationship between him and Mr. Coughlan. By the subscription agreement, Mr Saulnier agreed: (i) to provide a letter of credit for $100,000 initially until July 5, 1988 with the possibility of renewal until October 12, 1988; and (ii) to the assignment, by the numbered company, of the letter of credit to a bank to secure the company's borrowings not to exceed $18,000,000. In return, the numbered company agreed: (i) to repay the borrowing no later than October 12; (ii) to issue Mr. Saulnier common shares of the company by October 12, the number of which was to be based on their issue value divided into the principal amount of the letter of credit multiplied by 7.5% if the letter of credit expired in July and 15% if it expired in October; (iii) that Mr. Saulnier would be entitled to subscribe in priority to others and *pro rata* with existing shareholders to future securities offerings by the company, its successor or affiliated corporations; and (iv) that the bank loan funds would be used to acquire not less than 67.5% of the shares of Cavalier Energy and to finance related expenses.

[69] Mr. Saulnier obtained the letter of credit from the Bank of Montreal. He did not advance the face value of the letter of credit at that time but paid as a fee what he acknowledged to be a relatively small amount. (Transcript page 5127).

[70] In July of 1988, Mr. Saulnier agreed with Capital and Energy to extend his letter of credit to "... the closing of the public offering or October 12, 1988" (Exhibit 278 page 108 - 111). The extension agreement provided an opportunity for Mr. Saulnier to indicate whether he intended to subscribe to shares of the public offering. This portion of the agreement was not completed and Mr. Saulnier testified at trial that he had not made up his mind whether to do so or not at that time and intended to wait and see how matters developed. (Transcript 5117).

[71] The Westminer Ontario action was commenced at the end of July, 1988.

[72] In September of 1988, Capital issued an offering memorandum (a so-called special rights offering). This offering was issued to raise money to pay down the bank loan backed by the letters of credit. As the trial judge described it, investors such as Mr. Saulnier were, in effect, given the choice of paying to Cavalier the money the investor would otherwise have had to pay to the bank if the letters of credit had been called. The investor could subscribe for the special rights units to

the extent of his or her contingent liability on the letter of credit and Cavalier would advance the price to the bank as a credit against the investor's contingent liability. The choice for the investor was between paying the bank on the letter of credit and thereby acquiring a right of action against Cavalier or paying the same money to Cavalier and acquiring shares and convertible debentures in exchange.

[73] Mr. Saulnier chose the latter course, subscribing for $50,000 for which he received debentures and common shares of Capital. As a result, his letter of credit was reduced by $50,000 as of October 13, 1988 and, by arrangement between Mr. Saulnier and his bank, was extended to January 12, 1989.

[74] In December of 1988, Capital issued another offering memorandum (a so-called flow through shares offering). These units offered potentially significant tax savings to subscribers and Mr. Saulnier invested about $50,000 dollars, receiving 7200 flow through shares of Capital in return. According to his evidence at trial, when he invested in these flow through shares, Capital paid down its bank loan some more and his letter of credit was released. In effect, he bought securities in Cavalier through the two offerings, it paid down the bank loan secured by the letters of credit, thereby releasing his letter of credit which had been assigned to secure the loan. (Transcript page 5126).

[75] However, he financed the purchase of these securities with two $50,000 loans from his bank. One was eventually repaid in March of 1992 and the other in December of 1995. Mr. Saulnier did not attempt to enforce any of his rights against Capital or Energy prior to the receivership in 1992.

[76] I return to the legal analysis concerning proximity. It will be helpful to follow the analytical model set out in **Cooper** at para. 41.

[77] The first question in relation to proximity is whether the case falls within or is analogous to any of the existing categories in which proximity has been recognized in earlier cases: para. 41. While these categories are not closed, proximity is generally established by reference to them: **Cooper** at para 31. In my opinion, this case does not fall within any of the existing categories of negligence law in which proximity has been recognized.

[78] The next question, therefore, is whether this is a situation in which a new duty of care should be recognized: **Cooper** at para. 42. There is no challenge to

the judge’s finding that the appellants established foreseeablity of the harm they suffered. The remaining issue at the first step of the **Anns/Kamloops** analysis is whether proximity was established, that is, whether the respondents were in a “close and direct relationship” with the appellants making it just to impose on them a duty of care towards the appellants.

[79]   While there is no precise definition of what constitutes such a close and direct relationship, the gist of the requirement is that there should be “such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.”: **Donoghue v. Stevenson**, [1932] A.C. 562 (H.L.) at 581. In both **D’Amato v. Badger**, [1996] 2 S.C.R. 1071 at para. 49 and in McLachlin, J.’s judgment in **Norsk** at paras. 48 - 53, a number of indicators of proximity are referred to. They include the relationship between the parties, physical “propinquity” (nearness in space), assumed or imposed obligations and the existence of a close causal connection between the act and the harm suffered.

[80]   There was no relationship between Westminer and the appellants. As the judge found, Westminer did not even know the identity of the appellants. While some of the appellants had been investors in Seabright, several had not been. While many of them knew Mr. Coughlan (and could be considered part of his “following”, as the trial judge put it), some did not. There was no physical closeness (or “propinquity”, to use the term found in the cases). The appellants and Westminer neither assumed nor had imposed on them any mutual obligations. The causal link between Westminer’s acts and the harm suffered by the appellants was indirect to say the least. Westminer’s tortious conduct was directed against Mr. Coughlan with whom the appellants had no contractual relationship. Their relationship was with the venture he was promoting and their losses occurred as a result of the failure of that venture. So I would conclude that none of these factors supports the appellants’ submission that proximity existed between them and Westminer.

[81]   As the Supreme Court put it in **Cooper**, the first branch of the **Anns**/**Kamloops** test requires a finding of foreseeability “... plus something more...”, the “something more” being proximity: paras. 29 and 31. I agree with the respondents when they say that the appellants’ claim is a distant loss which arises from collateral relationships. In this case, while foreseeability was established, the “something more”, proximity was completely absent.

[82] The appellants submit that there are three aspects of their situation which, taken together, support a finding of proximity. Although these submissions overlap with those relating to the indeterminate liability analysis, I will refer to them here in the context of proximity and return to them as necessary at the second step of the analysis.

[83] First, the appellants say that the proximity analysis should be affected by the fact that Westminer's tort against Mr. Coughlan was intentional rather than simply careless. Second, they submit that they were a known and ascertained class of potential plaintiffs and, therefore, in combination with other factors, should be found to be in a proximite relationship with Westminer. Third, the appellants say that they and Mr. Coughlan were, in effect, engaged in a common venture. Given that Mr. Coughlan was the target of Westminer's intentional tort and that they were in such a close relationship with him, their relationship to Westminer should be considered to be proximate. I will turn to each of these submissions in turn, bearing in mind that it is the cumulative effect of all three considerations upon which the appellants rely.

[84] To turn to the first point, which is that the intentional nature of Westminer's conduct directed at Mr. Coughlan should affect the proximity analysis as between them and Westminer, I cannot accept this submission for two principal reasons.

[85] In the first place, proximity is concerned with the existence of a duty of care and therefore with the nature of the relationship between the plaintiff (the appellants here) and the defendant (Westminer in this case). As the Supreme Court put it in **Stewart v. Pettie**, [1995] 1 S.C.R. 131 at para. 32, the question of whether a duty of care exists is a question of the relationship between the parties, not a question of conduct. However, the appellants' submission addresses the conduct of the defendants, although I would note, not its conduct towards them, but its conduct towards Mr. Coughlan. The nature of Westminer's conduct is not relevant to the issue of duty of care, but to the question of standard of care. The intentional nature of the conduct toward others is not relevant to the issue of proximity between Westminer and the appellants.

[86] Second, the appellants claim in negligence. The allegedly tortious conduct by Westminer toward them was not intentional. The only claim before the court is based on Westminer's alleged negligence. That being so, I do not understand how

the fact that Westminer's conduct was intentional in relation to Mr. Coughlan could affect the proximity analysis in the negligence claim. If this were so, the relationship between Westminer and the appellants would be proximate if Westminer's conduct towards Mr. Coughlan had been intentional but not proximate if that conduct had only been careless. I do not follow the logic of this approach. The relationship between Westminer and the appellants is no different in either situation, so it is difficult to see why the proximity analysis should be different.

[87] The appellants' next submission is that they constitute a known and ascertainable class of potential plaintiffs. This sort of argument has generally been advanced at the second step of the **Anns/Kamloops** analysis as an answer to the potential for indeterminate liability. The point, in my opinion, does not relate specifically to the relationship between Westminer and the appellants. I will consider it further in my analysis of the second step.

[88] That leaves the third submission, that the appellants were engaged in a common venture with Mr. Coughlan and therefore in a proximate relationship with Westminer. This submission is based on these observations of McLachlin, J. in **Norsk** at pp. 1162 and 1164:

> Such a characterization brings the situation into the "joint" or "common venture" category under which recovery for purely economic loss has heretofore been recognized in maritime law cases from the United Kingdom (*The Greystoke Castle, supra*) and the United States (*Amoco Transport, supra*). <u>The reasoning, as I apprehend it, is that where the plaintiff's operations are so closely allied to the operations of the party suffering physical damage and to its property (which -- as damaged -- causes the plaintiff's loss) that it can be considered a joint venturer with the owner of the property, the plaintiff can recover its economic loss even though the plaintiff has suffered no physical damage to its own property</u>. To deny recovery in such circumstances would be to deny it to a person who for practical purposes is in the same position as if he or she owned the property physically damaged.
>
> ...
>
> ... I do not read the authorities which have considered the implications of a joint venture between the plaintiff and the owner of the damaged property as confining themselves to the formal terms of the contract. I prefer a more flexible test which permits the trial judge to consider all factors relevant to their relationship. The

> terms of the contract are an important consideration in determining whether economic loss is recoverable. But the contract may tell only part of the story between the parties. <u>If the evidence establishes that having regard to the entire relationship between the owner of the damaged property and the plaintiff, the plaintiff must be regarded as standing in the relation of joint or common venturer (or a concept akin thereto) with the property owner with the result that in justice his rights against third parties should be the same as the owner's, then I would not interfere</u>. ...
>
> (Emphasis added)

[89] I note first that the sort of case McLachlin, J. was addressing involved loss caused to one party (CN) as a result of its contract with the owner of a bridge which had been damaged due to Norsk's negligence. In other words, it was a case of contractual relational economic loss because it involved the claim by a plaintiff who had a contract with a party whose property was damaged by the tortfeasor: see Bruce Feldthusen, *Economic Negligence*, 4th ed. (Carswell, 2000) at p. 223. The present case is worlds removed from such a case, given that here there was no damage to Mr. Coughlan's property resulting from Westminer's intentional tort and that there was no contract between Mr. Coughlan and the appellants.

[90] Next, I note that the test for common venture advanced by McLachlin, J. in **Norsk** was that a common venture would be found if "... having regard to the entire relationship between the owner of the damaged property and the plaintiff, the plaintiff must be regarded as standing in the relation of joint or common venturer (or a concept akin thereto) with the property owner <u>with the result that in justice his rights against third parties should be the same as the owner's</u>, ..." (at page 1164; emphasis added). In my view, the appellants here cannot meet that test. There was no contract between Mr. Coughlan and any of the appellants. They were investors who were creditors of Capital with rights of action for breach of their contracts with the company and whose exposure was limited to the amount of their investment. It is not suggested that they have the same rights as against Westminer as did Mr. Coughlan. In my view, the appellants do not meet the test for common venturers set out by McLachlin, J.

[91] Finally on this point, I note that an equally authoritative opinion on the common venture aspect is that of LaForest, J. in **Norsk**. In his view, the existence or not of a joint venture must be determined by looking at the contract between the plaintiff (the appellants) and the property owner - or in this case, by analogy, the injured party, Mr. Coughlan. Of course, there is no such contract, even if this

approach could be expanded to situations other than those involving damage to property. For LaForest, J. the essence of the common venture situation is that A, the owner of property, suffers damage which is recoverable against the wrongdoer, C. and that B., who is bound to contribute to A's loss, seeks to recover the amount of its contribution from the wrongdoer: (at p. 1098). He also would look for traditional *indicia* of a joint venture - the presence of a legal entity in the nature of a partnership, a joint undertaking, a duty to share both profits and losses, etc.: at p. 1101. There are no such *indicia* here.

[92] In my respectful view, the common venture submission is not supported in law by either the judgment of McLachlin, J. or LaForest, J. Nor is it supported by the facts in the record.

[93] To conclude on proximity, in my view, the judge erred by not addressing proximity at the first step of the **Anns/Kamloops** analysis. Had he done so, he would have concluded that there was no proximity between the appellants and the respondents.

1.4 Preclusion of a *prima facie* duty by policy considerations:

[94] In applying the second step of the **Anns**/**Kamloops** test, the trial judge found that a *prima facie* duty of care in these circumstances should be precluded by virtue of the policy consideration of the potential for indeterminate liability. The appellants attack this conclusion, submitting that there is no potential for indeterminate liability here. The appellants say they were part of an ascertained and closed class namely, investors who had pledged letters of credit as security for a bank loan to Cavalier, and were reasonably in the contemplation of Westminer. They also submit that even if there is an element of indeterminate liability in the proposed duty of care, that policy consideration is outweighed by others, particularly the need to deter the sort of conduct in which Westminer engaged.

[95] The appellants' submission that indeterminate liability was not present here is advanced with both a legal and a factual underpinning. The legal underpinning is found in **Hercules Management Ltd. v. Ernst & Young**, [1997] 2 S.C.R. 165. The appellants submit that **Hercules** stands for the proposition that when a defendant has knowledge of an identifiable class of plaintiffs, then the scope of potential liability is sufficiently delimited to answer the concern about

indeterminate liability. In short, the submission is a version of the "known plaintiff/ascertained class" answer to the concern about indeterminate liability. The factual underpinning of the appellants' submission has two main elements. The first is what they describe as Moir, J.'s finding that they constitute an ascertained class. In particular, they rely on the judge's statement at para. 209 of his reasons that "... Westminer was aware that the purchase had been financed by two bank loans, one of which was backed by letters of credit and was likely to be retired through equity financing." This, the appellants say, shows that they constituted a closed class of persons defined by their letter of credit investments such that only members of this ascertained and closed class could be the recipients of the duty of care. Second, they submit that only those persons who invested prior to Westminer's tortious conduct coming to light would be included in the class, further limiting it in scope.

[96] I will address these submissions in turn.

[97] The appellants submit that on the findings of fact made by Moir, J., there is a clear and logical demarcation between the appellants and other potential claimants. I cannot accept this submission.

[98] Moir, J. found that the duty, if it exists, would arise on account of actions taken against a CEO and intended promoter of a private corporation with plans to go public and that such a duty cannot logically be contained either simply to creditors who invest with a view to taking shares or extend only to the purchase price of the company. He concluded that, logically, the duty would have to extend to those who invested as senior creditors by way of loans as well as to junior creditors whose loans are nearer equity. All such persons would be equally foreseeable as the appellants. He found, moreover, that the scope of liability would logically have to extend to the full amount of the various investments and not be limited to the purchase price of the company. Thus, far from finding that the appellants were members of an ascertained and closed class by virtue of their letter of credit (or other) investments, the judge concluded that their situation could not be meaningfully distinguished from all the other sorts of investors who would reasonably be foreseen in the case of an intentional wrong against the CEO of a private company with plans to go public.

[99] I therefore cannot accept the appellants' suggestion that, for the purposes of the **Anns/Kamloops** analysis, the judge erred by failing to treat them as an

ascertained, closed and, therefore, determinate class. The trial judge's point, and I think he was right, is that the duty of care contended for here would create indeterminate liability because its ambit could not be logically contained to the so-called letter of credit investors.

[100] We must remember that at the second step of the **Anns/Kamloops** analysis, we are not merely concerned with the facts of the present case, but with its policy implications. The question of indeterminacy is not simply how many plaintiffs have sued or for that matter how many potential plaintiffs there might be on the specific facts. The question is whether the imposition of the duty of care asserted by the appellants would lead to potentially indeterminate liability if applied generally.

[101] This point is well illustrated by **Bow Valley Huskey (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.**, [1997] 3 S.C.R. 1210. In considering the question of whether a *prima facie* duty of care should be negatived by the policy consideration of indeterminate liability, the Court looked to the implications for other cases of imposing the proposed duty. This involved asking the question of what other category or categories of relationships would fall within the scope of the proposed duty. The Court concluded as follows:

> 62 ... If the defendants owed a duty to warn the plaintiffs, it is difficult to see why they would not owe a similar duty to a host of other persons who would foreseeably lose money if the rig was shut down as a result of being damaged. Other investors in the project are the most obvious persons who would also be owed a duty, although the list could arguably be extended to additional classes of persons. What has been referred to as the ripple effect is present in this case.
>
> 63 No sound reason to permit the plaintiffs to recover while denying recovery to these other persons emerges. To hold otherwise would pose problems for defendants, who would face liability in an indeterminate amount for an indeterminate time to an indeterminate class. ...

[102] A premise of the appellants' submission in the present case is that Moir, J. found that only the potential harm to those, such as the appellants, who had given security for the bank loans would have been foreseeable to Westminer and that therefore, the duty of care is limited to them (and a few others in the same position

who did not join in the action). This, with respect, is not a correct characterization of Moir, J.'s findings.

[103] Moir, J. found that a person in Westminer's position would see that serious damage to the business reputation of Mr. Coughlan could result in damage to whatever venture he was promoting, including damage to the opportunities of "any investors" to realize their investments through the public markets: para. 231 (the quoted words are those of Moir, J.) His fundamental conclusion on this point was that: " [i]t was reasonablely foreseeable that serious damage to Mr. Coughlan's business reputation would cause loss to those investors. ..." that is, investors whom he defined as "private investors [who] had put up money or had put money at risk in a junior oil and gas business..." : para. 231. This fundamental conclusion was supported by a number of specific findings.

[104] The trial judge did not see anything unique or even distinctive about the situation of the appellants compared to what he considered to be the potentially indeterminate group of the creditors of Cavalier and related businesses. He found that, apart from Westminer's knowledge that Messrs. Coughlan, Hansen and McCartney had put up money or placed money at risk, it did not know whether other investors had already put money into or put money at risk for the private corporation or whether they would be invited to do so later or at the time the corporation would seek to go public: para. 231. Westminer, the judge found, did not know the identity of the appellants or of others who invested in Cavalier by putting their money at risk through bank letters of credit with personal recourse. It did not know much of this class of investors: it did not know whether any investment was present or reserved for the near future, it did not know the extent of the investment or even whether it involved part of the purchase price for Cavalier Energy, all of the price or some broader business being established using Cavalier as a stepping stone and it did not know whether investments had been made by way of equity or credit: para. 233. The most that could be said in relation to the appellants specifically, and this point does not apply to them all in any case, was that Westminer knew or ought to have known that some of Mr. Coughlan's followers had or might in the future invest in Cavalier or other like businesses.

[105] I, therefore, cannot accept the appellants' factual submissions in relation to foreseeability that, on the judge's findings, only the harm to those like the appellants, who had given security for the bank loans, would be foreseeable. In my respectful view, the judge found precisely the opposite, namely, that their

situations were not logically distinguishable from the point of view of foreseeability of risk of harm from a potentially indeterminate number of other persons who would lose money if Mr. Coughlan's business reputation were seriously damaged.

[106] I turn to the legal basis of the appellants' submission on indeterminacy, which derives, they say, from the Supreme Court's decision in **Hercules**.

[107] That case concerned the liability of a company's auditors to its investors for negligent misstatements in audit reports. While the Court found that there was a *prima facie* duty of care (i.e., that the first branch of the **Anns/Kamloops** test was satisfied), liability was precluded by the spectre of indeterminate liability. However – and this is the aspect relied on by the appellants – the Court stated that while in the general run of auditors' cases, concerns about indeterminate liability will negate the *prima facie* duty of care, this will not necessarily be so in all cases. Specifically, the Court stated that "... in cases where the defendant knows the identity of the plaintiff (or a class of plaintiffs) and where the defendant's statements are used for the specific purpose or transaction for which they were made, policy considerations surrounding indeterminate liability will not be of any concern since the scope of liability can be readily circumscribed. ..." (per LaForest, J. at para. 37)

[108] In my view, the appellants' reliance on this statement from **Hercules** is entirely misplaced. It is apparent on its face that the statement does not rely on the defendant's knowledge of the plaintiff or a class of plaintiffs alone to negate indeterminate liability. Rather, as the quoted passage indicates, the Court refers not just to that factor but also to the factor that the negligently made statement is used for the precise purpose for which it was intended. Thus, **Hercules** stands for the opposite proposition to that advanced by the appellants. It stands for the proposition that the fact that the plaintiff may be known or part of a known class is not, of itself, sufficient to oust the concern about indeterminacy.

[109] To understand this point, it is necessary to review some of the facts in **Hercules**. The audit reports in issue related to two companies, Northguard Acceptance Ltd. ("NGA") and Northguard Holdings Ltd. ("NGH"). The plaintiff, Guardian Finance of Canada Ltd., was the sole shareholder of NGH while Guardian along with the plaintiffs Hercules and Max Freed were shareholders in NGA. The defendant, Ernst and Young (formerly Clarkson Gordon), had been the

auditors of both NGA and NGH since 1971. The audits giving rise to the action were those conducted in 1980 and 1981. As pointed out by LaForest, J. at para. 45, <u>the defendant auditors knew the very identity of all the appellant shareholders who claim to have relied on the audited financial statements through having acted as NGA and NGH's auditors for nearly 10 years by the time of the first of the audit reports at issue in the case</u>. He also noted that the plaintiff Guardian was the <u>sole</u> shareholder of NGH: at para. 57. The point of reciting these facts is simply that, in **Hercules**, all of the shareholders suing were known to the auditors and, indeed, that in the case of the plaintiff Guardian, it was the <u>only</u> shareholder of one of the audited companies.

[110] These facts were used by the plaintiffs in **Hercules** as a springboard for their argument that no concern about indeterminacy arose on the facts of that case. This argument was, however, firmly rejected by the Court which emphasized that knowledge of the plaintiff or of a limited class of plaintiffs, while significant, is not alone sufficient to obviate concerns over indeterminate liability. This holding was applied even to the claim by Guardian, which as noted, was the sole shareholder of NGH. LaForest, J. put it this way:

> 45 ... the respondents knew the very identity of all the appellant shareholders who claim to have relied on the audited financial statements through having acted as NGA's and NGH's auditors for nearly 10 years by the time the first of the audit reports at issue in this appeal was prepared. <u>It would seem plausible to argue on this basis that because the identity of the plaintiffs was known to the respondents at the time of preparing the 1980-82 reports, no concerns over indeterminate liability arise.</u>
>
> 46 <u>To arrive at this conclusion without further analysis, however, would be to move too quickly. While knowledge of the plaintiff (or of a limited class of plaintiffs) is undoubtedly a significant factor serving to obviate concerns over indeterminate liability, it is not, alone, sufficient to do so</u>. In my discussion of *Glanzer, supra, Hedley Byrne, supra*, and *Haig, supra*, I explained that indeterminate liability did not inhere on the specific facts of those cases not only because the defendant knew the identity of the plaintiff (or the class of plaintiffs) who would rely on the statement at issue, but also because the statement itself was used by the plaintiff *for precisely the purpose or transaction for which it was prepared*. The crucial importance of this additional criterion can clearly be seen when one considers that <u>even if the specific identity or class of potential plaintiffs is known to a defendant, use of the defendant's statement for a purpose or transaction other than that for which it was prepared could still lead to indeterminate liability</u>.

> 47 <u>For example, if an audit report which was prepared for a corporate client for the express purpose of attracting a $10,000 investment in the corporation from a known class of third parties was instead used as the basis for attracting a $1,000,000 investment or as the basis for inducing one of the members of the class to become a director or officer of the corporation or, again, as the basis for encouraging him or her to enter into some business venture with the corporation itself, it would appear that the auditors would be exposed to a form of indeterminate liability, even if they knew precisely the identity or class of potential plaintiffs to whom their report would be given.</u>
>
> (Emphasis added)

[111] **Hercules** does not support the appellants' submission that indeterminacy is not a relevant concern where the defendant knows the identity of the plaintiffs or where they constitute a known and ascertained class. Properly understood, **Hercules** supports exactly the opposite proposition. **Hercules,** in fact, rejects the "known plaintiff/ascertained class" as a complete answer to the concern about indeterminacy.

[112] This rejection has been affirmed in other cases. In **Norsk, supra**, both McLachlin, J. (as she then was) for the majority in the result and LaForest, J. writing for himself and Sopinka and Iacobucci, JJ., dissenting, rejected the notion that "knowledge of the plaintiff" was alone sufficient to overcome concern about indeterminate liability. LaForest, J. characterized the notion as permitting recovery "where the defendant knows or has the means of knowing that the persons likely to be affected by his or her negligence consist of a definite number of persons..." : at para. 274. He pointed to a number of difficulties with this approach.

[113] First, as noted by Wilson, J. in **Kamloops** at pp. 30 - 31, while the fact of such knowledge may make the class determinate, it gives no guarantee that it will be small. More fundamentally, liability (or not) depending on such a test would be arbitrary; the test "..serves neither to distinguish particularly meritorious victims, nor to single out particularly careless tortfeasors. Its sole function is to reduce the class of claimants to a small group, <u>a function that could be equally well performed by any other factual distinction</u>." (at para. 279)(Emphasis added). As he put it, to allow CN's claim in that case as distinct from the claims of other victims by virtue of CN's particular foreseeablity as an individual victim would be to put a premium on notoriety.

[114] McLachlin, J. in **Norsk** agreed with these comments at para. 72 of her reasons. This rejection of the "known plaintiff/ascertained class" as a sufficient answer to indeterminacy was reiterated by the Court in **Martel** at para. 57 and in **Bow Valley Huskey (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.**, **supra** at para. 77.

[115] I note that the reasons for rejection of this approach are precisely the grounds upon which the judge in the present case found that the potential for indeterminate liability barred the appellants' claim. He saw no principled way on the record before him to distinguish, from the point of view of a duty of care, between investors like the appellants and other, equally foreseeable (and, I would add, equally proximate) investors and creditors.

[116] To sum up, I cannot accept the appellants' submission that they constituted an ascertained class of persons which, on the authority of **Hercules**, obviates the concern for indeterminate liability. As a matter of fact, the judge could not distinguish from the point of view of the applicable duty of care between the appellants and other investors and creditors. He did not err in this respect. As a matter of law, the "known plaintiff/ascertained class" test is not, on its own, sufficient to obviate the policy concern with indeterminate liability. The judge did not err in so finding.

[117] That brings me to the appellants' alternative argument that even if the proposed duty of care has the potential for indeterminate liability, there are sufficiently strong policy reasons for imposing such a duty none the less. I will assume, without deciding, that other policy considerations could outweigh the potential for indeterminate liability.

[118] The appellants point out that none of the other policy justifications for excluding liability for pure economic loss in negligence (i.e., other than the potential for indeterminate liability) are of much weight here. The distinction between physical injury or property damage, as compared with purely economic loss, is not very convincing they say. More efficient loss allocation has little to do with this sort of case because there was no realistic way in which the appellants could provide for the risk of loss caused by the intentional acts of Westminer towards Mr. Coughlan. The concern about the possible multiplicity of lawsuits is not very significant and is better controlled through other legal doctrines such as proximity in the first step of the test and *res judicata*. Here, the appellants say,

there was really only one class of investor and the facts have given rise only to two law suits.

[119] In my respectful view, these submissions give insufficient weight to the law's concern about creating duties of care which will give rise to potentially indeterminate liability. This is generally regarded as the primary policy consideration underlying the law's reluctance to impose a duty of care in relation to acts causing purely economic harm: see *Fleming*, *supra* at p. 196. They also, in my view, overplay the possible policy justifications for the imposition of the sort of sweeping duty of care for which the appellants contend.

[120] The main argument in favour of a duty of care here is the need to deter the sort of collateral damage suffered by those in the position of the appellants flowing from intentional torts committed against others. Conduct like that of Westminer towards Mr. Coughlan should be, and has been, censured and condemned. But is there a strong case for deterrence in relation to claims in negligence arising out of the same facts? I think not.

[121] First, the conduct toward the appellants was not intentional – the basis of their claim, as now asserted on appeal, is negligence – simple carelessness. The appellants' claims in the intentional torts were dismissed at trial because there was no intention to injure them and the expanded notions of intention such as constructive intention or wilful blindness were found not to apply: see paras. 217 and 218 of Moir, J.'s reasons. Liability in the intentional torts already provides a significant measure of deterrence and the primary focus for deterrence is logically in relation to intentionally inflicted injury.

[122] Second, the failure to recognize the proposed duty of care does not result in Westminer escaping liability entirely. It has already been found liable to Mr. Coughlan and the Seabright directors and has paid significant damages and costs, putting to one side the inevitable damage to its commercial reputation.

[123] Third, exclusion of the proposed duty of care does not necessarily entail denying compensation to those in positions like the appellants'. While pursuit of contractual or other rights against the corporate debtor or the promoter will not be a realistic option in all cases, it will be in some. In short, I do not think that the need for additional deterrence is sufficiently strong to overcome the real and significant

potential for indeterminate liability if the duty proposed by the appellants were accepted.

1.5 Conclusion Re Duty of Care:

[124] It follows that, in my opinion, the judge was right to conclude that there was no duty of care owed by the respondents to the appellants, although I would find that neither of the two steps of the **Anns/Kamloops** test was satisfied here. In light of that conclusion, it is not necessary for me to address the notice of contention issues dealing with standard of care or the remaining issues raised on appeal concerning the assessment of damages.

VI. DISPOSITION:

[125] I would dismiss the appeal with costs and disbursements. We were advised that the trial costs have not yet been fixed and it appeared that the parties were in agreement as to how the costs in this Court should be determined. We will, therefore, make no more specific order as to costs unless the parties request it.

[126] I would be remiss if I did not thank counsel for their careful and helpful submissions, both written and oral.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.
Hamilton, J.A.