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Sudoku Puzzles or Sausages? Statutory versus Contractual Interpretation in *Heritage Capital Corp. v. Equitable Trust Co.*

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In *Heritage Capital Corp. v. Equitable Trust Co.,*[1] the Supreme Court of Canada resolved a dispute between the creditor of the original owner of a designated heritage building and the building's new and current owner. The dispute was over who was entitled to the remaining incentive payments payable by the City of Calgary for the building's restoration and any decrease in the economic value of the building due to its designation as a historic resource under the *Historical Resources Act*.[2] In resolving this seemingly run-of-the-mill dispute, the Court utilized its tools of statutory and contractual interpretation – ostensibly firm and well established in respect of the former, somewhat new and improved in respect of the latter.[3] But what makes this judgment so much more interesting than it might otherwise first appear is the tension – and arguably unjustifiable distinction – it unwittingly reveals between courts' interpretations of legislatures' statutory intent and their interpretations of private parties' contractual intent. This tension is of considerable practical and theoretical importance.

Background Facts

A year after the original owner purchased the Lougheed building, it was designated a "Municipal Historic Resource" under s. 26 of the *HRA* in a bylaw passed by the City. Following the designation, the original owner and the City entered into an Incentive Agreement. The Incentive Agreement provided that the original owner would carry out work on the building to restore it to its original appearance of the year 1912. On completion of the work, the City would begin paying the owner $3.4 million in incentive payments in 15 annual installments. The Incentive Agreement compensated the original owner for the cost of the restoration work and satisfied the original owner's right under s. 28 of the *HRA* to compensation from the City for the loss of economic value due to the designation as a historic resource. The original owner completed the restoration work in 2007 and started receiving the Incentive Payments shortly thereafter. The Incentive Agreement, which also imposed obligations on the owner, was registered by caveat on title to the land; the entire agreement was attached to the caveat as a schedule.

[1] 2016 SCC 19 ["*Heritage Capital Corp.*"].
[2] R.S.A. 2000, c. H-9 ["*HRA*"].
[3] From a black letter law perspective, which I relegate to a footnote because I am strictly speaking a professor rather than a practitioner of law, this case is also notable for two reasons: (1) it confirms the (rather questionable) presumption that statutory exceptions to the common law must be interpreted narrowly (questionable because statutory law overrules the common law); and (2) it confirms that a deferential standard of review of mixed-fact-and-law questions of contractual interpretation applies, not just to arbitral decisions, but to all contractual interpretation decisions.

The original owner obtained additional financing, first from The Equitable Trust Company ("Equitable"), and subsequently from Heritage Capital Corporation ("Heritage"); the first loan was secured by a mortgage and a number of assignments, including the assignment of the Incentive Agreement; the Incentive Agreement also secured Heritage's loan. The original owner later defaulted on the Equitable loan; the building was put up for judicial sale and purchased by the original owner's parent company.

Before the sale closed, however, the original owner sought a declaration that the Incentive Payments were (1) not an interest in land, and (2) not included in the assets being sold to its parent. After closing, Equitable executed a specific assignment of its interest in the Incentive Agreement to the original owner's parent.

Who is entitled to the Incentive Payments? The building's new owner (*i.e.*, the parent of the original owner) argued that the Incentive Agreement constitutes a positive covenant that runs with the land and therefore accrues to the new owner; in the alternative, the new owner argued that the Incentive Payments were among the assets sold in the judicial sale. Heritage, on the other hand, argued that the *HRA* does not allow the Incentive Payments to run with the land, that the right to the payments was contractual, not statutory, and that the parties to the Incentive Agreement – Calgary and the original owner of the building – never intended the Incentive Payments to run with the land.

Subsections 29(1) and 29(3) of the *HRA* provide as follows:

> **29(1)** A condition or covenant, relating to the preservation or restoration of any land or building, entered into by the owner of land and
>
> (a) the Minister,
> (b) the council of the municipality in which the land is located,
> (c) the Foundation, or
> (d) an historical organization that is approved by the Minister,
>
> may be registered with the Registrar of Land Titles.
>
> […]
>
> **(3)** A condition or covenant registered under subsection (2) runs with the land and the person or organization under subsection (1) that entered into the condition or covenant with the owner may enforce it whether is positive or negative in nature and notwithstanding that the person or organization does not have an interest in any land that would be accommodated or benefited by the condition or covenant.

A master for the Alberta Court of Queen's Bench ruled that the Incentive Payments were not an interest in land.[4] The master further held that the parties to the Incentive Agreement had intended the payments to be a purely contractual benefit, and that those payments had not been sold by the original owner to its parent.

On appeal to a chambers judge of the Alberta Court of Queen's Bench, the chambers judge dismissed the new owner's appeal from the master's order, declaring that the original owner was entitled to receive the Incentive Payments, and that s. 29(3) of the *HRA* did not permit the Incentive Payments to run with the land.[5]

The Court of Appeal reversed, however, holding that the *HRA* creates a *sui generis* historic resource covenant that runs fully with the land, entirely ousting the common law rule that positive covenants do not run with the land.[6] O'Brien J.A. dissented, arguing that the objective of the *HRA* is to ensure that covenants made by a landowner in favour of the City run with the land, but that the *HRA* does not permit positive covenants in favour of the landowner to run with the land.

The Supreme Court's Modern Approach to Statutory Interpretation: More Sudoku Puzzle Solving than Sausage-Making

The Court applied the undisputed modern approach to statutory interpretation, finding that the words of s. 29 of the *HRA,* when read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament,[7] mean that only covenants of a person or organization listed in s. 29(1) will run with the land.

The Court's analysis depends on two presumptions: (1) that legislative provisions work together as part of a functioning whole; and (2) where the legislature expressly creates a statutory exception to a common law principle, that exception should be construed narrowly because the legislature is presumed not to have intended to change the common law unless it does so clearly,[8] confirming the Court's argument in *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.* that "a Legislature is not presumed to depart from the general system of law without expressing its intentions to do so with *irresistible clearness*, failing which the law remains undisturbed."[9]

The Court's actual analysis, however, fails to live up to its ritual incantation of the modern approach to statutory interpretation. The Court does not undertake an analysis of the "entire context" of the *HRA*; the Court says nothing about the *HRA's* context; it does not define the

[4] 2011 ABQB 269, 512 A.R. 200.
[5] 2013 ABQB 209, 550 A.R. 337.
[6] 2014 ABCA 427, 588 A.R. 258 ["*Court of Appeal Judgment*"].
[7] Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th ed., 2014) at 7; *Bell ExpressVu Limited Partnership v. Rex,* [2002] 2 S.C.R. 559 at paras. 26-30.
[8] *Heritage Capital Corp., supra* note 1 at para. 29.
[9] [1956] S.C.R. 610 at 614, quoted in *Heritage Capital Corp., ibid* at para. 29 [emphasis added].

"scheme" of the *HRA* or its "object"; it says nothing whatsoever about the "intention" of the Alberta legislature in passing the *HRA* in 2000 beyond merely reciting the Minister's responsibilities under s. 2 of the Act. The Court concentrates almost exclusively on sections 26-29 of the Act, which concern only the mechanics of designating a "Municipal Historic Resource". According to the Court, each "subsection of s. 29 is like a piece of a *puzzle*, and when they are all read together, they form a coherent whole."[10] This does not – and cannot – amount to a "purposive and contextual analysis of the *HRA*".[11]

Nor is it even a purposive and contextual analysis of s. 29 of the *HRA* taken in isolation. The Court of Appeal's analysis, although itself a far cry from the sweeping analytic promises made by the modern approach, offers a more purposive interpretation: "The statute creates a *sui generis* type of historical resources covenant, allows a municipality to designate a building a historic resource, and allows registration against the title to record the building's status. *The statutory regime is not complete unless historical covenants bind and benefit future owners of the land.*"[12] This is a far more compelling – if still incomplete and perhaps not quite irresistible – interpretation of the scheme and the underlying purpose of the *HRA*.

Why does this matter? Courts' invocation of the modern approach to statutory interpretation is fast becoming a legal fiction. Courts do not look at the entire context and purpose of statutes very often, if at all. Nor do they routinely abide by the principle that "each legal provision should be considered in relation to other provisions, as parts of a whole."[13] If they did, they would soon discover that few statutes form an internally consistent framework where the parts work together logically to achieve a larger purpose. Most modern statutes, in reality, are a mess, a jumble of half-measures, trade-offs, compromises, loopholes, and otherwise incomplete information. While it may be safer to rely upon a number of "presumptions" of statutory "construction," emerging empirical research into statutory drafting practices and processes suggests that such presumptions are essentially fictions that may frustrate rather facilitate statutory interpretation.[14]

The Supreme Court's Interpretation of Contracts: Facts over Fictive Presumptions

The Court's rehabilitated approach to contractual interpretation (unintentionally) illustrates the point pursued above. In *Sattva Capital Corp. v. Creston Moly Corp.,* the Court explained that "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which principles of contractual interpretation are applied to the words of the written

[10] *Heritage Capital Corp., supra* note 1 at para. 35 [emphasis added].
[11] *Ibid* at para. 31.
[12] *Court of Appeal Judgment, supra* note 6 at para. 15 [emphasis added]. Suppose the original owner had not completed the rehabilitative work that the Incentive Payments were intended to compensate? It is hard to imagine that the Supreme Court would have concluded that the burden of additional renovations would run with the land but not the benefits of making the renovations.
[13] P.-A. Côté, in collaboration with S. Beaulac and M. Deviant, *The Interpretation of Legislation in Canada* (4th ed., 2011) at 326.
[14] See e.g. Abbe R. Gluck & Lisa Schultz Bressman, "Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I" (2013) 65 *Stanford Law Review* 901.

contract, considered in light of the factual matrix."[15] Accordingly, contractual interpretation is a question of mixed fact and law reviewable on a deferential standard of reasonableness (with the exception of extricable questions of law). Questions of statutory interpretation, by contrast, are treated as questions of law reviewable on a standard of correctness.[16]

The (questionable) merits of the Court's contractual interpretation in the case at bar are beside the larger point here; suffice it to say that the Alberta Court of Appeal's contractual interpretation that both the benefits and the burdens flowing from the Incentive Agreement passed with the sale of the assets is the only interpretation that makes commercial sense.[17]

Rather, the larger but nonetheless practical point is that the Court's test in *Sattva Capital* mandating a close examination of a contract's factual matrix would work equally well – *mutatis mutandis*, for starters – for the interpretation of statutes. As Geoff Hall once argued, "a proper [statutory] interpretation is grounded in the text and the intention of the democratically elected legislature which created it *but also looks beyond the text to the enactment's purpose and broad policy* concerns."[18] Today, statutory interpretation proceeds on a number of increasingly fictive presumptions, which may be (and likely are) unknown to statutory drafters or otherwise cast aside for political and other considerations – including structural, personnel, and process-related influences.[19] Statutes – need it be said? – are more like sausages than Sudoku puzzles. We all know this. It is long past time for the courts to catch up and, in conjunction with legal academics and the practicing bar, develop new tools of statutory interpretation for the real world, as if politics mattered.

[15] [2014] 2 S.C.R. 633 at para. 50.
[16] *Canadian National Railway Co. v. Canada (Attorney General)*, [2014] 2 S.C.R. 135 at para. 33.
[17] Again, imagine that the rehabilitative work remained incomplete at the time of the sale of the building, in which case it would not be a windfall for the new owner to receive the Incentive Payments as a positive covenant running with the land. Or imagine that *additional* rehabilitative work on the building is required, which would indisputably be an obligation that the new owner would have to fulfill because the burdens attendant to the historical designation of the building run with the land, making the continued payment of the Incentive Payments to the original owner a windfall to the original owner (or its creditors). These are hardly far-fetched hypotheticals.
[18] Geoff R. Hall, "Statutory Interpretation in the Supreme Court of Canada: The Triumph of a Common Law Methodology" (1998) 21 *Advocates Quarterly* 38 at 65 [emphasis added].
[19] Lisa Schultz Bressman & Abbe R. Gluck, "Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II" (2014) 66 *Stanford Law Review* 701. Research of this kind into Canadian legislative drafting practices and processes is sorely needed.

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Transformative Technologies: Regulating Autonomous Vehicles

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with commentary on aviation and drones by Marcus Dickinson, X4Drones.

This article addresses the potential changes that autonomous vehicles ("AVs") will necessitate for current transportation regulatory and liability regimes. The future introduction of AVs requires adaptations for legislative and insurance regimes on a massive scale and has the potential to rewrite present methods of risk allocation in the affected industries. This article will appeal to those with interests in infrastructure and transportation; as the AV - and as an expansion of the "internet of things" - presents a convergence of these fields.

Disruptive Technology

Our first encounters with AV operation were probably through self-driving cars depicted in pop culture – and we reveled in the novelty. But since those early blushes, individuals have increasingly appreciated the importance of AV implementation. While auto advertisers often suggest lone vehicles on picturesque mountain roads, or racing across empty deserts, the undeniable fact is that, for most individuals, driving occurs surrounded by other vehicles, and represents a time consuming chore. It is also one of the most dangerous chores we can do. Self-driving cars, with vehicle to vehicle connectivity, for example, hold the potential for incredible safety improvements.

AVs also present a disruptive technology. For individuals, driverless cars represent perhaps the most intimate of several new forms of individual mobility, which also includes the increasing prevalence of ride sharing programs, or car sharing services. Combining AV technology with these services could potentially drastically alter transportation options, maintenance and operational costs altering individual vehicle ownership rates and utilization. For the public at large, potential impacts range from alterations to public transport consumption, curbing travel delays as well as the frequency and severity of traffic accidents - thereby reducing injuries and fatalities while diminishing the related "accident economies" - and even changing land use planning requirements, as a road usage and even parking needs diminish.

Much of the present literature surrounding autonomous vehicles concerns regulatory programs pointed at testing of vehicles. In addition, much insurance industry commentary addresses the possible claims adjustment or new programs that are forthcoming. For example, some predict AVs pose a severe disruption to auto insurance regimes as accident frequency and severity could fall sharply. Eventually, such a change ought to translate to lower claims costs for insurers, and lower premiums for customers. AVs therefore have the potential to transform the insurance industry, particularly given that individual and commercial auto

represents the largest property and casualty insurance lines for many insurers, often constituting upwards of 40% of premiums.

Given the potential AVs represent, many insurers are following developments within the sector and participating in strategy to develop and implement suitable programs. However, the insurance industry's reaction is somewhat restrained largely due to the technological uncertainty and unknown consumer uptake. Insurance product delivery can only adapt and respond as the technological issues become better delineated.

Present hurdles include appreciating and planning for the distinctions between vehicles with varying levels of semi-autonomous driver aids - through the phases of autonomous operation up to fully autonomous operation, and obtaining a better understanding of future utilization rates for private automobiles in the face of changing demographics and as less consumers own vehicles; as well as factoring in individuals now able to offer up their own vehicles for limited commercial or shared ownership options. There exists no real track record or accident statistics for AVs and so there is little to provide guidance on how to insure against associated risks.

One expectation is that the sophistication of commercial insurance offerings will increase, including the introduction of hybrid type policies with personal and commercial coverages operating when the vehicle is in use for commercial purposes. As well, insurance regimes will need to adapt from programs focused on personal liability, to programs focused on product liability, as ever more of vehicle operation is assumed by software and related componentry, leading to a shared liability with equipment suppliers. New modes of failure will be attributed to the vehicle, as the responsibility for avoiding accidents shifts from driver to vehicle manufacturer. A non-exhaustive list of potentially responsible parties could include vehicle or component manufacturers, software developers, or perhaps road designers and builders in the case of intelligent road systems.

Commercial vehicles too will be impacted. The introduction of increased automation and, perhaps sooner, vehicle to vehicle connectivity, leads to improved efficiencies in operations and supply chain management. Such improvements, in turn, can affect the applicable insurance programs available to the commercial sphere.

With AVs, and increased connectivity, the importance of high levels of data collection and analysis is evident. This data will be necessary to decipher what causes future accidents. The required analysis also has the potential to alter the current approach to forensic accident investigations. Big data collection and analysis will be equally important to appreciate operational risks and thus to underwrite it.

The auto insurance industry is, or very soon will be, in flux. The looming introduction of AVs presents a high degree of uncertainty and the rate of change will depend upon the introduction of the technology, which in part is governed by available regulatory frameworks.

Regulatory Framework

Presently, in North America, federal governments are responding to potential changes created by AVs and are introducing additional research efforts and funds to help prepare. In the United States, the National Highway Traffic Safety Administration has issued policy statements and provided interpretation to industry, while the Obama administration had proposed to spend $4 billion over the next decade to accelerate the acceptance of AVs on U.S. roads. Closer to home Transport Canada has had access to testing vehicles, and Canada's Transport Minister has called for a Senate committee to study connected and automated vehicles. Ontario's government has stated that AVs are a priority of Ontario's Transport Minister. There have also been calls for national self-driving regulations.

Meanwhile, individual provinces and states are introducing pilot programs and developing regulations to accommodate the testing and eventual introduction of autonomous vehicles. Almost every jurisdiction which has approached the issue has done so slightly differently, as each attempt to make their respective regions more attractive to testing and development, while at the same time balancing the concerns and needs of their constituents.

A common question that arises is the degree to which existing regulation actually prohibit AV operation. Industry actors seek clarity and regulatory certainty and tend to gravitate to those areas that most provide it. Various jurisdictions, including Michigan, California, Florida, Nevada and the District of Columbia, allow the testing of autonomous vehicles on public roads. Georgia, Hawaii, New Jersey, North Carolina, New York, Maryland, Rhode Island, Oklahoma, Virginia, and Arizona are currently addressing the issue either through pending bills, or executive orders, or with designated plans to study the introduction of autonomous vehicles. Along with a theme of engaging in future study, the present regulatory programs have common elements that focus on permissible testing conditions and the continuing role of human operators.

AV regulations are also directed to maintain distinct lines of liability. Some exempt original vehicle manufacturers from liability arising from AV conversions (as noted in regulations in D.C., Florida, Michigan, or Nevada). Others expressly impose liability upon subcomponent system producers, or expressly state that a licensed driver must remain in the driver's seat at all times and able to take control, or at the very least, remains legally responsible for the AV for traffic infractions and criminal offenses in the same manner as a driver of a non-autonomous vehicle.

Regulations adapted for AVs also must consider exceptions to present rules concerning driving requirements, which were drafted against the premise of a human operator. For example, a Florida regulation bans the usage of handheld devices while driving, but exempts operators of autonomous vehicles operating in autonomous mode. A similar exemption is necessary to circumvent a present New York requirement that a vehicle's operator have one hand on the steering wheel at all times, as such a requirement runs counter to autonomous operation. The potential interconnectivity of vehicles also requires reconsideration of regulations

concerning road usage, for instance, safe driving distances and "tail gating". California is finalizing regulations for the post testing deployment requiring manufacturers to confirm vehicles were successfully tested, meet certain safety requirements, and are ready for the general public to operate on public roads.

Given the amount of data that may be collected by AVs, regulations have also been developed concerning the handling of that data. California (with other states) requires manufacturers of autonomous technology installed on vehicles to provide a written disclosure to purchasers describing the data collection by said technology.

It is evident that the regulatory structure must accompany the advance of AV technology, as uncertainty benefits few. Already, some auto manufacturers have opted to scale back the operation of autopilot systems as users seemed increasingly disinterested in actually driving. For example, due partly to a risk of driver disengagement, Tesla implemented changes its autopilot system to limit the autopilot operation to roads with dividers and medians.

Interestingly, of six identified roadblocks to the mass adoption of driverless, legal liability, policymakers and consumer acceptance were ranked as the biggest obstacles. Cost, infrastructure and technology were considered less of a hindrance. Regardless of the roadblocks to instruction, one continuing certainty is that with an accident somebody will be accountable – be it human driver in a negligence scenario, or manufacturer in a product liability context. An ongoing doctrine of victim protection requires a comprehensible liability regime and an efficient mechanism of compensation.

AVs Beyond Land

While much discussion focuses on the implementation of AV on roadways, technology extends the potential of AVs to sea and air transportation as well. Such operations, in turn, requires further reassessment of present law, convention and regulation.

Automation is already prevalent throughout these forms of transport. For instance, in air transport, the term autopilot is new to no one. In the marine context, AVs are already used in submarine applications, in the defence industry for mine clearance and targeting, in the oil and gas for subsea positioning, in environmental and surveying and in data collection.

Similar to land transport industries, further automation in marine shipping could translate to improved efficiencies and safer operations. Marine shipping is an industry spanning 90% of world trade and approaching $400 billion, so improving efficiencies at this scale presents an opportunity for considerable results.

Manufacturers, operators and working groups see potential in decreasing crew living quarters and support systems. Doing so would raise vessel carrying capacity while reducing vessel mass and operating costs. However, opponents suggest that the technological investment required to implement unmanned vessels for the carriage of goods or passenger is not

justified against potential savings. Critics suggest that few international shipping bodies are seriously considering unmanned ships while labour unions are particularly opposed given the impact upon seafarers.

Additionally, while the technology could be developed or may already exist, the regulatory hurdles necessary to harmonize international conventions and national state laws are significant. Marine law, and accompanying international conventions and regulations, are steeped in a long history largely developed quite independent from present technological factors.

Much law and international harmonization was developed during, or derived from, an age of sail and are frequently based upon the involvement of master and crew. Conventions derived from the roles of master and crew starts to fall away with the introduction of autonomous vessels. Affected conventions would include the Law of the Sea Convention, International Convention for the Safety of Life at Sea (SOLAS), International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW), Port State Control programs, and the list goes on. Indeed, one author has suggested that the potential impact of autonomous vessels on international convention would leave only the stowaway and the pirate as retaining their original legal character.

Nevertheless, consider that we have already seen, and will continue to see an extensive use of automation of vessels. While human error and fatigue still does cause most maritime accidents, accidents have declined significantly. That very reduction in accidents may prove to be the prevailing reason why the widespread introduction of AVs at sea is less likely than on land. Improved automation and declining accident rates may simply not justify the massive investment required to develop marine AVs or retrofit existing vessels.

Marine transport engages legal international harmonization to address common concerns raised by expensive methods of transport carrying much valuable cargo, and which - if an incident arose - could cause considerable harm to the environment and to third parties. Accordingly, the persistence of human oversight, however flawed that is, will likely continue.

AV operation in the aviation field are similarly significant and well underway. Perhaps the most technologically accessible is that of the drone. Until recently, the word 'drone' was perhaps most associated with news highlights of unmanned aerial vehicle strikes in foreign countries. But the more common and increasing usage is much closer to home. The 2015 holiday season saw over 1 million drones sold, while Boxing Day 2015 saw over 400,000 drone related hospital visits. With the consumer drone industry set to be in excess of $17 million in Canada over the next ten years, the increasing prevalence of consumer, and commercial, drones represent another area for significant regulatory advancement.

Transport Canada presently has regulations in place for safety, with restrictions on recreational users largely designed around principles of individual security and privacy. These regulations include minimum insurance liability requirements and restrictions on flight at

night, over crowds, and within the vicinity of other buildings or aircraft. Commercial operators are mandated to carry operator certificates, and have higher levels of liability insurance. Local municipalities are also enacting bylaws concerning drone usage.

The expectation is that by 2017, Transport Canada will introduce three tiers of UAV operation: recreational use, with a required registered product with serial number, simple professional operations, largely similar to existing commercial operators, and a third tier for complex professional operations including consistent and stringent licensing for those with demonstrated competency.

In Conclusion

The development of appropriate regulation is crucial to the introduction of emerging technologies. As the technology develops, and like any of these industries when in their infancy, the present regulatory uncertainties will eventually coalesce into a more uniform code for operations and liability apportionment. The scope of data collection and connectivity that allows AVs to operate will generate incredible amounts of specific data about individual actors. Such data will ultimately improve our calculation of risks, our assessments of events, and our imposition of liability. But managing and containing that data itself presents significant risks. The capture and management of that large data underscores the issues of software reliability and cyber-security, which may eventually become as central to liability in transportation industries as human error is currently.

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The Supreme Court decision in *Lacasse*: White Collar Offenders Beware

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On December 17, 2015, in the decision of *R. v. Lacasse*,[1] the Supreme Court of Canada sent a warning to ordinarily law-abiding citizens who commit impaired driving, by upholding a six-and-a-half-year term of imprisonment for the offence of impaired driving causing the death of two people. This warning extends to other law-abiding citizens who might be thinking about committing so-called white collar crimes such as bribery or price fixing, or being willfully blind to the commission of such crimes. Justice Wagner's majority decision specifically targets the impact of deterrence on first offenders:

> While it is true that the objectives of deterrence and denunciation apply in most cases, they are particularly relevant to offences that might be committed by ordinarily law-abiding people. It is such people, more than chronic offenders, who will be sensitive to harsh sentences.[2]

The highly publicized *Muzzo* case, imposing a ten year sentence for impaired driving causing the deaths of three children and their grandparent follows this new way of thinking as Muzzo was an ordinary law-abiding person of otherwise good character.

The decision in *Lacasse* has widespread implications for general sentencing principles on a number of levels. The court recognizes that proportionality is a cardinal sentencing principle which trumps parity as a secondary sentencing principle. This trumping of principles allows for the evolution of sentencing beyond strict ranges as set by prior precedents.

Justice Wagner's judgment provides a very helpful construction of proportionality into two fundamental competing factors: (1) seriousness of the crime's consequences; and (2) moral blameworthiness of the offender:

> In such cases, proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not

[1] 2015 SCC 64, [2015] S.C.J. No. 64 (S.C.C.). This decision was followed in *R. v. Kazenelson*, 2016 ONSC 25, in imposing a three-and-a-half-year prison term in the *Metron*-related case of death in the workplace, decided January 11, 2016.
[2] *Supra*, at para. 73

> only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender[3] [...].

The decision in *Lacasse* is also important with respect to the standard of review of trial level sentencing decisions. The court modifies the classic test that an error in principle, the failure to consider a relevant factor, or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention. The modification is that such errors will only justify intervention where it appears from the trial judge's decision that such an error had an impact on the sentence.

Justice Wagner sets out the stark reality that impaired driving offences still cause more deaths than any other offence in Canada. Yet our legislators for some reason resist the most simple pro-active *ex ante* mechanism to stop impaired driving, which would be the mandatory requirement that every new vehicle be equipped with an interlock breathalyzer machine. The added costs to vehicle cost spread out across society would surely be worth it if lives would be saved, which is a virtual certainty.[4]

General Sentencing Principles

The judgment in *Lacasse* recognizes that sentencing remains one of the most delicate stages of the criminal justice process in Canada. Although this task is governed by ss. 718 et seq. of the *Criminal Code*, and although the objectives set out in those sections guide the courts and are clearly defined, sentencing nonetheless involves the exercise of a broad discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing.

The Supreme Court holds on to the objective of rehabilitation as one of the main objectives of Canadian criminal law. Rehabilitation is identified as "one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate".[5] This is a complex area, as it requires insight into why an offence occurred in order to effectively rehabilitate the offender, and there is considerable controversy about the efficacy of a prison term to achieve rehabilitation. There is mixed empirical evidence on the efficacy of prison in relation to specific deterrence.

Facts

Mr. Lacasse pleaded guilty to two counts of alcohol-impaired driving causing death. Lacasse lost control of his vehicle while entering a curve on a country road. He was speeding, and his ability to drive was impaired by alcohol. Nadia Pruneau, who was celebrating her 18th

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[3] Lacasse at paragraph 12

[4] Jull and Petersen, "Canada: Judicial Recognition of Risk Assessment, R. v. Michaud" http://globalcompliancenews.com/judicial-recognition-of-risk-assessment-r-v-michaud-published-20150929.

[5] Lacasse at paragraph 4.

birthday that night, and Caroline Fortier, aged 17, were in the back seat of the vehicle. They both died instantly. Neither the vehicle's mechanical condition nor the weather contributed to the accident. Lacasse was entirely responsible for the accident.

Lacasse had been deeply distressed during the weeks and months following the accident and had become suicidal. At the time of the sentencing hearing, he was 20 years old. He did not have a criminal record, although he had been convicted of offences under the *Highway Safety Code*, including three speeding offences.

The sentencing judge attached less weight to the fact that Lacasse had pleaded guilty on the ground that he had done so relatively late, long after he was in a position to make decisions about the conduct of his trial. The sentencing judge also attached less weight to the fact that Lacasse did not have a criminal record, because in his view, the offence was one that was likely to be committed by people who do not have criminal records.

Furthermore, the sentencing judge emphasized the particular situation in the Beauce region of Québec, where approximately one in five cases involves an impaired driving offence. He even posed the question whether driving while impaired is trivialized more there than elsewhere.

For all these reasons, the sentencing judge sentenced Lacasse, on each count of impaired driving causing death, to six years and six months' imprisonment minus the period of one month he had spent in pre-trial detention; the two sentences were to be served concurrently.

Standard for Intervention on an Appeal from a Sentence

The Supreme Court has reiterated on many occasions that appellate courts may not intervene lightly in sentence decisions, as trial judges have a broad discretion to impose the sentence they consider appropriate within the limits established by law. The court has narrowly defined the types of error in principle that will generally justify intervention:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.[6]

An issue which split the court in *Lacasse* is the question of whether such errors necessarily require intervention. Justice Gascon wrote a dissenting opinion, joined by Chief Justice MacLachlin, stating the view that where there is a reviewable error in the trial judge's reasoning, for example, where the judge has characterized an element of the offence as an aggravating factor, it is always open to an appellate court to intervene to assess the fitness of the sentence imposed by the trial judge. In other words, such an error opens the door to an

[6] Lacasse at paragraph 44.

appellate court then affirming that sentence if it considers the sentence to be fit, or imposing the sentence it considers appropriate without having to show deference.

Justice Wagner held that every such error of principle will not necessarily justify appellate intervention regardless of its impact on the trial judge's reasoning. Intervention is only appropriate if the error would have *had an impact on the sentence*:

> In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.[7]

In the *Lacasse* case, both the majority and minority of the court were of the opinion that the sentencing judge erred in identifying the fact that Lacasse was intoxicated as an aggravating factor, as intoxication was a constituent element of the offence itself and accordingly had a higher sentencing range by definition. However, Justice Wagner held that this is a non-determinative error that did not unduly affect the sentence, given that the sentencing judge identified other aggravating factors. It was apparent that the sentencing judge attached no real weight to this factor.

Ultimately it was the opinion of the Supreme Court that the sentence of six years and six months' imprisonment, although severe, fell within the overall range of sentences normally imposed in Quebec and elsewhere in the country and was not demonstrably unfit.

Justice Wagner repeats the reminder given by the Supreme Court about showing deference to a trial judge's exercise of discretion because first, the trial judge has the advantage of having observed the witnesses in the course of the trial and having heard the parties' sentencing submissions. While this is obviously a fact, the witnesses may have testified only on liability issues only and not on issues relevant to sentencing and this should be borne in mind. Moreover, a sentencing judge may consider hearsay evidence where found to be credible and trustworthy.[8]

I have argued previously that a trial judge has little advantage over an appellate court in assessing hearsay evidence for the simple reason that the declarant of the hearsay evidence is not available for the trial judge to see or evaluate under the spotlight of cross-examination. Rather, the decision is made on a principled basis which an appellate court is capable of assessing just as well.[9] To the extent that a sentencing judge relies on hearsay evidence in making sentencing decisions, it is respectfully submitted that the level of deference ought to be adjusted accordingly.

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[7] Lacasse at paragraph 44.
[8] *Criminal Code*, s. 723(5); and see *R. v. Kunicki* (2014), 307 C.C.C. (3d) 233 (Man. C.A.).
[9] Kenneth Jull, "Courts as Gatekeepers: Alternative Hypotheses" in Archibald and Echlin, *Annual Review of Civil Litigation 2009*, p. 471 at pp. 479 to 480.

Proportionality

The fundamental principle of proportionality is stated in s. 718.1 of the *Criminal Code*, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle.

As noted earlier, Justice Wagner's judgment juxtaposes these two fundamental competing factors: The more serious the crime and its consequences, the heavier the sentence will be. The competing and different factor is the moral blameworthiness of the offender. This latter factor included three prior convictions of Lacasse for speeding, which in the court's view showed that he was irresponsible when behind the wheel, and his convictions under the *Highway Safety Code* were all the more relevant given that speeding had played a part in the accident in this case.

A further example of the moral blameworthiness of the offender being weighed in the calculation is demonstrated by the trial judge attaching less weight to the remorse expressed by Lacasse and to his guilty plea because of the lateness of that plea. A plea entered at the last minute before the trial is not deserving of as much consideration as one that was entered promptly.

Toronto Law Journal

Liability of Successor Franchisors[1]

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It is not uncommon during the tenure of a franchisee's franchise agreement, for a franchisor to sell its franchise system as a going concern. In most cases when a franchisor sells the entire franchise system, which inherently includes an assignment of its franchise agreements, to the new franchisor, the asset purchase agreement between the parties will contain language excluding:

a) all obligations and liabilities related to any default or breach of the franchise agreements existing prior to or as a consequence of the closing of the asset purchase agreement; and

b) liability for defaults or breaches under the franchise agreements existing prior to or as a consequence of the closing of the asset purchase agreement.

Further the assigned franchise agreements often contain language which frees and relieves the selling franchisor of liability for any covenants and obligations under the franchise agreement upon the purchasing franchisor assuming same. The following is an example of typical wording found in franchise agreements regarding the sale, assignment or transfer of the franchise system:

> The Franchisor may assign any or all of its rights and obligations arising from this Agreement, provided that any assignee shall agree in writing to assume all obligations undertaken by the Franchisor herein and so assigned by the Franchisor, and upon such assignment and assumption the Franchisor shall, ipso facto, be under no further obligations with respect to any matters so assigned.

In the circumstance in which franchisees allege that they have suffered damages against the selling franchisor for breaches of: i) the franchise agreement; and ii) statutory and common law duties, the question then arises as to what liability the purchasing franchisor has for these damages, if any. While it appears that a franchisee may assert any equities it had against the selling franchisor by way of set-off against the purchasing franchisor, it is far from certain whether a franchisee can fix liability on the latter for wrongs committed by the former prior to the assignment of the franchise agreement.

[1] The author acknowledges Paul B. Wronski, a research lawyer associated with Macdonald Sager Manis, LLP, for his assistance and insight into the writing of this article.

DISCUSSION

The starting point regarding assignments in Ontario is s. 53(1) of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, which provides:

> 53.--(1) Any absolute assignment made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action is effectual in law, subject to all equities that would have been entitled to priority over the right of the assignee if this section had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.

The effect of this provision was summarized by Prof. Waddams in the *The Law of Contract*, 6th ed. (Aurora, Ont.: Canada law Book, 2010) at para. 280, as follows:

> By the terms of s. 53(1) of the *Conveyancing and Law of Property Act* the assignee takes “subject to all equities”. The effect of this provision is to permit the obligor to assert against the assignee any defences available against the assignor at the time of the assignment, or any that arise before notice is given to the obligor of the assignment. Thus, even though the assignee may pay full value in good faith for the obligation, the assignee will lose if the obligor has a defence against the original obligee. The only recourse is against the assignor. Where one of two innocent parties must suffer for the default of the assignor, the law protects the obligor.

The leading Canadian decision on set-off in the context of assignments is *Holt v. Telford*, [1987] 2 S.C.R. 193 (“*Holt*”). This was a case that considered the set-off of debts owing under mortgages (as opposed to claims for unliquidated damages). The Telfords and a company called Canadian Stanley swapped lands and gave each other vendor take-back mortgages. Canadian Stanley assigned the Telford mortgage to the Holts. The Telfords tendered payment on Canadian Stanley but it was not accepted. The parties continued to negotiate. The Telfords brought an application to have the mortgage discharged and paid the money into court after receiving notice of the assignment.

The Holts commenced an action for payment on the assigned mortgage. The issue to be resolved by the court was whether the Telfords could set-off the amounts due to them under the Canadian Stanley mortgage against that which was due under their mortgage. The court answered in the affirmative, holding that the Telfords were entitled to rely on the defence of equitable set-off.

Legal set-off was unavailable in *Holt*. In Ontario, legal set-off is codified by s. 111 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (*Canada Trustco Mortgage Co. v. Pierce Estate*,

[2005] O.J. No. 1886 (C.A.), at para. 41). Citing the British Columbia Court of Appeal's decision in *Cobra [Coba] Industries Ltd. v. Millie's Holdings (Canada) Ltd.*, [1985] B.C.J. 1994 ("*Cobra Industries*"), in which the court stated that once one debt is assigned, formerly reciprocal debts lose the character of "mutual cross-claims". Accordingly, Wilson J. concluded in *Holt* that set-off at law was no longer available because of the assignment of the Telford mortgage (para. 25).

However, set-off in equity was available. Wilson J. stated:

> **26** The distinction between set-off at law and set-off in equity was canvassed by the British Columbia Court of Appeal in (*C.I.B.C. v. Tuckerr Indust. Inc.*), supra, at p. 605:
>
> > Such a set-off has its origin in equity and does not rest on the statute of 1728. It can apply where mutuality is lost or never existed. It can apply where the cross obligations are not debts.
>
> Equitable set-off is available where there is a claim for a money sum whether liquidated or unliquidated: see (*Aboussafy v. Abacus Cities Ltd.*), [1981] 4 W.W.R. 660 (Alta. C.A.), at p. 666. More importantly in the context of this case, it is available where there has been an assignment. There is no requirement of mutuality. The authorities to be reviewed indicate that courts of equity had two rules regarding the effect of a notice of assignment on the right to set-off. First, an individual may set-off against the assignee a money sum which accrued and became due prior to the notice of assignment. And second, an individual may set-off against the assignee a money sum which arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with that contract or series of events.

Wilson J. also cited, at para. 33, the following five principles summarized by MacFarland J.A. in *Cobra Industries* regarding equitable set-off:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: (*Rawson v. Samuel*), [1841] Cr. & Ph. 161, 41 E.R. 451 (L.C.).
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: [(*Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt (U.K.) Ltd.*), [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim: (*Fed. Commerce and Navigation Co. v. Molena Alpha Inc.*), [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].

> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: (*Bankes v. Jarvis*), [1903] 1 K.B. 549 (Div. Ct.); (*Br. Anzani*).
>
> 5. Unliquidated claims are on the same footing as liquidated claims: [(*Nfld. v. Nfld. Ry. Co.*), [1888] 13 App. C. 199 (P.C.)].

The court concluded:

> **37** … The debts which the Telfords are seeking to set-off did not accrue due before the date of the notice of assignment. Thus, the debts can be set-off only if the Telfords can demonstrate that they arise out of the same contract or closely interrelated contracts. In my view, the Telfords have succeeded in demonstrating this. In essence, what happened here was that the Telfords and Canadian Stanley "swapped" parcels of land. The Telfords bought land from Canadian Stanley and gave a mortgage to Canadian Stanley but they also sold land to, and received a mortgage from, Canadian Stanley. The mortgages were entered into on the same date. The purchase price for both parcels was the same, namely $265,000. Except for the January 31, 1981 payment, the payments under the two mortgages were on the same dates and for the same amounts. It is these two latter payments under the Canadian Stanley mortgage and the Telford mortgage that the Telfords seek to set-off against each other. Because the Telford mortgage and the Canadian Stanley mortgage are part of the land exchange deal, being part of the consideration for the reciprocal transfers, they are, in my view, closely connected and meet the requirements for an equitable set-off. They were made with reference to one another. It would be unfair to enforce only one side of the land exchange agreement.

These principles would appear to be applicable to the circumstances which we have outlined above. On the assignment, the purchasing franchisor took subject to all the equities the franchisees had against the selling franchisor. The right of set-off is one such equity. It must be noted, however, that set-off is a defence. Under the circumstances described above, franchisees could assert a defence based on equitable set-off against any claims that the purchasing franchisor could assert against them. However, any claims a franchisee had against the selling franchisor would have to be proved. That is, the franchisee would have to prove that the selling franchisor owed them the duties claimed, that those duties were breached and that it suffered damages as a result.

The defence of set-off is, however, distinct from the question of whether franchisees in the circumstances described above can fix the purchasing franchisor with liability for the acts or defalcations of the selling franchisor. It would appear that that this issue depends, at least in part, on what liabilities purchasing franchisor agreed to assume. If it could be said that purchasing franchisor agreed to assume all liabilities flowing from the assigned franchise agreements, then the claims that the franchisees would have had against the selling franchisor could be asserted directly against purchasing franchisor in a counterclaim in an action commenced by the latter rather than by way of set-off. However, agreements

governing the sale of a franchise system normally allocate as between seller and purchaser liabilities arising under the assigned franchise agreements and otherwise.

Before turning to the question of direct liability on the part of the purchasing franchisor, a few comments on novation are warranted. Depending on the facts of the case, an assignment of an obligation or contract can result in a novation whereby the assignor is completely removed from the equation. In essence a new contract is formed between the assignee and the obligee. This principle was considered by the Supreme Court of Canada in *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410. As to the operation of novation, the court stated:

> **30** The common law has long recognized that while one may be free to assign contractual benefits to a third party, the same cannot be said of contractual obligations. This principle results from the fusion of two fundamental principles of contract law: 1) that parties are able to make bargains with the parties of their own choice (freedom of contract); and 2) that parties do not have to discharge contractual obligations that they had no part in creating (privity of contract). Our law does, however, recognize that contractual obligations which a [page427] party has freely assumed may be extinguished in certain circumstances and the doctrine of novation provides one way of achieving this.
>
> **31** A novation is a trilateral agreement by which an existing contract is extinguished and a new contract brought into being in its place. Indeed, for an agreement to effect a valid novation the appropriate consideration is the discharge of the original debt in return for a promise to perform some obligation. The assent of the beneficiary (the creditor or mortgagee) of those obligations to the discharge and substitution is crucial. This is because the effect of novation is that the creditor may no longer look to the original party if the obligations under the substituted contract are not subsequently met as promised.
>
> **32** Because assent is the crux of novation it is obvious that novation may not be forced upon an unwilling creditor and, in the absence of express agreement, the court should be loath to find novation unless the circumstances are really compelling. Thus, while the court may look at the surrounding circumstances, including the conduct of the parties, in order to determine whether a novation has occurred, the burden of establishing novation is not easily met. The courts have established a three-part test for determining if novation has occurred. It is set out in (*Polson v. Wulffsohn*) (1890), 2 B.C.R. 39 as follows:
>
> 1. The new debtor must assume the complete liability;
> 2. The creditor must accept the new debtor as principal debtor and not merely as an agent or guarantor; and
> 3. The creditor must accept the new contract in full satisfaction and substitution for the old contract

Given the narrow scope of this principle and the usual language of an asset purchase agreement for the sale of a franchise system, it seems unlikely that a novation could be asserted based on the typical circumstances set forth above.

More helpful to franchisees in the circumstances described above is the decision in *Sovereignty Investment Holdings, Inc. v. 9127-6907 Quebec Inc.*, [2008] O.J. No. 4450 (S.C.J.), and paras. 44-59 in particular. There, the original franchisor assigned the franchise agreement to the assignee franchisor after disclosure had been made but prior to the expiry of the two year period following execution of the franchise agreement. The letter advising the franchisee of the assignment “included an undertaking to assume all obligations of the Franchisor under the Agreement executed by 9187 [the assignee] pursuant to section 19.1 of the Agreement. Pursuant to that provision, the Franchisor was released from all of its obligations under the Agreement upon delivery of the undertaking, except obligations arising prior to such delivery” (para. 8). The reference to the “Agreement” in this quote is to the franchise agreement between the franchisee and the assignor franchisor. It was accepted that, as a practical matter, the franchisee had to look to the assignee franchisor if it was to have any chance at recovering its investment (para. 44)

At issue was whether the assignee franchisor could be liable to rescission because of the inadequate disclosure on the part of the assignor franchisor. The court answered that question in the affirmative. A subsidiary issue was whether the assignee could be liable to make the payments under s. 6(6) of the *Arthur Wishart Act (Franchisee Disclosure), 2000*, S.O. 2000, c. 3 (the “*Wishart Act*”). The court concluded that it was, stating:

> **48** First, the principal argument of 9187 is that the definition of "franchisor" does not accommodate the concept of an assignee. This conclusion rests on the assumption that the definition speaks to the grant of a franchise as at a particular point in time. However, a franchise agreement necessarily involves continuing obligations of both the franchisor and the franchisee during the term of the franchise including, for example, the grant of the right to use the intellectual property and other rights associated with the franchise system. On this basis, a franchise agreement can also be approached conceptually as involving a continuing grant subject to on-going compliance by the franchisee with its obligations under the agreement. In the circumstances of two possible interpretations, the Court should select the interpretation that best gives effect to the policy of the Act including, in particular, the objective of protecting franchisees from losses arising out of inaccurate or incomplete disclosure.
>
> **49** Second, treatment of an assignee as a "franchisor" is necessary to give effect to the policy of the Act which is directed, in addition to ensuring adequate disclosure, toward requiring fair dealing between parties to franchise agreements and to ensuring that franchisees have the right to associate. These objectives, which are addressed in sections 3 and 4, respectively, would be frustrated if the Act imposed these obligations only on the initial party to the franchise agreement. To be effective, the obligations in sections 3 and 4 of the Act must apply to the franchisor from time to

time in respect of any particular franchise agreement, including any assignee. I will address separately the inferences to be drawn from the wording of these provisions of relevance for the issue in this application.

50 Section 3 of the Act imposes a duty of fair dealing on each party to a franchise agreement. There can be little doubt that this obligation extends to assignees. Because they do not employ the terms "franchisor" and a "franchisee", the provisions of section 3 easily accommodate assignees who assume obligations under a franchise agreement. 9187 submits that, because this approach was used by the draftsman in respect of provisions that are clearly intended to embrace assignees, the wording of section 3 supports its argument that, where the term "franchisor" is used in the Act, it is to be construed more narrowly.

51 However, it is not a necessary inference from the wording of section 3 that references in the Act to a "franchisor" are intended to be restricted to the original franchisor. The absence of references to the franchisor and franchisee in section 3 reflects both the imposition of the duty of fair dealing on both parties to the franchise agreement and the possibility, as contemplated expressly in the definition of franchise agreement, that a franchise agreement may be comprised of several agreements having differing counterparties. Accordingly, the wording in section 3 does not necessarily evidence an intention that the term "franchisor" in the Act is to be restricted to the original franchisor.

52 On the other hand, section 4 of the Act imposes obligations in sections 4(2) and 4(3), and grants a right of action in section 4(5), in respect of a "franchisor." The purpose of section 4, which deals with a franchisee's right to associate with other franchisees, would be frustrated in many instances if the term "franchisor" did not include an assignee during the term of a franchise agreement. Section 4 therefore provides considerable support for the conclusion that the Legislature intended the term "franchisor" to extend to assignees of the original franchisor under a franchise agreement, at least in the context of the franchisee's right to enforce statutory rights in its favour.

53 Similarly, the policy objective of ensuring complete and full disclosure would be negated in the case of renewals of franchise agreements if the term "franchisor" did not extend to assignees. Sections 2, 5(1)(a) and 5(7)(f), collectively, require a franchisor to provide a disclosure document on a renewal of a franchise agreement at the end of its original term in the event of a material change since the date of the franchise agreement. Because lengthy terms are not uncommon for franchise agreements, it is not unusual for assignments to occur during the life of such agreements. This disclosure obligation would therefore be frustrated in respect of any franchise agreements that had been assigned if "franchisor" did not also embrace any assignee of an original franchise under such a franchise agreement.

54 Third, the purpose of the statutory rights set out in section 6(6) is to restore a rescinding franchisee to the position it would have been in if it had not executed the franchise agreement. It therefore deals with the circumstances of rescission in a manner which is consistent with the imposition of liability under section 6(6) on third parties who would not otherwise be liable for the actions of the franchisor. As mentioned, section 6(1) and 6(2) do not limit the exercise of rescission to circumstances in which the original franchisor remains a party to the agreement. In addition, section 6(6) specifically provides a rescinding franchisee with rights against any "franchisor's associate", in addition to the franchisor, in order to increase the possibility of recovery. The extension of the obligations of a franchisor under section 6(6) to an assignee of a franchisor is therefore entirely consistent with the policy of the statute.

55 Fourth, this interpretation produces a more commercially reasonable result than the interpretation proposed by 9187. 9187 argues that it is contrary to the policy of the Act to permit rescission against an assignee that was not responsible for deficiencies in the disclosure previously given by a franchisor to a prospective franchisee. It suggests that the Act intends to impose liability on a "fault-based" basis. I do not agree.

56 The statute is directed principally to protecting franchisees against inadequate or inaccurate disclosure and to providing rights of recovery of their investment in the event that they are victims of such disclosure. That would be frustrated in many circumstances by a "fault-based" approach to liability. It is also contradicted by the imposition of liability on any party that qualifies as a "franchisor's associate" of the franchisor even if such party bears no responsibility for the inadequate or incorrect disclosure that has triggered the rescission.

57 In addition, 9187's argument does not take into account the relative positions of a franchisee and an assignee. A franchisee can take no action to prevent an assignment of its franchise agreement or to protect itself against such eventuality. On the other hand, a franchisor can protect itself in a number of ways against liability for defective disclosure by an assignor of a franchise agreement. This is addressed further below. For this reason, 9187's argument based on the policy implications of permitting rescission against an assignee of a franchise agreement is, I think, misdirected.

58 Lastly, 9187's argument that such an interpretation in inconsistent with the availability of a defence to rescission in favour of an assignee purchaser for value without notice cannot succeed given the determination above that an assignee cannot assert such a defence to an action under section 6(2) of the Act.

59 Accordingly, I conclude that, as an assignee of the Agreement, 9187 is obligated to comply with the provisions of section 6(6) of the Act pertaining to a franchisor as a result of Sovereignty's exercise of its right of rescission under section 6(2).

The court went on to consider whether the assignee had to comply with s. 6(6)(a) of the *Wishart Act*. In concluding that it did, the court stated:

> **60** 9187's final argument is that, even if it is obligated to comply with the obligations of the Franchisor under section 6(6) as an assignee, it is nevertheless not obligated to comply with the provisions of paragraph 6(6)(a) of the Act because it has not received any money from the applicant. It argues that it would only be liable if the Act required it to refund any monies *paid to it* by the franchisee rather than *monies received from* the franchisee.
>
> **61** I agree that, in the absence of language that imposes the refund obligation with respect to all monies *paid to* a franchisor, paragraph 6(6)(a) is susceptible of two possible interpretations. Nevertheless, I conclude that the Legislature intended that the obligation in paragraph 6(6)(a) extend to an assignee for the following reasons.
>
> **62** First, the Court should select the interpretation of section 6(6)(a) that best gives effect to the policy of the Act - in this case, the policy of providing financial protection to franchisees - provided such interpretation does not produce a commercially unreasonable result. In this case, as mentioned above, the interpretation that imposes the obligation to comply with section 6(6)(a) on an assignee is not only reasonable but also consistent with commercial practice.
>
> **63** Such interpretation recognizes the important reality that, as between the franchisee and the assignee, it is the latter that is in a position to protect itself. As mentioned, a franchisee typically has no ability to prevent an assignment of a franchise agreement or to protect itself against a subsequent liquidation of the original franchisor. On the other hand, the assignee has the ability to undertake due diligence to establish apparent compliance with the disclosure provisions of the Act by its vendor before agreeing to take an assignment of any franchise agreement. It also has the option at such time of bargaining for security, a guarantee, a holdback or escrow of a portion of the purchase price, or other forms of protection against subsequent claims by a franchisee. Alternatively, it can wait until expiration of the two-year limitation period under section 6(2) before completing its acquisition of any particular franchise agreement or it can require an estoppel letter or other form of comfort directly from the franchisee as a condition of taking the assignment of a franchise agreement prior to such time.
>
> **64** Second, given that the claims in paragraphs 6(6)(b), (c) and (d) can be asserted against an assignee on the basis of the conclusion that "franchisor" includes an assignee for the purposes of section 6(6), it would be perverse to limit claims under paragraphs 6(6)(a) to the original franchisor. In view of the netting of claims provided for in paragraph 6(6)(d), such an interpretation would require a franchisee to pursue claims against both parties concurrently and to obtain a determination in its action against the original franchisor before it could quantify the relief to which it is entitled from the assignee under paragraph 6(6)(d). Such a procedure is contrary to the legislative

> objective in enacting the Act of facilitating claims by a franchisee based on a failure of a franchisor to comply with its disclosure obligations under the statute.

Whether this rationale would apply to other non-rescission or non-statutory claims that franchisees in the circumstances described above might have against the selling franchisor, which they might want to assert against purchasing franchisor, is unclear. What does appear to be clear is that it is the statute itself that essentially imposes liability on an assignee for the disclosure inadequacies of the assignor, and, potentially, for breaches of the duty of fair dealing under s. 3 and of the right to associate under s. 4 of the *Wishart Act*. Although not mentioned in the decision, similar reasoning could arguably be applied with respect to remedies under s. 7 (misrepresentations in a disclosure document or failure to comply with s. 5). Given the holding in this case that rescission was available against the assignee for the disclosure deficiencies of the assignor, it would appear that Wilton-Siegel J. was suggesting that the assignee could have been held liable for the assignor's breaches of s. 3 or 4 of the *Wishart Act* if in fact any such breaches had occurred. Unfortunately that issue was not addressed directly. The assignee, as a franchisor in its own right, would of course be subject to ss. 3 and 4 post-assignment regardless of any other consideration.

As stated, it is unclear whether the reasoning applied to ss. 3, 4 and 6 rights could be extended to rights that do not flow from the *Wishart Act*, such as rights that flow from breaches of the franchise agreement *simpliciter*. Wilton-Siegel J. rejected the assignee's argument that the statute imposes fault-based liability for breaches of its provisions. However, liability under contracts is fault based, at least in the sense that a party must commit a breach in order for liability to arise. It is difficult to see, other than on a novel construction of the law, how this type of reasoning could apply outside of the statute to impose liability on the purchasing franchisor for the contractual and other non-*Wishart Act* wrongs committed by the selling franchisor, absent some other legal principle that would impose such liability.

The language of the asset purchase agreement and the assigned franchise agreements is relevant in this regard. Although not particularly enlightening, this issue was touched upon in *3574423 Canada Inc. v. Baton Rouge Restaurants Inc.*, 2011 ONSC 6697, where the court stated:

> **312** Although time was spent at trial, both in the evidence and in argument, about what liabilities Imvescor assumed under section 2.4 of the 2006 Mikes Purchase Agreement, I see no need to resolve that debate given my findings that the right of first refusal lapsed in mid-2001 and BRRI incurred no liability, under contract or the *AWA*, in respect of the right of first refusal. Simply put, there was no liability to pass down the chain. I dismiss the action as against Imvescor.

This point suggests the language of the documents that govern the assignment (the asset purchase agreement and ancillary documents) are relevant to the consideration of what liabilities an assignee franchisor can be fixed with regarding matters that occurred prior to the assignment. Based on the example asset purchase agreement assumption language which

is consistent with the typical language contained in franchise agreements as set out above, it is likely that the purchasing franchisor as assignee will not be found to have assumed liability for breaches of the franchise agreement committed by the selling franchisor and that the franchisees accordingly would have to seek redress for those breaches from or through the selling franchisor notwithstanding the assignment. The clause extracted above would also appear to preclude a novation as the assignor is only relieved of liability to the extent that the assignee agreed to assume the covenants and obligations under the franchise agreements.

Finally, there is one principle, that of the "pure principle of benefit and burden" that could be relevant in this analysis. This is a very complicated area of the law, which, given the contractual language discussed above, may not in the end provide assistance in resolving the issue of liability on the part of purchasing franchisors. The principle had its genesis in the decision of Megarry V.C. in *Tito v. Waddell (No. 2)*, [1977] Ch. 106 ("*Tito*"), who stated that it is one expression of the general principle that one cannot eat his cake and have it too (pp. 178-179 of QL report). It is a very long decision that involved consideration of the liability of assignees of mining contracts to replant mined out land. The case was discussed by E. Peel in *Treitel; The Law of Contract*, 13th ed. (London: Sweet & Maxwell, 2011). There, the author observed that, generally speaking, "a person to whom the benefit of a contract is assigned makes no promise to perform the obligations of the assignor; and in the ordinary case such an assignee does not become liable under the contract". The author cites the example of a builder who assigns to a bank moneys due or becoming due under a building contract. In such a case, "[t]he bank is under no liability to the builder's client for any breach of contract by the builder; the most that the client can do is to rely on the builder's breach in diminution or extinction of the bank's claim" (¶ 15-078).

There are exceptions to the general rule. The first is where,

> [t]he discharge of a burden may be a condition of the enjoyment of the benefit, so that the burden can be said to be annexed to the benefit, or to the subject matter of the contract. Where this is the case, a person (other than one of the original contracting parties) to whom the benefit is transferred must perform the burden, or at least forego the benefit if he fails to do so. If, for example, a right to extract minerals is subject to the duty to pay compensation if the surface of the land is let down, such compensation may have to be paid by the assignee of the mining right. This exception, however, does not apply if the burden, though imposed in the same instrument which creates the right, is not a condition of its exercise but an independent obligation undertaken by the original grantee of the right. [¶ 15-079]

As Megarry V.C. noted in *Tito*, "[t]he mere fact that the same instrument creates both the benefit and the burden, or that they both relate to the same subject matter, cannot possibly, in my view, make the one conditional on the other." Thus, the fact that the benefits and the burdens arise out of the franchise agreement, at least for the contractual claims, does not mean that the benefits and burdens are thereby conditional for the purposes of the first exception.

The author continues on to state that the burden of such independent obligations may have to be performed by an assignee under a second and broader exception to the general rule, that of the "pure principle of benefit and burden" (¶ 15-080). The following extract from *Treitel* describes that principle as framed in *Tito*:

> … In [*Tito*] a company that was engaged in mining phosphates on a Pacific island had acquired land there under contracts obliging it to return any worked out land to its former owners and to replant it. The rights under these contracts were transferred to commissioners "subject to … the covenants … therein contained"; and the commissioners undertook to keep the company indemnified against claims by the landowners under the original contracts. Many years after the company had been wound-up, it was held that the commissioners were liable to the landowners for failing to perform the covenant to replant. Their liability was based on the "pure principle of benefit and burden".

The author continued:

> That principle has been recognized in a number of earlier cases, but its existence does give rise to the problem of how it is to be reconciled with the rule "that in general contractual burdens are not assignable, though contractual benefits are". A person is certainly not subject to the burdens of a contract merely because he has taken benefits under it; … The "pure principle" is best regarding as a limited exception to this rule, restricted in scope by two factors. The first is that "the condition [which gives rise to the burden] must be relevant to the exercise of the right". This limitation is illustrated by *Rhone v. Stephens* where the owner of a house covenanted to keep the common roof of the house and an adjoining cottage in repair and both properties were then sold. It was held that the "pure principle" did not entitle the purchaser of the cottage to enforce the repairing covenant against the purchaser of the house; the duty to repair the roof was not a "relevant" condition of the right to occupy the house as there was no necessary connection between them. The second factor which restricts the operation of the "pure principle" is the intention of the parties to the assignment. An intention to subject the assignee of contractual rights to liabilities arising under the contract will not normally be inferred. In particular, any such inference will be displaced where it is the assignor who has undertaken (in the contract between the assignor and assignee) to discharge the burden; where it is plainly the intention of both parties to the assignment that the assignee is *not* to be subject to the obligations imposed by the original contract on the assignor; and where the assignment is of benefits acquired by the assignor under one instrument but the burden is imposed by another, recording a separate transaction. Even where the "pure principle" does apply, its effect is not strictly to transfer a liability; for the assignor remains liable to the other contracting party.

There appear to be a number of reasons why this principle may not assist franchisees. First, the commissioners in *Tito* undertook to indemnify the company against claims by the

landowners under the original contracts. Although there often is indemnification language in asset purchase agreements, they usually contain language akin to that set out above clearly indicating an intention as between the selling franchisor and the purchasing franchisor that the latter, as assignee, would not be subject to the liabilities that flowed from breaches of the assigned franchise agreements. Secondly, while *Tito* has been considered in Canada, it has been so mostly with respect to matters other than the "pure principle". In *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123*, [2002] O.J. No. 1023, the Ontario Court of Appeal doubted the correctness of the decision, preferring the reasoning in *Rhone v. Stephens* discussed in the extract from *Treitel* above, at least as it relates to the general principle that positive covenants do not run with the land. A conceptual distinction must also be drawn between the assignment of liabilities for past breaches and the assignment of future performance obligations. Even if the burden of the contract flowed from the benefit (the receipt of royalties, for example), it seems clear that the burden would be to honour the covenants going forward. Nonetheless, the debate over whether the "pure principle of benefit and burden" should be adopted into Ontario law seems far from over. In its recent decision in *Black v. Owen*, 2016 ONSC 40, the Divisional Court endorsed the benefit and burden exception to the general principle regarding positive covenants not running with the land. Whether the rationale underlying such an exception could be applied outside of that context is uncertain.

To conclude, it appears that franchisees could assert against a purchasing franchisor the defence of equitable set-off for the breaches of the selling franchisor. Under the principles discussed in *Sovereignty Investment Holdings, Inc. v. 9127-6907 Quebec Inc.*, it would appear that a purchasing franchisor could be held directly liable for a selling franchisor's breaches of s. 5, and perhaps ss. 3, 4 and 7 of the *Wishart Act*, as an assignee franchisor. In either case, franchisees would have establish liability and prove their damages.