

Claim No.: SC-09-00087264-0000

ONTARIO  
SMALL CLAIMS COURT

BETWEEN:

MARGARET HATFIELD

Plaintiff

- and -

CHILD and ARTWORLD INC. o/a ARTWORLD OF SHERWAY

Defendants

CLOSING ARGUMENT OF THE PLAINTIFF

Sommer's Business Law Firm  
Jonathan J. Sommer (LSUC  
42958N)  
2239 Queen Street East  
Main Floor  
Toronto, Ontario M4E 1G1  
Tel: 416.907.1085  
Fax: 1.866.488.6403  
Email: jsommer@sommers-  
law.ca

**INDEX**

	PAGE
PART I – KEY FACTUAL ISSUES	3
PART II – THE EVIDENCE	5
PART III - LEGAL ISSUES	17
PART IV - APPLICABLE LAW	18
PART V - LEGAL ANALYSIS	24
PART VI - RELIEF SOUGHT	30
PART VII - COSTS	31
AUTHORITIES CITED	34

**PART I – KEY FACTUAL ISSUES**

1. Is the painting entitled “Wheel of Life” (the “Painting”) a fake?
2. Whether the Painting is fake or not, was there a cloud on the title of the Painting at the time it was sold to the plaintiff?
3. At the time of the sale of the Painting to the plaintiff, did the defendants know that the Painting was a fake?
4. At the time of the sale of the Painting to the plaintiff, did the defendants know that the Painting had a cloud on title?
5. At the time of the sale of the Painting to the plaintiff, had the defendants acted with reckless disregard for the truth about the Painting's authenticity, or without caring whether it was authentic or not?
6. Leading up to the sale of the Painting to the plaintiff, did the defendants make a representation to the plaintiff that the painting was authentic and that it had value as an investment?
7. Leading up to the sale of the Painting to the plaintiff, did the defendants make any representations to the plaintiff that they were possessed of special skill or judgment with respect to the authenticity and value of the Painting?
8. Leading up to the sale of the Painting to the plaintiff, did the defendants make any representation as to the authenticity and investment value of the Painting on which they intended the plaintiff to rely and enter into a contract for the purchase of the Painting?
9. Did the plaintiff rely on the defendants' statements of the Painting's authenticity and investment value and enter into a contract for the purchase of the Painting?
10. Has the plaintiff suffered any damages as a result of her purchase of the Painting?
11. What is the Painting worth? What would it have been worth if it had been authentic?

12. What did the plaintiff expect to receive when she purchased the Painting?
13. When the plaintiff learned of the issues relating to the Painting's authenticity, what did she do?
14. What was Child's involvement in the sale of the Painting? What did she have to gain from the sale? What was her relationship to, and responsibility to, the corporate defendant, and to the plaintiff?
15. How much did the plaintiff pay the defendants for the Painting?

## **PART II – THE EVIDENCE**

In this section, each of the Key Factual Issues listed in Part I will be reiterated and then answered with reference to the evidence from the trial.

### **1. Is the painting entitled “Wheel of Life” (Exhibit 16, page 4 & 5, and Exhibit 42 Illustrative Chart #31))(the “Painting”) a fake?**

#### The Declaration

- On September 22, 2004, Norval Morrisseau (“Norval”), the alleged maker of the Painting, stated in a commissioned sworn declaration (the “Declaration” – Exhibit 16 at Tab 7) that the Painting is a fake.
- Letters from the lawyer who commissioned the Declaration and Norval’s physician both confirm that at the time of the making of the Declaration, Norval was of sound mind (Exhibits 7 and 8).
- The Declaration is consistent with a number of other declarations sworn by Norval in 2003, and with various letters sent by Norval’s lawyers, all of which identify fake paintings and/or require that the addressees of such letters and declarations cease and desist from selling and/or authenticating any alleged Norval works (Exhibits 31, 44 and Exhibit 32 (sub-exhibits A and B)).

#### Expert Evidence

- The plaintiff’s expert witness, Don Robinson, testified that after performing a detailed analysis of the Painting, he concluded that it is a fake. His testimony was tested with two days of cross-examination, and only became clearer and stronger in that cross-examination.
- Don Robinson has impeccable credentials as an expert in all aspects of the works of Norval, having known Norval personally, and having been his principal art dealer for the last 18 years of Norval’s life, until his death in 2007. Don Robinson is also the author of two books about Norval’s life and works.
- Don Robinson’s evidence was highly detailed, and covered every aspect of the Painting, including the subject matter, colours, technique, syllabic signature, and the drybrush signature on the Painting’s reverse side. Among his methods of analysis, Mr. Robinson applied a Morellian

analysis, which is a method that examines a painting's minute visual elements for consistency with the alleged artist's technical methods.

- Don Robinson testified that:

- (a) The Painting is "an extremely bad fake";
- (b) "there is no credible provenance back to the artist";
- (c) The figures in the syllabic signature do not follow the normal increase in size, and the lines do not show normal variability;
- (d) The black drybrush signature and writing on the reverse-side of the Painting is entirely inconsistent with Norval's work from that period: "I've never, ever been able to find...any authentic painting painted by Norval Morrisseau that was signed on the back with heavy black dry brush painted signatures";
- (e) The reverse-side drybrush writing is typical of 1970's fake paintings, and Norval "simply didn't use that technique";
- (f) The "N" and the "M" in the reverse-side signature are completely inconsistent with Norval's known signatures, as are many other aspects of the reverse-side writing;
- (g) The use of all capital letters for the reverse-side title of the Painting is completely inconsistent with the rare known-examples of reverse-side writing on Norval's paintings;
- (h) Although he has handled over 1,000 of Norval's paintings, he has never seen an authentic one with the reverse side writing done like it is done on the Painting – the large size, the way the letters are formed, the "N" and the "M", the "I" in "Life", and the use of drybrush;
- (i) He examined the images in the Painting of the headdress, the eyes, the lips, the pupils, the measurable distance between these elements, the bird and its beak, and the "muted", "dark" colour palette, and found that none of these elements were consistent with Norval's methods in 1979;

- The only expert evidence offered by the defence was that of Dr. Atul Singla, whose opinion was confined to the drybrush signature on the reverse side of the Painting (not including the drybrush title and date). Dr.

Singla's opinion was deeply flawed, however, for, *inter alia*, the following reasons:

- (a) He did no independent research beyond looking at a tiny number (9) of handwriting examples he claims to have received from the defendants and Joseph McLeod. McLeod, however, testified that he denies having any knowledge of or involvement in this lawsuit until the morning of his testimony on June 4, 2012, which is over two years after Dr. Singla claims to have met with him on March 30, 2010 (Singla Report – Exhibit 42, August 24, 2010 letter);
- (b) He was comparing apples to oranges, so to speak, in that none of the signatures he used as comparators to the signature on the Painting were in the same drybrush medium, nor were they of the same size, or on the same material (canvas);
- (c) Although he testified that his job was to identify both the similarities and the differences between the signature on the Painting and the comparators, his report only identified one difference, and ignores numerous other obviously significant differences such as the different trajectory angles of the two words of the signature and:(i) in “Norval”, the unusually shaped and sized “R”, the lack of a large gap in the top of the “a”, the unusually straight vertical line in the “l”; (ii) in “Morriseau”, the completely inconsistent single line up and down on the left side of the “M”, the completely inconsistent left-lean of the “o”, the unusual size and case of the “R”’s, the entirely inconsistent offset dot for the “i” (instead of a dash), the unusual angle of the top lines of the “S”’s, the inconsistent lack of a loop in the “e”, and the unusual vertical line and lack of diminishing size of the “u”.
- (d) To support his conclusion, he testified that it is very difficult to forge a signature using paint because this would cause an identifiable interruption of “flow”. This testimony was clearly illogical, as the signature on the Painting was painted in a drybrush technique, not with the sort of paint that would flow in the first place;
- (e) His ability to reason and/or accept logic appeared to be severely deficient. For example, when asked whether it is “possible” that the signature on the Painting could be a forgery, he said “no”. He then insisted on this conclusion even though his conclusion in his expert report was that the signature was “highly

probable" to be authentic, which is the second "level of certainty", as opposed to conclusively certain;

- (f) He seems to suffer from a sense that his abilities are infallible and/or from what is commonly known as "confirmation bias": (i) He stated that it is impossible that he could be wrong; (ii) He also stated that he has the perfect ability using "forger psychology" to predict what forgers will and will not do, and that it is impossible that any individual forger would do other than as he predicts; (iii) he also stated that it is impossible for a forger to "understand the details" that he himself is able to understand about forgeries, even though both he and forgers are human;
- (g) His credibility is highly questionable: (i) although he claims to have only appeared in 5 or 6 Canadian courts as an expert, he initially claimed to be unaware of a Canadian court decision involving the Royal Bank of Canada in which an opposing expert's opinion was preferred to his because Dr. Singla had examined an "inferior copy" of the subject signature; (ii) he also claimed never to have read the decision of the Immigration and Refugee Board of Canada in the *Gill* case, in which the Board refused to accept his conclusions on the basis that he may have provided an opinion that was "result-oriented to fit [his client's] story..." (Exhibit 43, paragraphs 29 and 39).

### Contextual Evidence

- Ritchie Sinclair testified that he was Norval's protégé, or apprentice, for the second half of 1979, the year in which the Painting was allegedly created. He stated that although he was Norval's assistant at that time, mixing paints and preparing canvases, he never saw the Painting, and also that the colours and canvas size used for the Painting are inconsistent with the colours and methods used by Norval in 1979.

### Lack of Provenance

- The defendants failed to provide a single source document, such as a receipt, bill of sale, testimonial, etc., evidencing the provenance of the Painting.
- None of the Defendants' witnesses provided any clear or verified provenance for the Painting. None of the defendants' witnesses claimed to know for certain how the Painting came to be, where it was painted, or what its chain of title is. None of the defence's witnesses claimed to have



seen the Painting painted by Norval, in Norval's possession, nor did any of them claim to have acquired, or witnessed the initial acquisition, of the Painting from Norval.

**2. *Whether the Painting is fake or not, was there a cloud on the title of the Painting at the time it was sold to the plaintiff?***

- The evidence showed that at the time that the Painting was sold, there were several issues clouding title: first, the Declaration identifying it as a fake was sworn by Norval in September of 2004 (Exhibit 16 at Tab 7); second, there was a general dispute regarding the existence of fake Norval paintings in the marketplace (testimony of Child); third, Michele Vadas had called the defendants the day before the sale and advised them that many of the paintings they were selling were fakes (Vadas Affidavit – Exhibit 32); fourth, Norval's different lawyers had written to the defendants on two occasions informing them of Joseph McLeod and Maslak-McLeod's involvement in selling fakes and also of the fact that many of the paintings being sold by the defendants were fakes (Michele Vadas Affidavit - Exhibit 32 (sub-exhibits A and B)).

**3. *At the time of the sale of the Painting to the plaintiff, did the defendants know that the Painting was a fake?***

On September 17, 2004, Norval's lawyer, Clarke R. Purves, wrote to the defendants and advised them that (Michele Vadas Affidavit: paragraph 2 of Exhibit 32 (sub-exhibit A)):

- (a)The Maslak-McLeod Gallery was selling “numerous fakes and imitations”;
- (b)Norval was not represented by Maslak-McLeod; and
- (c)Norval did not “recognize Maslak-McLeod as being able to authenticate any of Mr. Morrisseau's works”.

- On or about February 25, 2005, the day before the Painting was sold by the defendants to the plaintiff, Michele Vadas telephoned Child and advised her that Norval had seen television advertisements for Artworld of Sherway's collection of alleged Norval paintings the night before, and that the paintings shown were not by his hand and were in fact what he described as “abominations” and “fakes” (direct examination of Child; Michele Vadas Affidavit: paragraphs 6-8 of Exhibit 32).

- On or about February 25, 2005, also on the day before the Painting was sold by the defendants to the plaintiff, Norval had Aaron Milrad of Fraser Milner Casgrain LLP courier and email a letter to the defendants advising

them that (Michele Vadas Affidavit: paragraph 10 of Exhibit 32 (sub-exhibit B)):

(a) “various artworks that you are offering for sale attributed to our client are in fact fakes” and “are not by his hand”; and that

(b) Norval and Mr. Milrad “are prepared to meet with you and advise you of which works you have which are misattributed to our client...”

- Child admitted that she was aware, at the time of the Painting's sale to the plaintiff, that there was a controversy regarding the authenticity of some Norval paintings.
- Child also testified that in the purchasing and selling of paintings it is an important fact whether or not the artist has said that the painting is a fake.
- Child also testified that at the time of the sale of the Painting to the plaintiff she was aware that Joe McLeod, who supplied the certificate of valuation that was provided to the plaintiff with the Painting, was implicated by certain people as being someone who was involved in the fakes market.
- Child also testified that she knew at the time of the sale of the Painting to the plaintiff that between 1999 and the early to mid 2000's over 1,000 paintings attributed to Norval had entered the market through auctions and that such a number represented an unprecedented and very unusual surge in the market of Norval's paintings.

**4. At the time of the sale of the Painting to the plaintiff, did the defendants know that the Painting had a cloud on title?**

- For the same reasons as set out in Issue #3, above, the defendants were fully aware of a cloud on the title of the Painting, in that there were serious questions about its authenticity.

**5. At the time of the sale of the Painting to the plaintiff, had the defendants acted with reckless disregard for the truth about the Painting's authenticity, or without caring whether it was authentic or not?**

- According to Child and the defendants' website (Trial Exhibit 2), “due diligence” ought to be performed on all artworks, involving “check[ing] the work for it's [sic] as complete as possible history of ownership, condition, and other indicators of the authenticity...”, and that “One of

the more reliable ways to do this, is to always deal with reputable organizations. Artworld of Sherway is proud to stake it's [sic] reputation on the works we sell" (Exhibit 2, page 5). Despite this, however, Child admitted that no original source documentation had been placed in evidence in this action, and also that she could not provide a complete chain of title for the Painting.

- Child testified that at the time of the sale of the Painting to the plaintiff, she was aware of the dispute regarding the authenticity of Morrisseau paintings, but never mentioned it to the plaintiff.
- Child also testified that at the time she sold the Painting to the plaintiff she knew that "it was very difficult at that time to really establish provenance directly back to [Norval]".
- Child also testified that the various issues surrounding Norval's art raised "alarm bells" for her, but she "felt comfortable" despite never actually speaking with Don Robinson, who was making the various accusations, and whom she knew at the time to be Norval's principal dealer.
- Child also testified that following the phone call from Michele Vadas in which Vadas stated that Norval believed the paintings being sold by Child to be fakes, she did not further investigate the call, nor did she think it appropriate to tell the plaintiff about what Vadas had said.
- Child also testified that when she received the letter from Norval's lawyers dated February 25, 2005, which suggested that Norval meet with her and look over the paintings in her gallery, she and the defendant gallery declined the offer because Jim White, who was the source of the Painting, refused to allow Norval to examine the paintings, but that White's refusal did not raise any suspicion for her.
- Child dismissed the validity of the Statutory Declaration signed by Norval on September 22, 2004 (Trial Exhibit 16 at Tab 7) on the basis that he was incompetent and then, when the plaintiff provided the letters confirming Norval's competence from Norval's lawyer and doctor, she "never took the time to read them" despite knowing of them, but "...probably should have".
- Many of the things to which Child testified put her absolute and determined carelessness and disregard for the truth on display. For example:

- (a) under cross-examination, she refused to back down from the obviously-incorrect statement in paragraph 14 of her Amended Defence that “art is not an investment and cannot be characterized as such”, even when confronted by the corporate defendant’s website document titled “Artworld of Sherway Invites you to consider art as a diversification of your investment portfolio” (Trial Exhibit 2);
- (b) she was clearly unaware of the details of her \$3.2 million claim against Ritchie Sinclair, even though she said that she was;
- (c) she claimed to have “read over”, “reviewed” and “approved”, and to “care greatly” about, what is in her Defence and Amended Defence, but failed to notice her misspelled name, the lack of a defence for the corporate defendant, the many spelling and grammar errors, and at least one sentence that makes no sense;
- (d) She tried to explain the lack of any source documentation evidencing the provenance of the Painting as being because Norval “lived on the streets” and “gave his paintings away for alcohol, for drugs, for accommodations, for anything”, but then admitted that when she said these things she actually had no idea about any of it;
- (e) despite the existence of numerous “red flags” regarding the authenticity of the Painting at the time it was sold to the Plaintiff, Child dismissed all of them with unbelievable and unsubstantiated justifications, and continued to do so at trial: the call from Vadas might not have been from Vadas; Norval’s lawyers and Norval were being “controlled” by third parties; Norval was incompetent; she was too “busy” to verify Vadas’ phone call; Don Robinson could not be believed because he was trying to “control” the market.

**6. *Leading up to the sale of the Painting to the plaintiff, did the defendants make a representation to the plaintiff that the painting was authentic and that it had value as an investment?***

- The defendants’ website, which the plaintiff testified to having read and relied upon prior to the purchase of the Painting, stated that provenance should always be a “major concern” and that Artworld of Sherway “is proud to stake it’s [sic] reputation on the works we sell.” (Trial Exhibit 2, page 5).

- Also on the defendants’ website was a document entitled “Artworld of Sherway Invites you to consider art as a diversification of your investment portfolio” that the plaintiff testified to having read and relied upon prior to

the purchase of the Painting. Said document stated that, *inter alia*, "Our goal is to ensure that each work you purchase will prove to be a valuable addition to your collection and to your investment portfolio" (Trial Exhibit 2, page 5).

- The plaintiff testified that she spoke with Child and asked about the Painting's provenance and that Child offered to provide two certificates of appraisal in support of the price being charged for the Painting.

- In a manner that is consistent with the plaintiff's testimony about her discussion with Child (above), the defendants state at paragraph 7 of their Amended Defence, and Child reiterated same in her testimony, that the Painting is authentic.

**7. *Leading up to the sale of the Painting to the plaintiff, did the defendants make any representations to the plaintiff that they were possessed of special skill or judgment with respect to the authenticity and value of the Painting?***

- The defendants' website (Trial Exhibit 2, page 5), which the plaintiff testified to having read and relied upon leading up to her purchase of the Painting, states that Artworld of Sherway has "nearly 30 years in the business", has an "experienced gallery team", is a "reputable organization", that it "is proud to stake its reputation on the works [it] sell[s]", and that its goal "is to ensure that each work you purchase will prove to be a valuable addition to your collection and to your investment portfolio".

**8. *Leading up to the sale of the Painting to the plaintiff, did the defendants make any representation as to the authenticity and investment value of the Painting on which they intended the plaintiff to rely and enter into a contract for the purchase of the Painting?***

- As discussed in Issue #6, above, the defendants' website made various statements about both the authenticity and investment value of the works it sells (Exhibit 2).

- The plaintiff testified that in a phone call to Child before committing to purchase the Painting, she asked Child about the Painting's provenance, and that Child told her that the Painting came from a "gentleman collector" and that two certificates of appraisal would be provided.

- The defendants delivered valuation certificates (Exhibits 3a and 3b) to the plaintiff when she purchased the Painting, both of which identified the

Painting as a painting by Norval. Also, the invoice provided to the plaintiff by the defendants confirmed the Painting's authenticity (Exhibit 4).

- Child admitted under cross-examination that it is "all right for [her] customers to place their trust in [her] in terms of the authenticity of paintings".

**9. Did the plaintiff rely on the defendants' statements of the Painting's authenticity and investment value and enter into a contract for the purchase of the Painting?**

- The plaintiff testified that she would not have bought the Painting were it not a good investment and that she initially had no reason to doubt the truth of the certificates of appraisal provided, which "assumed" the authenticity of the Painting.

**10. Has the plaintiff suffered any damages as a result of her purchase of the Painting?**

- As Don Robinson testified that the Painting is worth nothing, and that it would have been worth as much as \$25,000 if authentic, the plaintiff has lost the \$25,000 value she would have had were the Painting what it was represented to be, namely, an authentic Norval Morrisseau from 1979.

- The plaintiff's testimony made it clear that when she purchased the Painting, she had made a general decision to buy a painting by Norval and that the purchase was justified as an investment. She first tried to buy one painting, which had become unavailable, and then she bought the Painting, as a second choice. She also testified that she incurred a financing cost for her purchase, in an amount of 4.25% of \$10,300.00 for 1 year, which is \$437.75. Furthermore, she testified that had she put her money into an authentic painting by Norval, or even into a GIC, she would now have had something worth more than what she obtained.

**11. What is the Painting worth? What would it have been worth if it had been authentic?**

- Don Robinson testified that the Painting is actually worth \$0, because it is a fake. He testified that if it were real, it would be worth between \$20,000 and \$25,000.

- Child testified on the assumption that the Painting is real, and gave it a "retail" value of \$15,000.

- Joseph McLeod, who testified for the defence, speaking under the assumption that the Painting is authentic, stated that the Painting is worth \$25,000.

**12. What did the plaintiff expect to receive when she purchased the Painting?**

- The plaintiff testified that she purchased the Painting for several reasons:
  - (a) she was in the process of collecting Native art for the purpose of making sure that her adopted Ojibway son “had an opportunity to experience his culture” through art in her home;
  - (b) she found Norval’s work “very compelling, very beautiful”;
  - (c) she believed Norval’s work to be a good investment.

- The plaintiff testified that she never would have purchased the Painting if it didn’t represent an investment, and that she knew Norval was ill and that if she didn’t purchase one of his paintings then she wouldn’t be able to afford to.

**13. When the plaintiff learned of the issues relating to the Painting’s authenticity, what did she do?**

- The plaintiff testified that she met and corresponded (Exhibits 6 and 35) with the defendants, from whom she demanded a refund, and who, initially, assured her that a resolution could be reached. Later, however, the defendants advised her that “this whole ‘Fake Morriseau’ controversy has gone too far and we will not let our good name be further implicated by falsehoods perpetrated for reasons we have yet to discover and by persons yet to be named”, and that “[a]fter trial, once our position that your painting is a genuine Morriseau is confirmed [...] we will be pleased to buy back the painting from you.” (Exhibit 6).

- The plaintiff then commenced this action on July 16, 2009 (Plaintiff’s Claim).

**14. What was Child’s involvement in the sale of the Painting? What did she have to gain from the sale? What was her relationship to, and responsibility to, the corporate defendant, and to the plaintiff?**

- Both Child and the plaintiff testified that Child was the only person the plaintiff dealt with in making her purchase of the Painting.

- Child testified that as the wife of the corporate defendant's sole shareholder, she receives a salary and the profits of the gallery enrich her lifestyle.
- Child testified that she is the gallery director of the corporate defendant, that she "is responsible for the day-to-day operations" of the corporate defendant's business, is "the directing mind of the company", and is "the one running the business".
- Child is a co-plaintiff with the corporate defendant in a lawsuit against Ritchie Sinclair, and in that lawsuit's Statement of Claim (Exhibit 33) the corporate defendant and Child are treated as indistinguishable from each other. She further stated that "if Artworld is defamed, yes, I would also be defamed".
- With respect to Child's responsibility to the plaintiff, Child testified that: (i) clients of the gallery should be able to rely on her statements about the authenticity of paintings sold; (ii) with respect to Child receiving notice from Norval's lawyers about selling fakes "There would have been an obligation if I felt there was reason to notify [the plaintiff]. I didn't feel there was reason to notify [the plaintiff]."

**15. How much did the plaintiff pay the defendants for the Painting?**

- According to both the plaintiff and Child, the price paid was \$9,000.00 plus \$1,350.00 in tax, for a total of \$10,350.00. The sale was evidenced by an Artworld of Sherway Invoice dated February 26, 2005 (Exhibit 4) in the amount of \$10,350.00 for "Norval Morrisseau 'Wheel of Life'" "dated 1979".



### **PART III – LEGAL ISSUES**

The following legal issues arise in this action:

1. Did the defendants make one or more fraudulent misrepresentations to the plaintiff regarding the authenticity, title or value of the Painting?
2. Did the defendants violate the provisions of the *Sale of Goods Act* in selling the plaintiff the Painting?
3. Did the defendants deceive the Plaintiff in selling her the Painting?
4. Did the defendants negligently misrepresent the authenticity, title or value of the Painting to the plaintiff?
5. Did the defendants innocently misrepresent the authenticity, title or value of the Painting to the plaintiff?
6. Did the sale of the Painting represent a mistake in the understanding of the parties?
7. To what remedies is the plaintiff entitled, and in what quantum?
8. Are punitive damages applicable in this case?
9. Is Donna Child personally liable to the plaintiff?

## **PART IV – APPLICABLE LAW**

### **1. Fraudulent Misrepresentation:**

A fraudulent misrepresentation is a statement known to be false or not caring whether it is true or false which induces the plaintiff to enter into a contract (Waddams. *The Law of Contract* (5th Ed). Para. 416).

### **2. Deceit:**

The tort of deceit requires the satisfying of several elements, which elements may be put as follows (see *Wiebe v. Gunderson*, 2003 BCSC 1282 (CanLII), <<http://canlii.ca/t/56k7>> retrieved on 2012-06-22, paragraphs 194-198 for an excellent discussion of deceit):

- (a) a false statement actively concealed;
- (b) knowledge of the falsity, or recklessness as to the statement's truth or falsity;
- (c) intent by the maker of the statement that the party to whom it was made act or rely upon it;
- (d) reliance by the plaintiff on the statement made;
- (e) damage to the plaintiff as a result of her reliance on the statement.

### **3. Negligent Misrepresentation:**

A negligent misrepresentation occurs where (see Osborne. *The Law of Torts* (4<sup>th</sup> Ed.). Irwin Law, 2011, pages 176-187). :

- (a) a false statement is negligently made;
- (b) the person making the statement owes a duty of care to the recipient;
- (c) the person making the statement is possessed of special skill or knowledge on the matter in question;
- (d) in the circumstances a reasonable person making the statement would know that the recipient is relying on her skill or judgment;

- (e) there is reasonable reliance on the statement by the recipient;
- (f) a loss is suffered by the recipient as a result of the reliance.

#### 4. **Sale of Goods Act:**

The Sale of Goods Act provides that under certain circumstances there is an implied condition of fitness for a particular purpose, the breach of which gives rise to the right to either repudiate the contract or claim damages for breach of a warranty. Section 15(1) of the *Sale of Goods Act* reads as follows:

Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

#### 5. **Innocent Misrepresentation:**

As Madame Justice McLachlin of the B.C. Court of Appeal (as she was then) stated in *Kingu v. Walmar Ventures Ltd.*, 1986 CanLII 142 (BC CA) at pages 6 & 7, an innocent misrepresentation requires:

1. A positive misrepresentation must have been made by the defendant;
2. Where the defendant owes a fiduciary duty to the plaintiff... failure to disclose material facts may suffice;
3. The representation must have been of an existing fact;
4. The representation must have been made with the intention that the plaintiff should act on it;
5. The representation must have induced the plaintiff to enter into the contract;

6. The plaintiff must have acted promptly after learning of the misrepresentation to disaffirm the contract;
7. No innocent third parties must have acquired rights for value with respect to the contract property;
8. It must be possible to restore the parties substantially to their pre-contract position.

#### 6. **Mistake:**

In *Seppanen v. Seppanen* 59 BCLR 26 (B.C.S.C.) at page 3, the court said:

"In common mistake, both parties make the same mistake. Each knows the intention of the other and accepts it but each is mistaken about some underlying and fundamental fact. In mutual mistake, the parties misunderstand each other and are at cross purposes. In unilateral mistake, only one of the parties is mistaken. The other knows, or must be taken to know, of his mistake."

#### 7. **Remedies & Quantum:**

- (a) The measure of damages for fraudulent misrepresentation is to secure the plaintiff's expectation interest where the defendant's fraudulent statement may be defined as a promise, as opposed to a mere representation. In defining the statement as a promise, the degree of reliance by the plaintiff may be relevant (Waddams. *The law of Contract* (5th Ed). Para 415);
- (b) Damages for deceit are intended to compensate the plaintiff for her actual loss, and may be calculated as the difference between the amount paid by the plaintiff and the true value of the property. Damages also may be obtained for loss of profit (*Wiebe v. Gunderson*, 2004 BCCA 456, paragraphs 29-40);
- (c) The remedy for a negligent misrepresentation is usually damages, though the English Court of Appeal has made it clear that a negligent misrepresentation that induces the making of a contract may give rise to damages in tort or in contract. Furthermore, Waddams suggests that it may be appropriate for a court to "use what tools are available for the purpose of achieving justice" (Waddams. *The law of Contract* (5th Ed). Paras 427-428)).

(d) The Sale of Goods Act gives the right to either repudiate the contract or claim damages for breach of a warrantee:

Breach of warranty

51. (1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat a breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but may,

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for the breach of warranty.

Measure of damages

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

Breach of warranty as to quality

(3) In the case of breach of warranty of quality, such loss is, in the absence of evidence to the contrary, the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

Right of action

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent the buyer from maintaining an action for the same breach of warranty if further damage has been suffered. R.S.O. 1990, c. S.1, s. 51.

Other rights of buyer preserved

52. Nothing in this Act affects the right of the buyer or the seller to recover interest or special damages in a case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed. R.S.O. 1990, c. S.1, s. 52.

(e) For an innocent misrepresentation, the remedy available to the plaintiff is rescission.

(f) When both parties are mistaken on a basic and fundamental element of the contract: the contract is void from the start if the mistake is of such significance that, in the words of English case law, it is a "false and fundamental assumption" of the contract (see *Seppanen v. Seppanen*, (1991) CanLII 1874 (BC SC), <<http://canlii.ca/t/1crnb>> retrieved on 2012-06-22, at page 3 and 4 (quoting the Supreme Court of Canada in *First City Capital Ltd. et al. v. British Columbia Building Corp.* (1989), 43 D.L.R. 29 (S.C.) at p. 37).

## 8. Punitive Damages:

In *Whiten v. Pilot Insurance Co.*, (2002 SCC 18), the court stated the following (at paras. 67-74):

"... I draw the following assistance from the experience in other common law jurisdictions which I believe is consistent with Canadian practice and precedent.

"First, the attempt to limit punitive damages by "categories" does not work and was rightly rejected in Canada.... The control mechanism lies not in restricting the category of case but in rationally determining circumstances that warrant the addition of punishment to compensation in a civil action. It is in the nature of the remedy that punitive damages will largely be restricted to intentional torts (and ... in the exceptional case in contract....

"Second ... the general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation (or ... the means by which the jury or judge expresses its outrage at the egregious conduct).

"Third, there is recognition that the primary vehicle of punishment is the criminal law (and regulatory offences) and that punitive damages should be resorted to only in exceptional cases and with restraint. Where punishment has actually been imposed by a criminal court for an offence arising out of substantially the same facts, some jurisdictions, such as Australia and New Zealand, bar punitive damages in certain contexts, but the dominant approach in other jurisdictions, including Canada, is to treat it as another factor, albeit a factor of potentially great importance.

"Fourth, the incantation of the time-honoured pejoratives ("high-handed", "oppressive", "vindictive", etc.) provides insufficient guidance (or discipline) to the judge or jury setting the amount. Lord Diplock ... called these the "whole gamut of dyslogistic judicial epithets"....

"Fifth, all jurisdictions seek to promote rationality. In directing itself to the punitive damages, the court should relate the facts of the particular case to the underlying purposes of punitive damages and ask itself how, in particular, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, i.e., because any higher award would be irrational.

"Sixth, it is rational to use punitive damages to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than a licence fee to earn greater profits through outrageous disregard of the legal or equitable rights of others.

"Seventh, none of the common law jurisdictions has adopted (except by statute) a formulaic approach ... such as a fixed cap or fixed ratio between compensatory and punitive damages. The proper focus is not on the plaintiff's loss but on the defendant's misconduct. A mechanical or formulaic approach does not allow sufficiently for the many variables that ought to be taken into account in arriving at a just award.

"Eighth, the governing rule for quantum is proportionality. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation). Thus there is broad support for the "if, but only if" test....

Then at paragraph 82, the court notes that for punitive damages to be awarded:

An independent actionable wrong is required, but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation.

## 9. Personal Liability of Child:

With respect to intentional torts, in *Scotia Macleod Inc. v. Peoples Jewellers Inc.* ((1995), 26 O.R. 3d 481 (C.A.)), the Ontario Court of Appeal held that for a claim against directors or officers to succeed, it is necessary to allege that they committed tortious behaviour outside their formal decision-making roles in the corporation. The court then identified the usual categories of torts giving rise to personal liability to include fraud, deceit and dishonesty. This principle was clarified by the same court in *ADGA Systems International Ltd. v. Valcom Ltd.* (1999) 43 O.R. (3d) 101 (C.A.) at 112, in which it was said that the requirement that actions of corporate managers have a "separate identity" from the corporation did not mean that corporate managers could not be held for torts when acting in the course of their duties.

With respect to negligence, the Supreme Court of Canada held in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* ([1992] 3 S.C.R. 299), that employees may be liable for negligence where damage to a customer's property was the foreseeable result of their failing to take the requisite care. Furthermore, in *NBD Bank, Canada v. Dofasco Inc.* ((1997), 34 B.L.R. (2d) 209 (Ont. Gen. Div.), aff'd (1999), 46 O.R. (3d) 54 (C.A.), leave to appeal refused, [2000] S.C.C.A. No. 96 (QL)), the defendant's corporate officer was found personally liable for negligent misstatements made while acting only in his role as an officer because of the direct relationship between him and the plaintiff bank.

## **PART V – LEGAL ANALYSIS**

### **1. Did the defendants make one or more fraudulent misrepresentations to the plaintiff regarding the authenticity, title or value of the Painting?**

It is submitted that the evidence set out in Part II above firmly establishes the elements of fraudulent misrepresentation:

- (a) “a statement known to be false or not caring whether it is true or false”: the defendants represented to the plaintiff that the Painting was an authentic Norval work with good title, a valuable investment, and that it was worth approximately what she paid for it, even though they knew or failed to heed any of the clear signs that Painting was fake and/or that it had a serious cloud on title;
- (b) “which induces the plaintiff to enter into a contract”: the plaintiff clearly purchased the painting because she was led to believe that it was by Norval, and represented a good investment of the type she was seeking.

### **2. Did the defendants deceive the Plaintiff in selling her the Painting?**

In the alternative, it is submitted that all of the elements of deceit are proven by the facts set out in Part II above.

- (a) “a false statement actively concealed”: the defendants fully knew that the Painting was a fake or, at the very least, that it had a significant cloud on title, but they failed to reveal these facts, even when asked by the plaintiff about the Painting’s provenance;
- (b) “knowledge of the falsity, or recklessness as to the statement’s truth or falsity”: either the defendants knew the Painting was a fake, or at the very least, that it had a significant cloud on title, or they recklessly and actively ignored every “red flag” that this was the case, such as the call from Vadas, the letters from Norval’s lawyers, knowledge of McLeod’s implication as a seller of fakes, the controversy about fakes, etc., and fabricated unsubstantiated justifications for maintaining their claim that it was authentic, without a cloud on title, and valuable;
- (c) “intent by the maker of the statement that the party to whom it was made act or rely upon it”: the defendants’ website



representations regarding their reliability, trustworthiness, experience, and the investment value of paintings sold, as well as the statements made on the phone to the plaintiff regarding authenticity, and the defendants' admission that clients could rely on their statements, all indicate that such was the defendants' intention;

(d) "reliance by the plaintiff on the statement made": the plaintiff's evidence was that she believed the defendants' representations, and that she wouldn't have bought the Painting if it hadn't been a good investment;

(e) "damage to the plaintiff as a result of her reliance on the statement": the Painting is worth nothing, so the plaintiff has lost the purchase price (\$10,350.00), the financing cost (\$437.75) as well as what she would have obtained in terms of return on investment (\$14,650.00 – based on a current value of \$25,000.00), for a total of \$25,437.75.

### **3. Did the defendants negligently misrepresent the authenticity, title or value of the Painting to the plaintiff?**

In the further alternative, it is submitted that all of the elements of negligent misrepresentation are proven by the facts set out in Part II above.

(a) "a false statement is negligently made": the defendants falsely stated that the Painting was an authentic, clear-titled and valuable painting by Norval, and the truth of this statement could have been discovered had the defendants acted reasonably in heeding the numerous "red flags" that their own knowledge ought to have raised;

(b) "the person making the statement owes a duty of care to the recipient": the defendants had, through their website, represented themselves as being trustworthy, reliable and experienced, and suggested that "one way" to perform "due diligence" was to deal with them. These representations created a strong, even fiduciary, duty of care in relation to the plaintiff;

(c) "the person making the statement is possessed of special skill or knowledge on the matter in question": the defendants represented themselves as being experienced art dealers;

- (d) “in the circumstances a reasonable person making the statement would know that the recipient is relying on her skill or judgment”: not only did the defendants hold themselves out as being reliable, but when the defendants advised the plaintiff that the provenance of the Painting was supported by two certificates of appraisal, it is clear that the defendants knew that the plaintiff was relying on the statement that the Painting was authentic;
- (e) “there is reasonable reliance on the statement by the recipient”: given the defendants’ representations of their own reliability, trustworthiness, expertise and length of time in the art business, it was reasonable for the plaintiff to rely on their assertions that the Painting was a genuine painting by Norval with clear title and that it was valuable and a good investment;
- (f) “a loss is suffered by the recipient as a result of the reliance”: the Painting is worth nothing, so the plaintiff has lost the purchase price (\$10,350.00), the financing cost (\$437.75) as well as what she would have obtained in terms of return on investment (\$15,000.00), for a total of \$25,787.75.

**4. Did the defendants violate the provisions of the *Sale of Goods Act* in selling the plaintiff the Painting?**

In the further alternative, it is submitted that although the failure to deliver an authentic Norval painting or, at least, to deliver one with a clean title, represents a fundamental breach or, in the alternative, a breach of condition, even if such failure is merely a breach of warranty then the plaintiff is entitled under the *Sale of Goods Act* to claim her “estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty” which, in this case, following the principles laid out in *Wiebe v. Gunderson*, ((2004) BCCA 456, paragraphs 29-40) ought to include her loss of investment opportunity.

**5. Did the defendants innocently misrepresent the authenticity, title or value of the Painting to the plaintiff?**

In the further alternative, it is submitted that all of the elements of innocent misrepresentation are proven by the facts set out in Part II above:

1. "A positive misrepresentation must have been made by the defendant": the defendants represented to the plaintiff that the Painting was an authentic Norval work with good title, a valuable investment, and that it was worth approximately what she paid for it, none of which was true;
2. "Where the defendant owes a fiduciary duty to the plaintiff... failure to disclose material facts may suffice": as mentioned above, the defendants had, through their website, represented themselves as being trustworthy, reliable and experienced, and suggested that "one way" to perform "due diligence" was to deal with them. These representations created a strong, even fiduciary, duty of care in relation to the plaintiff ;
3. "The representation must have been of an existing fact": the representation made was that the Painting was a genuine painting by Norval, from 1979, that it was valuable and that it had a clear title;
4. "The representation must have been made with the intention that the plaintiff should act on it": the statements of reliability, trustworthiness and of the authenticity of the Painting were made in the context of the defendants trying to sell the Painting, and thus were made with the intention that the plaintiff would act on same;
5. "The representation must have induced the plaintiff to enter into the contract": the plaintiff indicated that she wouldn't have bought the Painting were it not a valuable investment, and that she asked, prior to buying it, about the provenance. Clearly, she relied on the defendants' representations;
6. "The plaintiff must have acted promptly after learning of the misrepresentation to disaffirm the contract": the plaintiff, upon hearing that the Painting was a fake, demanded her money back from the defendants, and then, when they would not return it, promptly brought this action;
7. "No innocent third parties must have acquired rights for value with respect to the contract property": the Painting is still in the plaintiff's possession;

8. "It must be possible to restore the parties substantially to their pre-contract position": the defendants could return the purchase price (\$10,350.00), as well as pay the plaintiff's financing cost (\$437.75).

**6. Did the sale of the Painting represent a mistake in the understanding of the parties?**

In the further alternative, it is submitted that all of the elements of mistake are proved by the facts set out in Part II above.

"Each knows the intention of the other and accepts it but each is mistaken about some underlying and fundamental fact": if, acting entirely innocently and reasonably, neither the defendants nor the plaintiff were aware at the time of the sale that the Painting was not what it was represented to be, then there would be a common mistake as to an underlying and fundamental fact about the Painting.

**7. To what remedies is the plaintiff entitled, and in what quantum?**

1. If Fraudulent Misrepresentation: repayment of purchase price (\$10,350.00), repayment of financing cost (\$437.75), compensation for loss of investment (\$14,650.00) = Total: \$25,437.75;
2. If Deceit: repayment of purchase price (\$10,350.00), repayment of financing cost (\$437.75), compensation for loss of investment (\$14,650.00) = Total: \$25,437.75;
3. If Negligent misrepresentation: repayment of purchase price (\$10,350.00), repayment of financing cost (\$437.75), compensation for loss of investment (\$14,650.00) = Total: \$25,437.75;
4. If Sale of Goods Act violated: repayment of purchase price (\$10,350.00), repayment of financing cost (\$437.75), compensation for loss of investment (\$14,650.00) = Total: \$25,437.75;
5. If Innocent Misrepresentation: repayment of purchase price (\$10,350.00) and repayment of financing cost (\$437.75) = Total: \$10,787.75.

## 8. Are punitive damages applicable in this case?

It is submitted that punitive damages are applicable in this case as a result of the outrageous, high handed and highly reprehensible actions of the defendants and their counsel, both in the events that led to this action, as well as in the conduct of the action itself<sup>1</sup>.

It is further submitted that the failure of the defendants to provide the plaintiff with an authentic and clear-titled painting by Norval constituted a fundamental breach of the agreement with the plaintiff, and that the following alternatives (each of which is discussed in this Part V above), if found by this Honourable Court to exist, constitute independent actionable wrongs within the meaning of that requirement in *Whiten v. Pilot Insurance Co.*, (2002 SCC 18):

- (a) Deceit;
- (b) Fraudulent misrepresentation;
- (c) Negligent misrepresentation;
- (d) Breach of the fiduciary duty and/or duty of full and frank disclosure resulting from the representations of expertise, reliability and trustworthiness made by the defendants to the plaintiff.

The quantum of punitive damages is left entirely to the discretion of this Honourable Court to determine in keeping with the guiding principles applicable to awards of punitive damages set out in *Whiten v. Pilot Insurance Co.*, (2002 SCC 18), above.

## 9. Is Donna Child personally liable to the plaintiff?

It is submitted that the fraudulent, deceitful and dishonest behaviour of Donna Child in relation to the plaintiff's purchase of the Painting, which behaviour is detailed in Part II above, satisfies the requirements set out in Part IV above for a finding of personal liability against Donna Child in this case. It is submitted that her direct dealings with the plaintiff, the relationship of trust and reliance promoted by her and the corporate defendant, her dishonesty or reckless disregard for the truth, and the obvious foreseeability of harm to the plaintiff all support such a finding.

---

<sup>1</sup> For the sake of clarity, these comments should not be interpreted to impugn the conduct of the defendants' second counsel in this action, Mr. Brian Shiller, or his firm. Mr. Shiller's conduct was highly professional.

**PART VI – RELIEF SOUGHT**

The relief sought is set out in section 7 of Part V, above.

## PART VII – COSTS

It is submitted that this action has a number of unusual and exceptional aspects which either make it wholly unlike the vast majority of cases heard by this Honourable Court or require this Honourable Court to show its disapproval in the interest of justice. In particular:

- (a) The evidence, including the letter from the defendants to the plaintiff (Exhibit 6), shows that the defendants have never had any issue with buying the Painting back from the plaintiff, but that for a purpose entirely unrelated to her (namely, their action against Ritchie Sinclair) they required her to act as a guinea pig in order to obtain a judgment which could be used to satisfy said purpose. Accordingly, this action is in essence the defendants' action into which the plaintiff was dragged through no fault of her own;
- (b) Although the plaintiff began this action unrepresented, the defendants' and their counsel's refusal to follow the Rules and this Honourable Court's various orders, as well as the legal and factual complexity of the case, required that she obtain legal representation at significant cost;
- (c) As is clear from the nature and facts of this case, the issues at stake are much larger than the plaintiff's personal matter, and have far-reaching implications affecting Canadian national heritage, the Canadian art market, and the historic legacy of one of Canada's most important artists. Given these implications, it was appropriate for the plaintiff to spend a considerable sum of money on deep research and careful organization of the evidence in this matter, a matter of which neither she nor her counsel could (unlike the defendants) be expected to know a great deal prior to this action;
- (d) The defendants have unduly complicated this action and acted unreasonably by, inter alia, acting as described in the plaintiff's June 26, 2011 Written Submissions of the Plaintiff (re: Proposed Testimony of Wilfred "Wolf" Morrisseau) (and which June 26, 2011 submissions are incorporated herein by reference);
- (e) the fraudulent, dishonest and reprehensible lies made by the defendants in order to sell the Painting to the plaintiff;
- (f) the facetious statements made by the defendants and their witnesses during the course of the trial, including, inter alia, Donna

Child's fabrications regarding: (i) whether art can be an investment; (ii) her knowledge of her \$3.2 million claim against Ritchie Sinclair; (iii) her claims that Norval was not competent at the time he signed the declaration (Exhibit 16 at Tab 7); (iv) her completely unfounded statements about Norval's health and addictions designed to explain the lack of source documentation or provenance for the Painting.

- (g) In addition to various motions and other attendances required of the plaintiff in this action, the trial lasted approximately 5 days, with long adjournments in between court dates which required additional preparation time in order for counsel to refresh himself with the material prior to each such day;
- (h) The plaintiff is a retired schoolteacher with a limited and modest income.

A summary of the plaintiff's actual expenditures (and most recent counsel account due) is attached hereto as Schedule "A". It is submitted that the expenditures set out in said summary are very low in relation to the time spent and reasonably required in this matter, and that it is worth noting that the actual time spent far exceeds what was docketed, and what was docketed was significantly discounted. To be specific, the total docketed hours performed in this matter are 222.78, and total hours performed are in excess of 300 (without travel time), and, by the plaintiff's best estimate, the total amount billed for items not included within the various costs orders already made by this Honourable Court is \$36,445.00 (inclusive of taxes). Ultimately, plaintiff's counsel charged the plaintiff less than \$130.00 per hour worked.

Jonathan Sommer was called to the bar in 2000. His regular hourly rate for normal small claims matters is \$250.00, and for all other matters, \$300.00.

Considering the above, it is submitted that the following costs consequences ought to be awarded in each of the following scenarios:

1. Complete or significant victory for the plaintiff: the Court ought to exercise its discretion, in exceeding the limit set out in s.29 of the *Courts of Justice Act* to award the plaintiff all or most of her actual costs on the basis that the court considers it necessary in the interests of justice to penalize the defendants for their unreasonable behaviour in this proceeding;



2. Mixed result for the plaintiff: the same result as is requested for #1 above, on the same basis;
3. Victory for the defendants: no costs should be awarded, in recognition of, and as punishment of the defendants for, the facts set out in this part's subsections (a)-(f) above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24<sup>th</sup> DAY OF JUNE, 2012.

### AUTHORITIES CITED

1. Waddams. *The law of Contract* (5th Ed). Para. 415, 427-428
2. *Wiebe v. Gunderson*, 2003 BCSC 1282 (CanLII), <<http://canlii.ca/t/56k7>> retrieved on 2012-06-22, paragraphs 194-198
3. Osborne. *The Law of Torts* (4th Ed.). Irwin Law, 2011, pages 176-187
4. *Sale of Goods Act*, R.S.O. 1990, c. S.1, s.15 & 52 (sections reproduced in text above)
5. *Kingu v. Walmar Ventures Ltd.*, 1986 CanLII 142 (BC CA), at pages 6 & 7
6. *Seppanen v. Seppanen*, (1991) CanLII 1874 (BC SC), <<http://canlii.ca/t/1crnb>> retrieved on 2012-06-22, at pages 3 and 4
7. *Wiebe v. Gunderson*, 2004 BCCA 456, paragraphs 29-40
8. *Whiten v. Pilot Insurance Co.*, (2002 SCC 18)
9. *Scotia Macleod Inc. v. Peoples Jewellers Inc.* ((1995), 26 O.R. 3d 481 (C.A.))
10. *ADGA Systems International Ltd. v. Valcom Ltd.* (1999) 43 O.R. (3d) 101 (C.A.)
11. *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* ([1992] 3 S.C.R. 299)
12. *NBD Bank, Canada v. Dofasco Inc.* ((1997), 34 B.L.R. (2d) 209 (Ont. Gen. Div.), aff'd (1999), 46 O.R. (3d) 54 (C.A.), leave to appeal refused, [2000] S.C.C.A. No. 96 (QL))