In the Court of Appeal of Alberta

Citation: Brown v Sprague, 2025 ABCA 41

Date: 20250207
Docket: 2303-0169AC
Registry: Edmonton

Between:

Chad Brown

Appellant

- and -

Earl Sprague, Sprague-Rosser Contracting Co. Ltd. and 561845 Alberta Ltd., amalgamation successor of Canar Rock Products Ltd. (also previously known as 398739 Alberta Ltd.) and Sprague Transport Ltd.

Respondents

The Court:

The Honourable Justice Thomas W. Wakeling
The Honourable Justice William T. de Wit
The Honourable Justice Karan M. Shaner

Memorandum of Judgment of The Honourable Justice William T. de Wit and The Honourable Justice Karan M. Shaner

Memorandum of Judgment of The Honourable Justice Thomas W. Wakeling Concurring in the Result

Appeal from the Decision by
The Honourable Justice M. Kraus
Dated the 26th day of July, 2023
(Docket: 0903 05113)

Memorandum of Judgment

The Majority:

[1] This is an appeal of a trial judgment dismissing the appellant's claim against the respondents for breach of contract.

[2] We have read our colleague's reasons and agree with his disposition of this appeal, but we reach our conclusion on a narrower basis.

[3] We also agree with the background facts set out in detail by our colleague and we will not repeat them here.

[4] The appellant relied on a written agreement titled "Offer of Employment and Commitment to Key Employee" to found his claim at trial. The trial judge concluded the agreement was void for uncertainty. Specifically, at the time the parties entered into the agreement, it did not contain the essential terms of subject matter and price.

[5] The appellant has not demonstrated an overriding and palpable error in the trial judge's finding that the parties had not agreed to essential contractual terms when they entered into the agreement. On the contrary, the trial judge's conclusion that the agreement is void for uncertainty is firmly supported by both the evidence and the law. There is no basis to support appellate intervention on this point. This is a sufficient basis to dismiss the appeal and we do so; however, we will address our colleague's remarks respecting the issue of the appellant's failure to discharge his fiduciary duty as a lawyer.

[6] The trial judge found that the appellant failed to establish that his client, Mr. Sprague, was free from the undue influence of the appellant, and that he failed to establish that Mr. Sprague was adequately advised to seek independent legal advice. Relying on this Court's decision in *Hudye Inc v Rosowsky*, 2022 ABCA 279, the trial judge found the facts established there was a breach of fiduciary obligations, which formed an additional basis for concluding the agreement was not enforceable. Notably, the trial judge made adverse credibility findings against the appellant and rejected his evidence about whether he advised Mr. Sprague to obtain independent legal advice, as well as the appellant's version of the circumstances under which the agreement was signed.

[7] The appellant argues the trial judge erred in making these findings.

[8] Our colleague's reasons address the appellant's argument respecting the discharge of his fiduciary duties. We agree with his conclusions that the trial judge properly concluded a lawyer-client relationship is a fiduciary relationship; the appellant owed a fiduciary duty to the respondents as their legal counsel; and the appellant did not discharge the fiduciary duties, rendering the

agreement unenforceable. However, we do not endorse the hypothetical examples and summary of general statements of law set out in paragraphs 109 to 141 in section VI (C) of our colleague's reasons.

Appeal heard on October 29, 2024

Memorandum filed at Edmonton, Alberta
this 7th day of February, 2025

de Wit J.A.

Shaner J.A.

Wakeling, J.A. (concurring in the result):

I. Introduction

[9] This is an appeal of a judgment pronounced after a fourteen-day trial dismissing the appellant's claim against the respondents for breach of specific express terms of a contract.[1]

[10] It requires consideration of the nature of the fiduciary duties that a lawyer who does business with a client bears.

II. Questions Presented

[11] Chad Brown sued Earl Sprague, Sprague-Rosser Contracting Co. Ltd., and Canar Rock Products Ltd. for breach of an employment contract set out in a document entitled "Offer of Employment and Commitment to Key Employee".[2]

[12] Mr. Brown no longer seeks a remedy against Sprague-Rosser Contracting, his former employer. It went bankrupt in 2014 and has no assets.[3]

[13] It was common ground that the "Offer of Employment and Commitment to Key Employee" contained an offer by Sprague-Rosser Contracting to employ Mr. Brown as its vice-president of finance and general counsel and that Mr. Sprague signed it on behalf of the respondents on March 19, 2008.[4]

[14] It was also common ground that for a considerable period before Mr. Sprague signed the employment agreement on behalf of Sprague-Rosser Contracting, Canar Rock Products and himself, the McLennan Ross LLP law firm represented Sprague-Rosser Contracting, as well as Canar Rock Products, the sole shareholder of Sprague-Rosser Contracting, and Mr. Sprague, the principal shareholder of Canar Rock Products.[5]

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[1] Appellant's Extracts of Key Evidence 45. The judgment ordered the respondents to pay Mr. Brown $37,500 in damages for constructive dismissal. This was not an express term of Mr. Brown's employment agreement. Neither Mr. Brown nor the respondents contest this part of the judgment.

[2] Statement of Claim. Appeal Record 11.

[3] Oral Judgment. Appeal Record 86:25-26.

[4] Id. 83:11-13 & 113:22-25.

[5] Amended Statement of Defence, ¶ 2. Appeal Record 64.

[15] It was also agreed that for roughly the same period McLennan Ross employed Mr. Brown as an associate and assigned him to provide legal advice to Mr. Sprague, Sprague-Rosser Contracting, and Canar Rock Products.[6]

[16] The defendants pleaded that Mr. Brown was the lawyer for each of the defendants and did not discharge the obligations that he bore as their lawyer and as a fiduciary[7] and that the employment agreement is of no legal force.[8]

[17] Mr. Brown contests the defendant's right to rely on this defence. Mr. Brown argues that it was not raised in their pleadings.

[18] A litigant cannot derive an advantage from a defence not pleaded.

[19] Did the respondents plead breach of fiduciary duties?

[20] If the respondents pleaded breach of fiduciary duty and I take into account all the trial judge's findings of fact except those based on Mr. Sprague's evidence relating to his March 19, 2008 meeting with Mr. Brown – in essence, Mr. Brown told Mr. Sprague that Mr. Brown was his lawyer and Mr. Sprague did not need independent legal advice – and proceed on the basis that Mr. Jessamine had authority to negotiate on behalf of the respondents,[9] did Mr. Brown discharge the obligations imposed on him as a fiduciary?

[21] What obligations does the common law, equity and the Code of Conduct[10] impose on a lawyer who does business with a client?

[22] Mr. Brown testified that in the two-day period preceding the day Mr. Sprague signed his employment agreement he never told Mr. Sprague that he should get independent legal advice.[11]

[23] The trial judge held that Mr. Brown never recommended that the respondents retain independent legal counsel.[12]

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[6] Oral Judgment. Appeal Record 85:36-37, 86:3-6 & 87:15-19. See Transcript 102:23-40 & 134:16-33.

[7] In the lawyer-client relationship, the lawyer is the fiduciary and the client is the beneficiary.

[8] Amended Statement of Defence, ¶ 27. Appeal Record 70.

[9] There was evidence to support the conclusion that Mr. Sprague authorized Mr. Jessamine to negotiate the employment agreement on behalf of himself, Canar Rock Products, and Sprague-Rosser Contracting. Transcript 799:9-36, 1034:11-19; 1038:15-17, 1041:10-1042:10 & 1047:3-13.

[10] The Law Society of Alberta, Code of Conduct (2024).

[11] Transcript 145:18-30 & 1274:31-32.

[12] Id. 109:12-15, 109:27-28 & 109:41-110:12.

[24] If I decide that Mr. Brown did not discharge his fiduciary duties with respect to Mr. Sprague or Canar Rock Products, are the provisions of the employment agreement that impose obligations on Mr. Sprague and Canar Rock Products unenforceable?

[25] If I decide that Mr. Brown discharged his fiduciary duties to Mr. Sprague and Canar Rock Products, did Justice Kraus err in deciding that some provisions in Mr. Brown's employment agreement were too uncertain to be enforceable?

[26] If Mr. Brown's employment agreement contains only enforceable provisions, did Sprague-Rosser Contracting, the employer, breach the agreement?

[27] Did the trial judge err in finding that Sprague-Rosser Contracting did not breach the employment agreement when it failed to pay Mr. Brown a bonus for the year ending October 31, 2008 of approximately $300,000 and that Mr. Sprague breached the employment agreement by failing to transfer shares in Canar Rock Products valued at approximately $1,140,000 on October 1, 2008?

[28] Did the trial judge err in failing to award Mr. Brown damages of $75,000, the amount under the employment agreement due to Mr. Brown on termination without cause of his employment?

[29] If Sprague-Rosser Contracting breached Mr. Brown's employment agreement, are either Mr. Sprague or Canar Rock Products or both of them responsible for the damages Mr. Brown suffered on account of the breaches of Sprague-Rosser Contracting?

III. Brief Answers

[30] The respondents' amended statement of defence, without question, pleaded facts that underlie the defences of breach of fiduciary duty and undue influence.[13] The appellant must have known that the respondents relied on these defences and that the resolution of these defences was of paramount importance in the litigation.

[31] A lawyer who does business with a client has onerous fiduciary duties.

[32] In order to establish compliance with his or her fiduciary duties, a lawyer must be able to establish either or both of two distinct conditions.

[33] The main component of the first condition requires the lawyer to prove that the client confirmed to the lawyer that the client retained independent counsel to advise about the legal aspects of the proposed transaction.

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[13] Amended Statement of Defence, ¶¶ 2 & 7-11. Appeal Record 64-67.

[34] If a lawyer cannot prove the facts that support the first condition, a lawyer must, in order to meet the second condition, explain to the client why it is in the client's best interests to retain independent counsel, urge the client to do so, and provide the client with the information the client would have received had the client retained independent counsel.

[35] Even if I disregard Mr. Sprague's evidence – on March 19, 2008 Mr. Brown told him that Mr. Brown was his lawyer and it was not necessary for him and the other respondents to retain independent counsel – and proceed on the basis that Mr. Jessamine had authority to negotiate the employment agreement on behalf of the respondents, Mr. Brown did not meet the high bar governing a lawyer who does business with a client.

[36] Mr. Brown did not prove that the respondents informed him that they retained independent legal counsel.

[37] Nor did Mr. Brown prove the facts necessary to successfully invoke the second condition. He never adequately explained to the respondents why it was in their best interests to retain independent legal counsel and urged them to do so in a timely manner. Justice Kraus held that Mr. Brown never recommended to Mr. Sprague that the respondents retain independent legal counsel. In addition, Mr. Brown never brought to Mr. Sprague's attention, after the terms of the employment agreement were finalized, the burdens he bore if other parties to the employment agreement failed to honor their commitments.

[38] Mr. Brown breached his fiduciary duties to the respondents. As a result, the employment agreement that Mr. Brown seeks to enforce against Mr. Sprague and Canar Rock Products is voidable at the respondents' option. This means that there is no foundation for any claim Mr. Brown has against Mr. Sprague or Canar Rock Products.

IV. Statement of Facts

A. Mr. Brown's Lawsuit

[39] On April 8, 2009 Mr. Brown filed his statement of claim against Mr. Sprague, Sprague-Rosser Contracting, and Canar Rock Products alleging breach of his employment agreement.[14] He sought damages "in an amount not less than $1,875,000".[15]

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[14] Appeal Record 11.

[15] Statement of Claim, ¶ 44(a). Appeal Record 19.

[40] On May 8, 2009 the defendants filed a statement of defence and counterclaim.[16] In their statement of defence the respondents alleged that Mr. Brown was their lawyer and had never advised them to obtain independent legal representation relating to the employment agreement.[17]

[41] Roughly ten years later the respondents discontinued their counterclaim.[18]

[42] On May 25, 2009 Mr. Brown filed a reply and statement of defence to counterclaim.[19] He asserted that he advised Mr. Sprague to obtain independent legal counsel and that Mr. Sprague did obtain independent legal advice.[20]

[43] At the start of the trial, on December 11, 2019 Mr. Brown filed an amended statement of claim.[21] He reduced his damages claim to "an amount not less than $1,315,000.00".[22]

[44] That same day, the respondents filed an amended statement of defence.[23] The key paragraphs are set out below:

> 9. The Defendant Sprague and the Defendant Canar state that Brown was the solicitor for each of the Defendants at the time ... [Brown's employment agreement] was negotiated and executed. Brown had an interest, financial or otherwise, in the ... [employment agreement]. Brown owed the Defendants and each of them a duty, fiduciary or otherwise, to ensure that the Defendants' agreement to the ... [employment agreement] was not subject to undue influence by ensuring the Defendants were fully informed, the negotiations were honestly conducted and that the transaction was fair and just and in no way disadvantageous to his clients. Further, Brown's duty to the Defendants included ensuring that the clients were freed from Brown's influence and entered into the ... [employment agreement] on the basis of full information and acting solely of their own free will and independent will.
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> 10. ... [Mr. Brown's employment agreement] was the result of undue influence as Brown failed to meet or breached the aforementioned duty, fiduciary or otherwise,

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[16] Appeal Record 21 & 29.

[17] Statement of Defence, ¶ 8. Appeal Record 23.

[18] Discontinuance of Counterclaim. Appeal Record 53.

[19] Appeal Record 32.

[20] Reply and Statement of Defence to Counterclaim, ¶ 5(c). Appeal Record 34.

[21] Appeal Record 54.

[22] Amended Statement of Claim, ¶ 44(a). Appeal Record 63.

[23] Appeal Record 64.

> to the Defendants as the Defendants, or any of them, did not have independent legal advice nor were they afforded a reasonable opportunity to obtain the same, the Defendants were not fully informed as to their legal rights and obligations in the agreement and the transaction was neither fair nor just and it was disadvantageous to the Defendants or any of them.
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> 11. Further, the Defendants Sprague and the Defendants Canar, or either of them, were subject to Brown's undue influence as they were not placed in a position to act meaningfully, voluntarily, and with independent and informed judgment.

[45] Justice Krause dismissed Mr. Brown's action for the enforcement of the employment agreement.[24] He did so for these reasons:[25]

> [T]he [employment] Agreement … [is] not enforceable in part because the Plaintiff failed to advise the Defendants to seek independent legal advice and because the Plaintiff breached his fiduciary duty in pressuring Mr. Sprague to sign the [employment] Agreement in unfair and disadvantageous circumstances. Further … , the [employment] Agreement … [is] unenforceable because its terms … [are] uncertain.

[46] The trial judge allowed Mr. Brown's claim for constructive dismissal and awarded him a sum equal to his salary for a three-month period less any earnings from other sources during this period.[26]

B. Mr. Brown's Appeal

[47] On August 21, 2023 Mr. Brown filed a notice of appeal. He appealed the whole of the judgment, including the quantum of damages awarded for constructive dismissal.

[48] Mr. Brown's factum did not address the part of the judgment awarding him damages of $37,500 for constructive dismissal. I proceed on the basis that he abandoned this part of the appeal.

C. The Events Surrounding the Execution of Mr. Brown's Employment Agreement

[49] McLennan Ross LLP employed Mr. Brown from 2000 to 2008.[27]

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[24] Oral Judgment. Appeal Record 131:40.

[25] Id. 131:26-30.

[26] Id. 129:16-19.

[27] Id. 83:5-6 & 85:36-37.

[50] While at McLennan Ross, Mr. Brown acted for Sprague-Rosser Contracting.[28]

[51] Mr. Brown developed a friendship and working relationship with Jeff Jessamine, the general manager of Sprague-Rosser Contracting.[29]

[52] In late 2007 Messrs. Jessamine and Brown discussed the possibility that Mr. Brown would leave McLennan Ross and work for Sprague-Rosser Contracting.[30] The trial judge concluded that Mr. Brown was ready to move on from McLennan Ross and that Mr. Jessamine viewed Mr. Brown as a valuable ally and partner in taking over and running Sprague-Rosser Contracting.[31]

[53] After those discussions in late 2007, Mr. Brown told McLennan Ross not to consider him for partnership.[32] He wanted to explore the possibility of joining Sprague-Rosser Contracting.[33]

[54] Even though Mr. Jessamine negotiated the terms of Mr. Brown's employment agreement,[34] Mr. Brown understood that Mr. Sprague had the final word.[35]

[55] Justice Kraus never held that Mr. Jessamine had authority to negotiate on behalf of Mr. Sprague and Canar Rock Products. Nonetheless I will proceed on the assumption that Mr. Jessamine did have the authority.[36] But there is no evidence that Mr. Jessamine had the authority to sign the employment agreement on behalf of the respondents. And he did not. Mr. Sprague signed on behalf of the respondents.

[56] Most of the negotiations took place after March 7, 2008.[37]

[57] Mr. Brown was on vacation from February 29 to March 7, 2008.[38]

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[28] Id. 83:7-9.

[29] Id. 87:15-19.

[30] Id. 85:23-25 & 87:4-19.

[31] Id. 87:29-31.

[32] Id. 87:33-34.

[33] Id. 87:33-35.

[34] Id. 88:6-8.

[35] Id. 111:19-21.

[36] There was evidence to support the conclusion that Mr. Sprague authorized Mr. Jessamine to negotiate the employment agreement on behalf of himself, Canar Rock Products, and Sprague-Rosser Contracting. Transcript 799:9-36, 1034:11-19, 1038:15-17, 1041:10-1042:10 & 1047:3-13.

[37] Oral Judgment. Appeal Record 87:38-41.

[38] Id. 87:40-41.

[58] Mr. Sprague was in Mexico from February 27 until March 16, 2008.[39]

[59] Mr. Brown prepared the first draft of the employment agreement between March 7 and 11, 2008.[40] He forwarded the first draft to Mr. Jessamine on March 13, 2008.[41]

[60] Between March 13 and 19, 2008, Messrs. Brown and Jessamine exchanged a number of emails about the draft. [42]

[61] Neither of them provided any of these drafts to Mr. Sprague.[43]

[62] On March 17, 2008 Mr. Jessamine's personal lawyer reviewed the draft employment agreement to ensure that it would not adversely affect Mr. Jessamine's interests.[44] Counsel advised Mr. Jessamine that he only acted for Mr. Jessamine personally and could not provide advice to Mr. Sprague, Sprague-Rosser Contracting or Canar Rock Products.[45] The trial judge held that Mr. Brown knew this.[46]

[63] On March 18, 2008 Messrs. Sprague, Jessamine and Brown met at McLennan Ross's office to discuss the termination of a Sprague-Rosser Contracting employee.[47] Following that meeting, Messrs. Sprague and Jessamine went to Earl's Tin Palace to discuss Mr. Brown's prospective employment with Sprague-Rosser Contracting. The trial judge held that Messrs. Brown and Jessamine "outlined the *basics* of the employment agreement to Mr. Sprague".[48] They did not provide him with a copy of the unfinished draft employment agreement.[49] Mr. Brown testified that during the negotiations he never explained to Mr. Sprague in person or on the telephone the "specific" terms of the contract.[50]

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[39] Id. 87:38-39.

[40] Id. 87:41-88:1.

[41] Id. 88:3-4.

[42] Id. 88:6-7 & 110:28-32.

[43] Id. 88:6-8.

[44] Id. 88:11-13.

[45] Id. 88:16-19.

[46] Id. 88:15-17. See Transcript 122:2-14

[47] Id. 88:17-22.

[48] Id. 88:25-26 (emphasis added). See Transcript 808:27-809:16

[49] Id. 88:21-28.

[50] Transcript 140:9-16 ("Q … [D]uring the course of negotiating the offer of employment … , did you at any time meet with Earl [Sprague] to explain to him the specific terms of the agreement? A No. Q … [D]id you at any time talk to Earl [Sprague] on the phone and explain to him the express terms of the agreement? A No").

[64] Mr. Brown, in questioning, acknowledged that he did not recommend to Mr. Sprague at the Earl's Tin Palace meeting on March 18, 2008 or at any time in the March 17 to 19 period that he retain independent counsel to review the employment agreement.[51]

[65] Although Messrs. Sprague, Jessamine, and Brown all agreed that Mr. Sprague signed the employment agreement on March 19, 2008, they disagreed about the circumstances that preceded Mr. Sprague's execution of the employment agreement on March 19, 2008.

[66] Mr. Brown could not remember where and when he signed the employment agreement.[52] His evidence was that Mr. Jessamine had arranged for Mr. Sprague's signature.[53] According to Mr. Brown, he and Mr. Jessamine had negotiated changes on March 18 and 19. On March 19, 2008 Mr. Brown emailed two different "final" versions of the employment agreement to Mr. Jessamine – not Mr. Sprague.[54] Between the first and second final versions Mr. Brown sent out, he emailed Mr. Sprague indicating that he wanted to get the deal done that day – March 19, 2008.[55] In reply, Mr. Sprague expressed concern about taxes.[56] This email, according to Mr. Brown, prompted him to conclude that someone had advised Mr. Sprague about the employment agreement.[57] Mr. Brown testified that Mr. Jessamine advised him later in the day at Joey's restaurant that Mr. Sprague had signed the employment agreement. It was Mr. Brown's evidence that Mr. Jessamine gave Mr. Brown a single signed copy of the employment agreement when they were at Joey's restaurant.[58]

[67] Mr. Brown testified that he advised Mr. Sprague to seek independent legal advice twice. The first was in September or October 2007.[59] Mr. Brown acknowledged that this exchange

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[51] Oral Judgment. Appeal Record 88:30-33 & 109:6-10.

[52] Id. 88:41-89:1 & 110:23.

[53] Id. 89:1.

[54] Id. 110:28-33.

[55] Id. 110:38-111:4.

[56] Id. 111:6-9.

[57] Id. 111:35-38.

[58] Id. 111:41-112:2.

[59] Id. 108: 18-19.

preceded the commencement of serious negotiations.[60] The second was after Mr. Sprague returned from Mexico – which was March 16, 2008.[61]

[68] Mr. Sprague's evidence contradicted Mr. Brown's evidence. Mr. Sprague testified that he met with Messrs. Brown and Jessamine at McLennan Ross on March 18 to discuss the termination of a Sprague-Rosser Contracting employee.[62] They did not discuss the prospects of Mr. Brown joining Sprague-Rosser Contracting at that meeting. Mr. Brown did not want to discuss coming to work at Sprague-Rosser Contracting while at McLennan Ross.[63] They went to Earls Tin Palace.[64]

[69] Mr. Sprague testified that he did not review the draft of the employment agreement at that time.[65] The employment agreement had not been finalized and he did not have his glasses with him. He expressly denied that Mr. Brown told him to get independent legal advice.[66] Mr. Jessamine also testified that the question of independent legal advice did not arise at the March 18, 2008 Earls Tin Palace meeting.[67]

[70] Mr. Sprague testified that did not see[68] Mr. Brown's employment agreement until Mr. Brown brought an unsigned copy to his office on March 19, 2008.[69] Mr. Brown, he said, pressured him to sign the employment agreement.[70] He also testified that he questioned Mr. Brown about the need for independent advice.[71] Mr. Brown, he said, asked him not to consult McLennan Ross.[72]

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[60] Transcript 18:8-16 ("A … One thing I … indicated to both Jeff and Earl at the [Century Grill] meeting is … if we're going to be entering into some kind of negotiations about me joining you … that would be a conflict of interest … . I'm your lawyer and out interests would no longer align and so with respect to that, you would need to get independent legal advice. … But we were so far at that point away from an agreement that it wasn't like we were making arrangements. I was just saying, look … if we're going to go this route … it's just something we're going to have to consider").

[61] Oral Judgment. Appeal Record 108:22-27 & 108:34-36.

[62] Id. 108:36-37.

[63] Id. 108:38-39

[64] Id. 108:36-39.

[65] Id. 109:1-3.

[66] Id.

[67] Id. 109:5-6

[68] Id. 112:22-23.

[69] Id. 88:39-40, 110:21 & 112:22-24.

[70] Id. 112:7-9.

[71] Id. 112:13.

[72] Id. 112:15-16.

Mr. Brown did not want McLennan Ross to find out he was leaving yet.[73] Mr. Sprague also said he could have his former lawyer or a relative who was a judge review the agreement.[74] Mr. Brown objected. He could not wait that long.[75] Mr. Brown, according to Mr. Sprague, told him that he was Mr. Sprague's lawyer and that he could not advise him to act contrary to his best interests.[76] For this reason, Mr. Sprague did not have another lawyer review Mr. Brown's employment agreement.[77]

[71] Mr. Jessamine testified that he never gave a copy of the employment agreement to Mr. Sprague to be signed or had in his possession a copy of the signed employment agreement.[78] Mr. Jessamine stated that he was not present when Mr. Sprague signed the employment agreement.[79] He acknowledged meeting with Mr. Brown at Joeys on March 19, 2008, first for lunch and then later to celebrate. Mr. Jessamine testified that he did not give the signed agreement to Mr. Brown on either occasion.[80]

[72] All the witnesses agreed that Mr. Sprague signed the employment agreement on March 19, 2008 and that Mr. Brown did not email it to Mr. Sprague.[81]

[73] Justice Kraus believed Mr. Sprague's version of events.[82] He found that his evidence was more credible and more consistent with the evidence than Mr. Brown's.[83]

[74] Justice Kraus disbelieved Mr. Brown's evidence that he did not attend Mr. Sprague's office on March 19, 2008.[84]

[75] Justice Kraus concluded that Mr. Brown never recommended that Mr. Sprague or any of the other respondents seek independent legal advice.[85] The trial judge found that Mr. Brown's

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[73] Id. 112:13-16.

[74] Id. 112:16-17.

[75] Id. 112:18.

[76] Id. 112:18-20.

[77] Id.

[78] Id. 89:1-3.

[79] Id. 113:6-8.

[80] Id. 113:13-16.

[81] Id. 113:22-24.

[82] Id. 113:27.

[83] Id. 113:27-48.

[84] Id. 114:18-21.

[85] Id. 109:12-15, 109:27-28 & 109:41-110:3.

evidence was vague and unsupported.[86] Unlike other instances where Mr. Brown had documented conversations, he had not done so in relation to advising Mr. Sprague to obtain independent legal advice.[87]

[76] Justice Kraus was skeptical about whether the first instance that Mr. Brown referred to even occurred.[88] Messrs. Sprague and Jessamine denied that this meeting ever occurred.[89] In any event, Justice Kraus concluded that if this meeting did take place, it was early in the process and it was general in its discussion.[90]

[77] The second alleged instance where Mr. Brown advised Mr. Sprague to get independent legal advice was sometime after Mr. Sprague had returned from Mexico – March 17, 2008 or later. Mr. Brown did not recall the specific date.[91] Mr. Brown's evidence was that Messrs. Sprague and Jessamine, while in a McLennan Ross board room, pressured him to come to Sprague-Rosser. In response, Mr. Brown indicated he would not come over without an employment contract and that they would need independent legal advice on any such agreement.[92] Mr. Brown testified that he started drafting the employment agreement as soon as he returned to his residence and emailed the first draft to Mr. Jessamine a few days later.[93]

[78] Justice Kraus found that it was Mr. Brown's onus to demonstrate that he advised Mr. Sprague and Canar Rock Products to seek independent legal advice. The trial judge held that he had not done so.[94]

[79] Mr. Brown commenced employment with Sprague-Rosser Contracting on May 1, 2008 and his employment continued until November 10, 2008.[95]

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[86] Id. 108:5-8.

[87] Id. 108:6-8.

[88] Id. 108:14.

[89] Id. 108:11-12.

[90] Id. 108:14-20. See Transcript 18:14-15 ("A … But we were so far at that point from an agreement that it wasn't like we were making arrangements").

[91] Oral Judgment. Appeal Record 108:22-24.

[92] Id. 108:24-27.

[93] Id. 108:30-32.

[94] Id. 109:12-15, 109:27-28 & 109:41-110:12.

[95] Id. 85:38-40.

V. Important Provisions of the Offer of Employment and Commitment to Key Employee

[80] The important provisions of the Offer of Employment and Commitment to Key Employee are set out below:[96]

> Preamble:
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> ...
>
> C. Brown, prior to negotiating the terms of this Offer of Employment and Commitment to Key Employee ("the Agreement"), advised The Sprague Group that any negotiation concerning the proposed position would represent a conflict of interest given his position as barrister and solicitor with the law firm of McLennan Ross and his capacity as legal counsel to The Sprague Group;
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> D. As a result of the possible conflict of interest, The Sprague Group agrees that they have been given the opportunity to engage independent legal representation and that this Agreement is fair and reasonable to The Sprague Group in all material respects;
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> ...
>
> J. Further, Sprague has decided to retire over the next five years from the business of ... [Sprague-Rosser Contracting], and as a result, divest himself of his interest in ... [Sprague-Rosser Contracting] (through Canar) through a succession plan being developed by the law firm of McLennan Ross LLP (the "Succession Plan");
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> K. The Sprague Group acknowledges that Brown has provided no legal direction or advice concerning the Succession Plan, although acknowledges that Brown has been privy to the development of the Succession Plan by Raymond Hupfer ("Hupfer") at McLennan Ross, with their consent;
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> L. The Succession Plan proposes that certain key employees of ... [Sprague-Rosser Contracting] shall, over the next five years, purchase all shares in ... [Sprague-Rosser Contracting] through the Succession Plan as developed by Hupfer. The key employees are: Jeff Jessamine, Matt MacKay, Dan Edwards, and Brent Poirier (collectively the "Key Employees");

[96] Appellant's Extracts of Key Evidence 45-48 (capitalization of headings has been removed).

M. As of November 1, 2007, The Sprague Group has agreed to sell to the Key Employees a certain number of shares of ... [Sprague-Rosser Contracting] as set out in the Succession Plan to be developed by Hupfer. The particular manner in which the shares of ... [Sprague-Rosser Contracting] will be transferred to the Key Employees is not yet determined; and,

N. In recognition of Brown leaving a successful legal practice to join the business ... [Sprague-Rosser Contracting], The Sprague Group has agreed to include Brown in the group of Key Employees, and further agreed that Brown will receive shares of ... [Sprague-Rosser Contracting], the particulars of which are set out below.

...

Specific Terms:

...

2. Brown will be included in the Key Employees and will be entitled to purchase, as of November 1, 2007, 5% of the issued and outstanding voting shares in ... [Sprague-Rosser Contracting] as defined in the Succession Plan;

3. Further, Brown will have the option to purchase or otherwise acquire a further 5% (for a total of 10%) of the issued and outstanding voting shares in ... [Sprague-Rosser Contracting]. The terms upon which Brown will be entitled to purchase those further shares will be defined in the Succession Plan, but in any event, no later than the conclusion of the Succession Plan when 100% of the voting shares in ... [Sprague-Rosser Contracting] are sold;

...

9. In addition to the salary paid to Brown under paragraph 1, above, Brown will receive employee benefits, perquisites, vacation time, and bonuses as an employee of ... [Sprague-Rosser Contracting] commensurate with the Key Employees giving regard to his share holdings and contribution to the business of ... [Sprague-Rosser Contracting];

10. Further, Brown will be treated fairly and in good faith and in a manner consistent with the other Key Employees during conclusion of the Succession Plan and settling terms of any Unanimous Shareholder Agreement;

11. In the event that ... [Sprague-Rosser Contracting] elects to terminate Brown’s employment, other than for cause, Brown will be entitled to a minimum 6

> months pay in lieu of notice, which will be due and payable at the date of termination. In addition to the 6 months pay in lieu of notice, Brown shall be entitled to any further or other notice, or pay in lieu notice, that he is entitled to according to Alberta law based upon services provided to ... [Sprague-Rosser Contracting] in his capacity as Vice President Finance & Administration;
>
> ...
>
> Standard Terms:
>
> ...
>
> 17. If any covenant or agreement is made by more than one party it shall be considered joint and several and any default by one joint covenantor shall be deemed a default by all covenantors;

VI. Analysis

A. Pleadings Play a Vital Role in Civil Procedure

[81] "Pleadings play a fundamental role in civil procedure".[97]

[82] From the judicial perspective, their most important function is to define the issues the court must decide. Pleadings that discharge this role give "adverse parties fair notice of the case against them".[98]

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[97] *Knelsen Sand & Gravel Ltd. v. Harco Enterprises Ltd*, 2021 ABCA 385, ¶ 97; 77 C.P.C 8th 243, 271. See also *Anglin v. Resler*, 2024 ABCA 113, ¶ 225; 69 Alta. L.R. 7th 171, 282 per Wakeling, J.A. ("In Alberta, as elsewhere in the common law world, pleadings play a vital role in the dispute resolution process"); *PetroFrontier Corp v. Macquarie Capital Markets Canada Ltd*, 2022 ABCA 136, ¶ 22; 84 C.P.C. 8th 295, 324 per Wakeling, J.A. ("pleadings are important") & 2 W. Stevenson & J. Côté, Alberta Civil Procedure Handbook 13.27 (2025) ("Pleadings are of key importance").

[98] *Anglin v. Resler*, 2024 ABCA 113, ¶ 225; 69 Alta. L.R. 7th 171, 281-82 per Wakeling, J.A. (" While other pretrial mechanisms – discoveries for example – may assist in defining the issues, it is beyond question that well drafted pleadings play the leading and indispensable role in defining the issues the court must decide and ensuring that the civil process gives adverse parties fair notice of the case against them"); *AARC Soc'y (Alberta Adolescent Recovery Centre) v. Canadian Broadcasting Corp.*, 2019 ABCA 125, ¶ 55; 449 D.L.R. 4th 208, 233 per Wakeling, J.A. ("the goal of pleadings is to identify the issues that the action presents for judicial resolution") & *Woodlands Enterprises Ltd. v. Int'l Woodworkers of America Local 1-184*, at 3-4 (March 22, 1978 Wakeling) ("Care must be taken to ensure that both sides, as well as the impartial decision maker, understand what is at stake. If the Arbitration Board does not take some time to crystallize the issues, confusion will inevitably mar the proceedings. Relevant points will not leave their mark if the decision maker is unsure of the crucial issues. … Should both sides discharge their howitzers against different targets, an observer will never know which one is the better shot").

[83] This is the case in any common law jurisdiction with which I am familiar.[99]

[99] United Kingdom: *Farrell v. Secretary of State*, [1980] 1 All E.R. 166, 173 (H.L. 1979) per Lord Edmund-Davies ("The primary purpose of pleadings … is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it"); *Al Rawi v. Security Service,* [2010] EWCA Civ 482, ¶ 18; [2010] 4 All E.R. 559, 565, aff'd, [2011] UKSC 34; [2012] 1 All E.R. 1 per Lord Neuberger, M.R. ("a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance, so that the trial can be fairly conducted"); *Domsalla v Barr*, [1969] 1 W.L.R. 630, 634 (C.A.) per Edmund Davies, L.J. ("the basic object of pleadings … is to crystallize the issue so as to enable both parties to prepare for trial, and, indeed, to decide whether they should go to trial at all or rather to seek to compromise their differences, and, if they fail to do that, to guide the defendant on the important matter of payment into court"); *Thorp v. Holdworth*, 3 Ch. D. 637, 639 (1876) per Jessell M.R. ("The whole object of pleadings is to bring the parties to an issue. … [T]he whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay"); United States: *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544, 555-56 (2007) per Souter, J. ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief', in order to 'give the defendant fair notice of what the … claim is and grounds upon which it rests,' … . While a complaint … does not need detailed factual allegations …, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do … . Factual allegations must be enough to raise a right to relief above the speculative level"); Australia: *Banque Commerciale, S.A. v. Akhil Holdings Ltd.*, [1990] HCA 11, ¶ 18; 169 C.L.R. 279, 286 (1990) per Mason, C.J. & Gaudron, J. ("The function of pleadings is to state with sufficient clarity the case that must be met … . In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision") & *Dare v. Pulham*, [1982] HCA 70, ¶ 6; 148 C.L.R. 658, 664 ("Pleadings and particulars have a number of different functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it …; they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial …; and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court"); New Zealand: *High Court Rules 2016*, r. 5.26(b) ("The statement of claim … must give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff's cause of action"); *Price Waterhouse v. Fortex Group Ltd.*, CA 179/98 Nov. 30, 1998 at 17 & 19 (N.Z. Ct. App. 1998) per McGechan, J. ("It has become fashionable in some quarters to regard the pleadings as being of little importance. … Any such view is misguided. Pleadings which are properly drawn and particularised are, in a case of any complexity, if not in all cases, an essential road map for the Court and the parties. …. The pleader and Court simply ask, 'in the circumstances of this claim, is that statement sufficiently detailed to state a clear issue and inform the opposite party of the cause to be met?'. This is not, under modern practice, simply some minimum which a Defendant needs so as to be able to plead. It is intended to supply an outline of the case advanced, sufficient to enable a reasonable degree of pre-trial briefing and preparation. Discovery and interrogatories are only an adjunct, not a substitute for pleading") & *Hopper Group Ltd. v. Parker*, [1987] NZCA 205, p.8; 1 P.R.N.Z. 363, 366 per Bisson, J. ("One essential part of pleadings is to state precisely the basic facts on which the plaintiff relies so as to clearly define the issues which the defendant has to meet. If that is not done, it is difficult for a defendant to prepare for trial … . Furthermore, if the case goes to trial without precise pleadings, much time can be wasted and a defendant might be taken by surprise when the real issue not previously stated clearly suddenly emerges").

[84] Common law scholars around the world agree that pleadings are important. To a large extent, they also agree on why.[100]

[100] J. Côté, Systematic Advocacy 5.4-5.5 (2017) ("Pleadings commonly have nine basic aims. A few are obvious, but many are not. Here are the nine: 1. to choose the tribunal 2. to satisfy limitations legislation and Rules of Court … 3. to persuade your opponent … 4. to persuade judges and masters who rule on various aspects of the suit 5. to give notice and set the issues … 6. to influence the onus of proof or the standard of proof … 7. to dictate the scope of discovery and trial evidence … 8. not to pin your client down too much … 9. to allow proper relief"); 2 W. Williston & R. Rolls, The Law of Civil Procedure 637 (1970) ("The function of pleadings is fourfold: 1. To define with clarity and precision the question in controversy between litigants. 2. To give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issues disclosed by them. A defendant is entitled to know what it is that the plaintiff asserts against him; the plaintiff is entitled to know the nature of the defence raised in answer to his claim. 3. To assist the court in its investigation of the truth of the allegations made by the litigants. 4. To constitute a record of the issues involved in the action so as to prevent future litigation upon the matter adjudicated between the parties"); L. Abrams & K. McGuinness, Canadian Civil Procedure Law 735 (2d ed. 2010) ("There are four main purposes of pleading, these being: (1) to define and inform other parties and the court of the nature of the cause of action and the issues of fact (and, at least implicitly, law) that are in dispute amount the parties; (2) to state the material facts that each party respectively alleges to be true and on which each relies in support of his or her side of the dispute; (3) to identify the nature of the relief that each party seeks; and (4) to serve as the basis of the record of the proceeding"); C. Wright & A. Miller, Federal Practice and Procedure § 1202 (4th ed. 2024) ("Historically pleadings have served four major functions: (1) giving notice of the nature of a claim or a defense; (2) stating the facts each party believes to exist; (3) narrowing the issues that must be litigated; and (4) providing a means for speedy disposition of sham claims and insubstantial defenses. ... The federal rules provide procedural techniques that are more efficient than pleading for performing the last three of the four traditional pleading functions. The relevant facts may be determined by discovery. The issues likewise may be narrowed by discovery, or by a pretrial conference, or by partial summary judgment under Federal Rule of Civil Procedure 56. … This is not to deny that the pleadings, in some cases, will still assist in performing one or more of these three functions; rather, it simply suggests that the pleadings no longer carry exclusive responsibility for them. The only function left to be performed by the pleadings alone is that of notice"); A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 328 (4th ed. 2021) ("The process of identifying the issues in dispute is carried out by exchanging statements of case, previously knowns as pleadings"); A. Zuckerman, S. Wilkins, J. Adamopoulous, A. Higgins, S. Hooper, & A. Vial, Zuckerman on Australian Civil Procedure 247-48 (2018) ("The process of identifying the issues in dispute is carried out by an exchange of pleadings. … The purpose of this exchange is, first and foremost, to identify the issues in dispute which the court has to decide. … Secondly, pleadings establish the boundaries of what is to be argued and proved at trial and therefore what evidence must be gathered, prepared and presented. Thirdly, pleadings enable the court to perform its case management function including setting the scope of discovery, deciding if matters may be disposed of summarily, managing the use of expert witnesses and gauging trial duration and necessary preparation time to schedule case management conferences and trial dates. Finally, pleadings allow the parties to assess the strength of each other's case and therefore help to facilitate settlement"); A. Beck, Principles of Civil Procedure 109-10 (3d ed. 2012) ("without a proper definition of issues, it may be impossible for the other party to respond to the pleading. If this is the case, there is not normally irreparable prejudice, although further particulars or an amendment would normally be required. However, it must also be borne in mind that the pleadings set out the issues in terms of which the court ultimately comes to a decision. If the basis of a claim or defence is not raised at all in the pleadings, the court will not take it into account in reaching its decision") & J. Corry, Laws of New Zealand: Civil Procedure: High Court (2021 reissue 2) ¶86 ("The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the High Court will have to adjudicate in order to determine the matters in dispute between the parties. It follows that the pleadings enable the parties to decide in advance of the trial what evidence will be needed and the appropriate method of trial can be determined").

[85] Pleadings also serve several secondary functions. Two stand out. First, they are the markers for the determination of relevance – what documents or other items a party must produce and what questions a party must answer.[101] Second, they "constitute a record of the issues involved in the action so as to prevent future litigation upon the matter adjudicated between the parties".[102]

[86] Several fundamental propositions are derived from the basic norm that pleadings identify the issues the adjudicator must resolve.

[87] First, a court has no jurisdiction to resolve an issue not presented by the pleadings. This has two aspects. A court cannot consider a cause of action that is not set out in the statement of

[101] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 5.2(1) ("For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected (a) to significantly help determine one or more of the issues raised in the pleadings, or (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings"). See also A. Zuckerman, S. Wilkins, J. Adamopoulos, A. Higgins, S. Hooper & A. Vial, Zuckerman on Australian Civil Procedure 248 (2018) ("pleadings establish the boundaries of what is to be argued and proved at trial and therefore what evidence must be gathered, prepared and presented").

[102] 2 W. Williston & R. Rolls, The Law of Civil Procedure 637 (1970). See *Anglin v. Resler*, 2024 ABCA 113, ¶ 170; 69 Alta. L.R. 7th 171, 238 per Wakeling, J.A. ("A civil proceeding is an abuse of process if it contravenes a fundamental civil procedure principle – the prosecution of the contested proceeding undermines the doctrine of finality and the legitimacy of tribunal determinations").

claim.[103] This proposition benefits a defendant.[104] A defendant should not be adversely affected by a judicial determination that the defendant never knew or had no reasonable grounds to believe was a potential outcome – the pleadings disclose no such basis for relief. Nor can an adjudicator deprive a plaintiff of a remedy on account of a defence not presented in the pleadings.[105] This

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[103] *Piikani Nation v. Kostic*, 2018 ABCA 234, ¶ 70; [2018] 9 W.W.R. 455, 480 ("The first obstacle to Ms. Kostic's proposed claim to indemnity is that there is no pleading ... claiming indemnity from Piikani Nation. ... [A court cannot] grant a remedy for a cause of action that has not been pleaded. The failure to plead a claim for indemnity is sufficient to dismiss this aspect of the appeal"); *M.N.P. v. Bablitz*, 2006 ABCA 245, ¶¶ 4, 7 & 10; [2006] 12 W.W.R. 397, 401 & 402 per Berger, J.A. ("No allegations set out in the Amended Statement of Claim ... provided adequate or any notice of the 'special issue of causation' articulated for the first time by the trial judge in his first set of written reasons for judgment. ... Neither the Respondents nor the trial judge suggested this alternate causation theory during the course of the trial preceding the liability judgment. In the result, the Appellant [the defendant] was effectively precluded from tailoring his evidence to meet this theory of causation. ... [T]he Appellant was entitled to know the case he had to meet and had the right to a fair opportunity to meet that case. The introduction for the first time of an innovative theory of causation in the reasons for judgment was fundamentally unfair"); *Poulos v. Caravelle Homes Ltd.*, 1997 ABCA 18, ¶ 2; 196 A.R. 138, 140 per Foisy, J.A. ("it was an error for the trial judge to find the appellant vicariously liable based on the conclusion that it and Doug Lloyd were partners, where partnership was neither pled nor argued"); *McDonald v. Fellows*, 1979 ABCA 224, ¶¶ 10 &13; 17 A.R. 330, 336 per Laycraft, J.A. ("such evidence as there is establishes that Mr. McDonald acted for himself and his wife with her authority and approval. In any event, it was not, in my opinion, open to the learned trial Judge to decide the case on a basis contrary to the pleadings, without any request for amendment of those pleadings, after amending them himself at the conclusion of the evidence. ... [T]his case must be determined on the basis that the parties did enter into an agreement. The issues to be determined as between plaintiffs and defendants are whether the sale was made on a Sunday and was therefore illegal and, if so, whether the plaintiffs may recover the deposit paid to the vendors of the land"); *Rodaro v. Royal Bank of Canada*, 59 O.R. 3d 74, 93-94 (C.A. 2002) per Doherty, J.A. ("Mr. Rodaro did not plead that RBC's improper disclosure to Barbican deprived him of the opportunity to negotiate a 'package deal' involving the sale of the debt and his equity in the project. At no time during the months of trial or the course of lengthy argument did Mr. Rodaro suggest that the improper disclosure had caused him to lose the opportunity described by Spence J. That theory appeared for the first time in the reasons of Spence J. It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings. ... By stepping outside of the pleadings and the case as developed by the parties to find liability, Spence J. denied RBC and Barbican the right to know the case they had to meet and the right to a fair opportunity to meet that case. ... Spence, J. erred in finding liability on a theory never pleaded and with respect to which battle was never joined at trial") & *460635 Ontario Ltd. v. 1002953 Ontario Inc.*, 127 O.A.C. 48, 50-51 (1999) per Labrosse, J.A. ("The pleadings did not allege any negligence against Kallinikos personally. ... [T]he parties to a legal suit are entitled to a resolution of their differences on the basis of the issues joined in the pleadings"). See also *Potash Corp. of Saskatchewan Mining Ltd. v. Todd*, [1987] 2 W.W.R. 481, 491 per Cameron, J.A. ("the determination of an application for injunctive relief in a civil action ... begins, just as it does in any other action, with the pleadings. The statement of claim constitutes the foundation upon which the plaintiff will have built his case for the interlocutory relief he seeks").

[104] *Price Waterhouse v. Fortex Group Ltd.*, CA 179/98 Nov. 30, 1998, at 18 (N.Z.C.A 1998) per McGechan, J. ("both the Court and opposite parties are entitled to be advised of the essential basis of a claim or defence, and all necessary ingredients of it, so that subsequent processes and the trial itself can be conducted against recognisable boundaries. Neither the Court nor opposite parties should be placed in the position of having to deal with a proposition of whose substance adequate notice has not been given in the pleadings").

[105] *Citadel General Assurance Co. v. Johns-Manville Canada Inc.* [1983] 1 S.C.R. 513, 527 per McIntyre, J. ("I would add in conclusion that neither the defence relating to absence of due notice nor that relating to the failure to exercise mechanics' lien claims were pleaded in the appellant's statement of defence. The respondent relied on Rule 148 of Ontario Rules of Practice to argue that the notice defence should fail on that ground. … Rule 148 should have its effect

proposition benefits a plaintiff. A plaintiff should not be adversely affected by a judicial determination that the plaintiff never knew or had no reasonable grounds to believe was a potential outcome – the pleadings disclosed no defence of this nature.

[88] Second, in the absence of a compelling reason, a court should not grant a remedy that is not expressly or implicitly sought in the pleadings.[106]

[89] A pleading – either a statement of claim or a statement of defence – must state the facts on which the party relies.[107]

[90] The benchmarks of an adequate statement of claim are not difficult to meet.[108] It must allege facts that meet all the elements of a cause of action.[109] But the plaintiff need not identify any cause

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and defences of this nature should be pleaded if they are to receive consideration by the Court."), *Paniccia Estate v. Toal*, 2012 ABCA 397, ¶ 32; 539 A.R. 349, 357 ("a judgment based on an issue not pleaded is improper. So the trial judge would have been wrong to find for the … [defendant] on either of the new issues without such an amendment"); *Cain v. Clarica Life Ins. Co.*, 2005 ABCA 437, ¶¶ 17, 19 & 20; 384 A.R. 11, 15 per Côté, J.A. ("The statement of defence … clearly pleaded all along that the respondent had terminated his own employment by resigning and taking the severance package. But no pleading … ever questioned the validity of the deal made for a severance package, nor even suggested that there was no such deal. … Yet the trial reasons appear to have set aside the severance contract between the parties on the basis that it was unfair or unconscionable. … Presumably the respondent argued thus at trial. That procedure flew in the face of many of the Rules of Court respecting pleadings") & *Ducharme v. Davies*, [1984] 1 W.W.R. 699, 717-18 (Sask. C.A. 1983) per Cameron, J.A. (Having found that a three-year-old could not be held to be contributorily negligent for the damages he suffered in a collision because he was not protected by a seat belt, the Court refused to allow the defence to argue that he should pay because the mother was also a tortfeasor and her negligence contributed to the plaintiff's damages: "Concurrent negligence, as between tortfeasors, that causes injury to another, will generally render them liable to make contribution to, or indemnify each other in the degree which each was at fault. I cannot … understand why the defendants think that because they pleaded contributory negligence as against each of the plaintiffs, they are entitled to claim that Mrs. Ducharme was concurrently negligent and must, in effect, share in the child's damages. They did not plead that Mrs. Ducharme was a joint tortfeasor who breached her duty to the infant and that in consequence the child's damages are to be apportioned between them and reduced").

[106] *Mazepa v. Embree*, 2014 ABCA 438, ¶ 8; 588 A.R. 288, 292 per Watson & Slatter, JJ.A. ("It is well established that a trial or chambers judge should not ... grant remedies beyond the pleadings") & *Sumner v. PCL Constructors Inc.*, 2011 ABCA 326, ¶ 26; 515 A.R. 231, 242 ("It is generally inappropriate for a trial judge to decide a case on a basis not pleaded by the parties").

[107] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 13.6(2)(a) ("A pleading must state ... the facts on which a party relies").

[108] *Anglin v. Resler*, 2024 ABCA 113, ¶ 219; 69 Alta. L.R. 7th 171, 266 per Wakeling, J.A. ("The standards governing the minimum attributes of a statement of claim are not onerous and are easily met. A statement of claim need not be a first-class pleading to survive a challenge under rule 3.68(2)(b)").

[109] *Mancuso v. Minister of National Health and Welfare*, 2015 FCA 227, ¶¶ 16 & 19 per Rennie, J.A. ("It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought. ... The plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability"); *Tchenguiz v. Grant Thornton UK LLP*, [2015] EWHC 405, ¶ 1 (Comm.) per Leggatt, J. ("Statements of

of action[110] or, if the plaintiff does identify a cause of action, the correct one.[111] The statement of claim must "include a statement of any matter on which a party intends to rely that may take

case must be concise. They must plead only *material* facts, meaning those necessary for the purpose of formulating a cause of action") (emphasis added); A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 329 (4th ed. 2021 J. Wells general ed.) ("In its statement of case, a party needs to state all the *material* facts pertinent to their case. Where a claimant has not pleaded a fact necessary to establish a particular cause of action, the court has no jurisdiction to give judgment on that basis") (emphasis added) & 1 Civil Procedure 573 (Sir Geoffrey Vos ed.-in-chief 2018) (U.K.) ("The claimant should state all the facts necessary for the purpose of formulating a complete cause of action"). Some statements of claim do not disclose a cause of action. See *Alberta Teachers' Ass'n v. Buffalo Trail Public Schools Regional Div. No. 28*, 2022 ABCA 13, ¶ 24 per Wakeling, J.A. ("Suppose P files a statement of claim alleging that D cheers for the Nashville Predators in breach of his common law duty to cheer for his hometown National Hockey League team... . ... D applies for an order dismissing P's action on the ground that it discloses no cause of action"); *Wall v. Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255, ¶ 84; 404 D.L.R. 4th 48, 82 per Wakeling, J.A. ("suppose ... a person is unhappy that ... she was not invited to her cousin's ... wedding. She invited her cousin to her two children's weddings and believes that her cousin should reciprocate. The inconsiderate cousin has hurt her feelings. No court will entertain the aggrieved cousin's claim. She does not allege that her cousin is in breach of any agreement to invite each other to their children's weddings. Hurt feelings are not a legal interest that the unhappy family member can complain about") *& Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 548-49 (2007) per Souter, J. ("Liability under §1 of the Sherman Act ... requires a 'contract, combination …, or conspiracy, in restraint of trade or commerce.' The question in this putative class action is whether a §1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed").

[110] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, ¶ 54; [2001] 2 S.C.R. 460, 489 per Binnie, J. ("A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court ... . Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success") *& Letang v. Cooper*, [1964] 2 All E.R. 929, 934 (C.A.) per Diplock, L.J. ("A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. ... If A., by failing to exercise reasonable care, inflicts direct personal injury upon B., those facts constitute a cause of action on the part of B. against A."). See B. Garner, Garner's Dictionary of Legal Usage 142 (3d ed. 2011) ("Cause of action = (1) a group of operative facts, such as a harmful act, giving rise to one or more rights of action; or (2) a legal claim. Writers on civil procedure prefer that the term be confined to sense 1").

[111] *Anglin v. Resler*, 2024 ABCA 113, ¶ 211; 69 Alta. L.R. 7th 171, 263 per Wakeling, J.A. ("the plaintiff [is not required] to identify the cause of action that serves as the legal foundation for the claim"); *Balm v. 3512061 Canada Ltd.*, 2003 ABCA 98, ¶ 11; 327 A.R. 149, 153 per Côté, J.A. ("Paragraph 37 in the amended statement of claim is new, and is clearly a new cause of action. However, though the legal conclusions pleaded is new, the acts alleged in it are not new. It is a trite law that a statement of claim need not name causes of action or draw legal conclusions. It need only plead facts. So the plaintiff could merely have sent the original defendants' counsel a letter warning that he would argue at trial that proof of such and such facts already alleged in the statement of claim would constitute the cause of action of mutuality of obligations under law merchant"); *Alexander v. Pacific Trans-Ocean Resources Ltd.*,1991 ABCA 286, ¶ 14; 120 A.R. 22, 25 ("A pleading need only allege facts; legal conclusions are permissible, but not mandatory") & *Fullowka v. Whitford*, 147 D.L.R. 4th 531, 539 (N.W.T.C.A. 1996) ("a pleading is valid and suffices to raise a certain cause of action if it gives facts which create that cause of action. It need not name that or any cause of action or give a legal conclusion, and indeed it may name a different cause of action"), leave to app. ref'd, [1997] 2 S.C.R. xvi.

another party by surprise",[112] give particulars of breach of trust, fraud, misrepresentation, wilful deceit, undue influence, and defamation,[113] and also state the remedy claimed.[114]

[91] The benchmarks of an adequate statement of defence are equally modest. While the defence is obliged to allege the facts on which the defendant relies,[115] it need not accurately characterize the legal effect of the facts. But a statement of defence must "include a statement of any matter on which a party intends to rely that may take another party by surprise, including, … (a) breach of trust … [or] (k) undue influence".[116]

[92] In assessing the importance of pleadings, two caveats must be kept in mind. First, a court may allow a party to amend a pleading at any time.[117] Second the parties can, without formal amendment of the pleadings, by agreement, express or implied, present to the court for resolution issues not identified in the pleadings.[118]

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[112] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 13.6(3).

[113] Id. r. 13.7.

[114] Id. r. 13.6(2)(c) ("A pleading must state ... the remedy claimed").

[115] Id. r. 13.6(2)(a) ("A pleading must state ... the facts on which a party relies").

[116] Id. r. 13.6(3).

[117] Id. r. 3.65(1) ("Subject to subrule (5), before or after close of pleadings, the Court may give permission to amend a pleading"). See *AARC Society v. Canadian Broadcasting Corp.*, 2019 ABCA 125, ¶ 53; 449 D.L.R. 4th 208, 231 per Wakeling, J.A. ("A court should exercise its discretion and allow a party to amend a pleading after the close of pleadings unless there is a compelling reason not to. The nonmoving party bears the burden of demonstrating that there is a compelling reason not to allow the proposed amendment"); *Mazepa v. Embree*, 2014 ABCA 438, ¶ 9 ("while the court is limited by the pleadings, the effect of the rule is reduced by the concurrent ability of the court to amend the pleadings at any time") & *Longstaff v. Birtles*, [2001] EWCA Civ 1219, ¶¶ 10, 11 & 38; [2002] 1 W.L.R. 470, 473 & 477 (the appeal court allowed the appellants to amend their claim at the end of the appeal).

[118] *Mazepa v. Embree*, 2014 ABCA 438, ¶ 9; 588 A.R. 288, 293 per Watson & Slatter, JJ.A. ("the parties can always consent to matters of procedure, such as amendments to the pleadings, or the resolution of the case on issues not strictly pleaded. That consent can be express or implied. Here, previous counsel for the appellant explicitly advised the original chambers judge that the appellant would waive any shortcomings in the pleadings ... and invited the court to grant spousal support"); *Canadian-Dominion Leasing Corp. v. Suburban Superdrug Ltd.*, 56 D.L.R. 2d 43, 50 (Alta. Sup. Ct. App. Div. 1966) per Kane, J.A. ("the issue [of fundamental breach] was in fact fought out even though not pleaded ... . [G]enerally speaking, the practice now is that the pleadings may be taken as amended to follow the course of the trial"); *McPhail and McPhail v. Richards and Pitcairn*, 12 W.W.R. (N.S.) 433, 437 (Alta. Sup. Ct. App. Div. 1953) per O'Connor, C.J ("As to the pleadings, speaking generally the practice now is that they may be taken as amended to follow the course of the trial"); *Dare v. Pulham*, [1982] HCA 70, ¶ 6; 148 C.L.R. 658, 664 ("[There are] cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial") & *Brown v. Heathcote County (No. 2)*, [1982] 2 N.Z.L.R. 618, 621 (H.C.) per Hardie Boys, J. ("There was a counterclaim for the damage done to the defendant's vehicle, and an amended statement of defence and counterclaim were filed on the very day of the trial. The plaintiff did not raise the plea of contributory negligence to the counterclaim. … [W]hen all the pleadings were taken together, contributory negligence was obviously in issue between the parties").

B. The Respondents' Statement of Defence Raises the Defence of Breach of Fiduciary Duty and Undue Influence

[93] A statement of defence that states the facts on which the defendant relies complies with rule 13.6(2)(a) of the *Alberta Rules of Court*.[119]

[94] The respondent's amended statement of defence meets this modest requirement. Paragraph 9 unambiguously, asserts that "Brown was the solicitor for each of the Defendants at the time ... [Brown's employment agreement] was negotiated and executed. Brown had an interest, financial or otherwise in the ... employment agreement".[120]

[95] While a statement of defence need not characterize the legal consequences of pleaded facts, paragraph 9 of the respondents' amended statement of defence does: "Brown owed the Defendants and each of them a duty, *fiduciary*, or otherwise to ensure that the Defendant's agreement to the ... [employment agreement] was not subject to undue influence by ensuring that the Defendants were fully informed, the negotiations were honestly conducted, and that the transaction was fair and just and in no way disadvantageous to his client".[121]

[96] The respondents' amended statement of defence unambiguously alleges that Mr. Brown was a fiduciary and that he breached his duty as a fiduciary.

[97] The respondents are entitled to rely on this defence.

C. A Lawyer May Do Business with a Client Only if Onerous Conditions Are Met

1. A Lawyer-Client Relationship Is a Fiduciary Relationship

[98] A lawyer-client relationship is a fiduciary relationship.[122]

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[119] Alta. Reg. 124/2010.

[120] Amended Statement of Defence, ¶ 9. Appeal Record 66.

[121] Id. (emphasis added).

[122] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 417 per La Forest, J. ("nobody would argue against enforcement of fiduciary duties in policing the advisory aspect of solicitor-client relationships"); *Galambos v. Perez*, 2009 SCC 48, ¶ 36; [2009] 3 S.C.R. 247, 265 per Cromwell, J. ("There is no doubt that the solicitor-client relationship is an example [of a *per se* fiduciary relationship]"); *Brown v. Inland Revenue Commissioners*, [1965] A.C. 244, 256 (H.L. 1964) per Lord Reid ("A solicitor has a fiduciary duty to his clients"); *Clark Boyce v. Mouat*, [1994] 1 A.C. 428, 437 (P.C. 1993) (N.Z) per Lord Jauncey ("That a solicitor owes a fiduciary duty to a client is not in doubt"); *Hospital Products Ltd. v. United States Surgical Corp.*, [1984] HCA 64, ¶ 28; 156 C.L.R. 41, 68 per Gibbs, C.J. ("The archetype of a fiduciary is of course the trustee, but it is recognized by the decisions of the courts that there are other classes of persons who normally stand in a fiduciary relationship to one another – e.g., partners, principal and agent, director and company … [and] solicitor and client"); *Ferguson v. Yaspan*, 183 Cal. Rptr.3d 83, 91 (Ct. App. 2014) per Hoffstadt, J. ("Attorneys are fiduciaries who owe their clients 'the most conscientious fidelity'"); *Hudye Inc. v. Rosowsky*, 2022

[99] The lawyer is the fiduciary. The client[123] is the beneficiary.

[100] A fiduciary has onerous duties.[124]

ABCA 279, ¶ 30; 472 D.L.R. 4th 707, 722 ("certain relationships, such as that of solicitor and client, are *per se* fiduciary in nature"); *Longstaff v. Birtles*, [2001] EWCA Civ 1219, ¶ 1; [2002] 1 W.L.R. 470, 471 per Mummery, J. ("This case powerfully demonstrates the importance of the paramount duty of a solicitor to observe *fiduciary* obligations in his personal dealings with a client") (emphasis in original); The Law Society of Alberta, Code of Conduct, r. 3.4-13, Commentary [2] ("The relationship between lawyer and client is a fiduciary one")(2024); Federation of Law Societies of Canada, Model Code of Professional Conduct, r. 3.4-1, Commentary [5](2024)("The lawyer-client relationship is based on trust. It is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client"); Restatement (Third) of the Law Governing Lawyers §16, Comment b (2000) ("A lawyer is a fiduciary, that is a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. Assurances of the lawyer's competence, diligence, and loyalty are therefore vital") & 66 Halsbury's Laws of England, ¶ 799 (5th ed. 2009) ("The relationship of solicitor and client is regarded in equity as a fiduciary relationship").

[123] Who is a client? See The Law Society of Alberta, Code of Conduct, s. 1.1-1 (2024) ("In this Code, unless the context indicates otherwise, … 'client' includes a client of a lawyer's firm, whether or not the lawyer handles the client's work, and may include a person who reasonably believes that a lawyer-client relationship exists, whether or not that is the case at law") & Commentary [1] ("A lawyer-client relationship is often established without formality"); Federation of Law Societies of Canada, Model Code of Professional Conduct, r. 1.1-1 (2024) ("In this Code, unless the context indicates otherwise … 'client' means a person who: (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf and includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work") & Restatement (Third) of the Law Governing Lawyers § 14 ("A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services or (2) a tribunal with power to do so appoints the lawyer to provide the service"). See Justice Cromwell, in *Galambos v. Perez*, 2009 SCC 48, ¶ 20; [2009] 3 S.C.R. 247, 59, appeared to hold that there must be an "ongoing, solicitor-client relationship" & *Comm'n on Professional Ethics & Conduct v. Carty*, 515 N.W. 2d 32, 35 (Iowa Sup. Ct. 1994) per Andreasen, J. ("The rule protects persons who regularly rely on an attorney for legal services which arise on an occasional and on-going basis").

[124] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 471 per La Forest, J. ("clients in a professional advisory relationship have a right to expect that their professional advisors will act in their best interests to the exclusion of all other interests, unless the contrary is disclosed"); *Doiron v. Caisse Populaire D'Inkerman Ltee*, 17 D.L.R. 4th 660, 667 (N.B.C.A. 1985) per La Forest, J.A. ("the law has always imposed a stringent duty of care on solicitors owing to the position of trust and confidence they occupy"); *Day v. Mead*, [1987] 2 N.Z.L.R. 443, 452 (Ct. App.) per Cooke, P. ("high standards are expected of fiduciaries"); *Beery v. State Bar of California*, 739 P.2d 1289, 1294 (Cal. Sup. Ct. 1987) ("The attorney-client relationship is a fiduciary relation of the very highest character"); *Cox v. Delmas*, 33 P.836, 839 (Cal. Sup. Ct. 1893) ("The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity - - *uberrima fides*"); *Ferguson v. Yaspan*, 183 Cal. Rptr.3d 83, 91 (Ct. App. 2014) per Hoffstadt, J. ("Attorneys are fiduciaries who owe their clients 'the most conscientious fidelity'"); The Law Society of Alberta, Code of Conduct, r. 3.4-13, Commentary [2] (2024) ("The relationship between lawyer and client is a fiduciary one and no conflict between the lawyer's own interest and the lawyer's duty to the client is permitted") & Federation of Law Societies of Canada, Model Code of Professional Conduct, r. 3.4-1, Commentary [5] ("it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other

[101] Justice Gillese summarizes them:[125]

> A fiduciary's obligations is rooted in the duty of loyalty. This duty translates into an obligation to act strictly in the best interests of the other. The duty to act strictly in the best interests of the other ... [means] that a fiduciary may not permit his or her personal interests to conflict with the responsibilities of the fiduciary office ... [and] must act honestly with due diligence, and with the utmost candour.

[102] Equity principles, out of necessity, are expressed in an abstract manner. "Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms".[126]

[103] The initial task of enumerating more detailed standards that provide sufficient guidance to the fiduciary and the beneficiary often reside with the regulator of the fiduciary. This is certainly the case with respect to lawyers.

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duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty to avoid conflicting interests").

[125] E. Gillese, The Law of Trusts 11 (3d ed. 2014). See *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, ¶ 35; [2007] 2 S.C.R. 177, 205 per Binnie, J. ("Fiduciary responsibilities include the duty of loyalty, of which an element is the avoidance of conflicts of interest"); *The Queen v. Neil*, 2002 SCC 70, ¶ 24; [2002] 3 S.C.R. 631, 647 per Binnie, J. ("Loyalty includes putting the client's business ahead of the lawyer's business"); *Davey v. Woolley, Hames, Dale & Dingwall*, 133 D.L.R. 3d 647, 650 (Ont. C.A. 1982) per Wilson J. ("A solicitor is in a fiduciary relationship to his client and must avoid situations where he has or potentially may develop a conflict of interests. ... This is not confined to situations where his client's interests and his own are in conflict although it of course covers that situation"); *Bolton v. Law Society*, [1994] 2 All E.R. 486, 491 & 492 (C.A. 1993) per Bingham, M.R. ("It is required of lawyers practicing in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness. .... [It is necessary] to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth"); *Nocton v. Lord Ashburton*, [1914] A.C. 932, 965 (H.L.) per Lord Dunedin ("a fiduciary position ... imposes on him the duty of making full and not a misleading disclosure of facts known to him when advising his client"); *McPherson v. Watt,* 3 A.C. 254, 266 (H.L. 1877) per Lord O'Hagan ("There must be *uberrima fides* between the attorney and the client, and no conflict of duty and interest can be allowed to exist"); *In re Cooperman*, 83 N.Y.2d 465, 471-72 (Ct. App. 1994) per Bellacosa, J. ("Sir Francis Bacon observed, '[t]he greatest trust between [people] is the trust of giving counsel' ... . This unique fiduciary reliance, stemming from people hiring attorneys to exercise professional judgment on a client's behalf – 'giving counsel' – is imbued with ultimate trust and confidence ... . The attorney's obligations, therefore, transcend those prevailing in the commercial market place ... . The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's"); *Farrington v. Rowe McBride & Partners*, [1985] 1 N.Z.L.R. 83, 89 (Ct. App.) per Richardson, J. ("A solicitor has a fiduciary duty in equity to his client. The relationship between solicitor and client carries with it obligations on the solicitor's part to act with absolute fairness and openness towards his client. ... [H]e is bound to observe the utmost good faith towards his client") & *Day v. Mead*, [1987] 2 N.Z.L.R. 443, 457 (Ct. App.) per Somers, J. ("In equity the relationship is fiduciary embracing the duty to act with absolute fairness and openness. ... At law the retainer imposes on the solicitor a contractual obligation to be skilful and careful for the breach of which he will be liable in damages").

[126] *Boardman v. Phipps*, [1966] 3 All E.R. 721, 756 (H.L.) per Lord Upjohn.

[104] The rules law societies have formulated about conflicts of interest and the fiduciary duties courts have imposed on lawyers doing business with clients make it clear that a lawyer who does business with a client must navigate perilous waters. This is because the interests of the lawyer and the client are not the same. Lawyers are human beings. They are not immune to the tendency to protect self interest: "[H]uman nature being what it is, there is a danger in these circumstances, of the person holding the fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect".[127]

[105] Chief Justice Cardozo, when a member of New York's highest court, explained why a fiduciary's duties must be strictly enforced:[128]

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions... Only thus has the level of conduct for fiduciaries been kept at a higher level than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

[106] Placing this onerous burden on the shoulders of a lawyer is not unfair. A lawyer is under no obligation to do business with a client.[129]

2. A Lawyer's Fiduciary Duties When Doing Business with a Client Are Onerous

[107] Courts and not law societies – the professional regulators – determine the standards that govern the lawyer as a fiduciary when a lawyer is sued for breach of fiduciary duty or the enforceability of an agreement between a lawyer and client is at issue.[130] But a court would be

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[127] *Id.*

[128] *Meinhard v. Salmon*, 164 N.E. 545, 546; 249 N.Y. 458, 464 (Ct. App. 1928). See also *Stockton v. Ford*, 52 U.S. 232, 247 (1851) per Nelson, J. ("There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it").

[129] See D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 996 (4th ed. 2012) ("no one is obligated to accept the office of trustee") & G. Bogert, Trusts 100 (6th ed. 1987) ("Every person who is tendered the office of trustee has the power to accept or decline it").

[130] *Brown v. Inland Revenue Comm'rs*, [1965] A.C. 244, 258 (H.L. 1964) per Lord Reid ("This opinion [of the Law Society of Scotland] … has … [no] binding force and … [cannot] be supported in law. I do not see how the difficulty

unwise, when recording the duties a lawyer doing business with a client has, to adopt benchmarks less onerous than those adopted by the professional regulators.[131] There is no good reason why the courts in constructing such a standard should be less demanding than the profession's regulators – the lawyers' peers. On the other hand, if the regulator sets the bar too low, there may be good public policy reasons to adopt more demanding markers.[132]

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in discovering who is the owner can make the money the property of the solicitor"); *Farrington v. Rowe McBride & Partners*, [1985] 1 N.Z.L.R. 83, 92 (Ct. App.) per Richardson, J. ("the ethical standard set by the professional body concerned is not to be taken as the measure of a practitioner's fiduciary obligation in equity"); *Maguire v. Makaronis*, [1997] HCA 23, ¶ 41; 188 C.L.R. 449, 466 per Brennan C.J. & Gaudron, McHugh, & Gummow, JJ. ("compliance with the requirements of the Solicitors' (Professional Conduct and Practice) Rules 1984 … would not necessarily satisfy the requirements of the fiduciary obligations of a solicitor to the client"); *Griva v. Davison*, 637 A.2d 830, 846-47 (D.C. Cir. 1994) per Ferren, J. ("a violation of the Code of Professional Responsibility of the Rules of Professional Conduct can constitute a breach of the attorney's common law fiduciary duty to the client"); *Avianca, Inc. v. Corriea*, 705 F. Supp. 666, 679 (D.D.C.. 1989) per Lamberth, J. ("The Disciplinary Rules ... of the American Bar Association's Code of Professional Responsibilities, which have been adopted by both the District of Columbia Court of Appeals and the United States District Court for the District of Columbia ... while not strictly providing a basis for a civil action, nonetheless may be considered to define the minimum level of professional conduct required of an attorney, such that a violation of one of the ... [Disciplinary Rules] is conclusive evidence of a breach of the attorney's common law fiduciary obligations") & *Financial General Bankshares, Inc. v. Metzger*, 523 F. Supp. 744, 762-63 (D.C. Cir. 1981) per Gasch, J. (Defendant asserts that the Code cannot be used as a basis for private litigation. In a strict sense, however, the basis for a civil action ... is the common law of fiduciary and ethical obligations. .... Whether or not a breach of those obligations has occurred may be determined by resort to the standards set forth in the Disciplinary Rules").

[131] *Galambos v. Perez*, 2009 SCC 48, ¶ 29; [2009] 3 S.C.R. 247, 262 per Cromwell, J. ("Codes of professional conduct, while they are important statements of public policy with respect to the conduct of lawyers, are designed to serve as a guide to lawyers and are typically enforced in disciplinary proceedings. They are of importance in determining the nature and extent of duties flowing from a professional relationship. ... They are not, however, binding on the courts"); *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, 1244 & 1246 per Sopinka, J. ("An important statement of public policy with respect to the conduct of barrister and solicitor is contained in the professional ethics codes of the governing bodies of the profession. … These rules must be taken as expressing the collective views of the profession as to the appropriate standards to which the profession should adhere. … [A]n expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy") & *Reid v. Graybriar Industries Ltd.*, 2006 ABQB 519, ¶ 94; [2006] 10 W.W.R. 271, 294 per Verville, J. ("rules set by a professional body are of guiding importance in determining the nature of the duties flowing from a particular professional relationship").

[132] E.g., *Brown v. Inland Revenue Comm'rs*, [1965] A.C. 244, 257-58 (H.L. 1964) per Lord Reid ("The appellant [lawyer] founds on a passage in the report of the council of the Law Society of Scotland for 1951: 'The Council have also been asked for their views regarding the question of the disposal of interest on deposit receipts or deposits with savings banks for unnamed clients. They have expressed the opinion that if the allocation of interest on a general sum taken out of the client account and placed on deposit receipt or with a savings bank is so difficult or involves so much work as to be substantially impracticable, the solicitor is entitled to retain the interest in the form of a general charge against clients for the work involved in keeping the clients' banking account(s)'. This opinion, coming from so responsible a body, negatives any possible suggestion of professional malpractice by the appellant or any other solicitor who has acted in accordance with it. But it was not argued that it has any binding force and I do not think that it can be supported in law. I do not see how the difficulty in discovering who is the owner can make the money the property of the solicitor. Nor am I aware of any authority for making a general or collective charge against clients").

[108] A lawyer who contemplates doing business with a client must understand the obligations he or she has under the common law, equity, and a governing code of conduct[133] and whether they

[133] Federation of Law Societies of Canada, Model Code of Professional Conduct r. 3.4-28 (2024) ("A lawyer must not enter into a transaction with a client unless the transaction with the client is fair and reasonable to the client"), r. 3.4-29 ("Subject to rules 3.4-30 to 3.4-36, where a transaction involves: lending or borrowing money, buying or selling property or services having other than nominal value, giving or acquiring ownership, security or other pecuniary interest in a company or other entity, recommending an investment, or entering into a common business venture, a lawyer must, in sequence, (a) disclose the nature of any conflicting interest or how a conflict might develop later; (b) consider whether the circumstances reasonably require that the client receive independent legal advice with respect to the transaction; and (c) obtain the client's consent to the transaction after the client receives such disclosure and legal advice"), r. 3.4-30 ("Rule 3.4-29 does not apply where ... (b) a lawyer borrows money from a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business") & r. 3.4-33 ("A lawyer must not lend money to a client unless, before making the loan, the lawyer (a) discloses to the client the nature of the conflicting interest; (b) requires that the client: (i) receive independent legal representation; or (ii) if the client is a related person as defined by the Income Tax Act (Canada) receives independent legal advice; and (c) obtains the client's consent"); The Law Society of Alberta, Code of Conduct, r. 3.4-13 (2024) ("A lawyer must not enter into a transaction with a client who does not have independent legal representation unless the transaction is fair and reasonable to the client and the client consents to the transaction"); Law Society of British Columbia, Code of Professional Conduct for British Columbia, r. 3.4-28 (2024) ("Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction"); Law Society of Saskatchewan, Code of Professional Conduct (2024) (rules 3.4-28, 3.4-29, 3.4-30 & 3.4-33 are identical to the same-numbered rules in the Federation of Law Societies of Canada's Model Code of Professional Conduct); The Law Society of Manitoba, Code of Professional Conduct (2023) (rules 3.4-28, 3.4-29, 3.4-30 & 3.4-33 are identical to the same-numbered rules in the Federation of Law Societies of Canada's Model Code of Professional Conduct); Law Society of Ontario, Rules of Professional Conduct, r. 3.4-28 (2022) ("A lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client"), r. 3.4-29 ("except for borrowing from a regulated lender or from a related person, a lawyer shall not borrow from a client"); Barreau du Québec, Code of Professional Conduct of Lawyers, §90 (2024) ("A lawyer may not carry on business with his client ... except on terms and conditions that are fair and reasonable"); Law Society of New Brunswick, Code of Professional Conduct (2023) (rules 3.4-28, 3.4-29, 3.4-30 & 3.4-33 are identical to the same-numbered rules in the Federation of Law Societies of Canada's Model Code of Professional Conduct"); Nova Scotia Barristers' Society, Code of Professional Conduct (2023) (rules 3.4-28, 3.4-29, 3.4-30, & 3.4-33 are identical to the same numbered rules in the Federation of Law Societies of Canada's Model Code of Professional Conduct"); Law Society of Prince Edward Island, Code of Professional Conduct, r. 3.4-28 (2023) ("Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction"); Law Society of Newfoundland and Labrador, Code of Professional Conduct, (2020) (rules 3.4-28, 3.4-29, 3.4-30 & 3.4-33 are identical to the same-numbered rules in the Federation of Law Societies of Canada's Model Code of Professional Conduct"); Law Society of Yukon, Code of Professional Conduct (2024) (rules 3.4-28, 3.4-29, 3.4-30 & 3.4-33 are identical to the same-numbered rules in the Federation of Law Societies of Canada's Model Code of Professional Conduct"); Law Society of the Northwest Territories, Code of Professional Conduct (2019) (rules 3.4-28, 3.4-29, 3.4-30 & 3.4-33 are identical to the same-numbered rules in the Federation of Law Societies of Canada's Model Code of Professional Conduct"); Law Society of Nunavut, Code of Professional Conduct (2022) (rules 3.4-28, 3.4-29, 3.4-30, 3.4-33 are identical to the same-numbered rules in the Federation of Law Societies of Canada's Model Code of Professional Conduct"); Solicitors Regulation Authority, Code of Conduct for Solicitors, Regulated European Lawyers and Registered Foreign Lawyers, §6.1 (2023) ("You do not act if there is an own interest conflict or a significant risk of such a conflict") ("own interest conflict means any situation where your duty to act in the best interests of any client in a relation to a matter conflicts

can be met.[134] If they cannot be met, a lawyer should abandon the project – not do business with the client.[135]

[109] Consideration of a number of hypotheticals that feature a transaction involving a lawyer and his or her client will contribute to my ability to formulate sound principles governing the fiduciary relationship. This Court has not undertaken this task before.[136]

[110] Suppose an Alberta lawyer sells one of his Rolls-Royces to his mechanic who owns a repair shop specializing in the maintenance of Rolls-Royce and Bentley motor cars. L does all M's legal work – business and personal. M regularly purchases Rolls-Royce cars from his customers and others and resells them in the course of his business. M has a better idea of the car's value than L does. L and M agree on a fair market price for the car. This is a standard commercial transaction. There is no reason to impose any extraordinary burdens on L simply because he is M's lawyer.[137]

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or there is a significant risk that it may conflict with your own interests in relation to that or a related matter"); American Bar Association, Model Rules of Professional Conduct, r. 1.8 (2024) ("(a) A lawyer shall not enter into a business transaction with a client ... unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction") & The State Bar of California, California Rules of Professional Conduct, r. 1.8.1 (2023) ("A lawyer shall not enter into a business transaction with a client ... unless each of the following requirements has been satisfied: (a) the transaction or acquisition and its terms are fair and reasonable to the client and the terms and the lawyer's role in the transaction are fully disclosed and transmitted in writing to the client in a manner that should reasonably have been understood by the client; (b) the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and (c) the client thereafter provides informed written consent to the terms of the transaction or acquisition, and to the lawyer's role in it").

[134] *Iowa Supreme Court Attorney Disciplinary Bd. v. Willey*, 965 N.W. 2d 599, 602 (Iowa Sup. Ct. 2021) per Oxley, J. ("Attorneys who engage in business dealings with their clients create an inherent conflict of interest under our rules of professional conduct. Such conflicts are not prohibited – as long as the attorney first meets strict disclosure requirements and provides adequate information so that their clients can make an informed consent to the conflict").

[135] *Nocton v. Lord Ashburton*, [1914] A.C. 932, 969 (H.L.) per Lord Shaw ("[The defendant solicitor] was ... personally interested [in the release given by the plaintiff] and he profited as a co-speculator by the transaction of release; and I am of opinion that the duty of ... [the defendant solicitor] was ... to decline to act professionally or as the adviser of his client and to insist that a separate solicitor should be obtained').

[136] In *Hudye Inc. v. Rososky*, 2022 ABCA 279, ¶ 52; 472 D.L.R. 4th 707, 728 the Court was content to adopt Justice Verville's summary of the duties a lawyer entering into a transaction with a client has.

[137] American Bar Association, Model Rules of Professional Conduct, r. 1.8, Comment (2024) ("[Rule 1.8] does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client and the restrictions in paragraph (a) are unnecessary and impracticable"); The State Bar of California, California Rules of Professional Conduct, r. 1.8.1 (2023) ("A lawyer shall not enter into a business transaction with a client …

L supplied no legal services to M in this transaction. L derived no advantage because he was M's lawyer. There is no reason to treat L in any different manner than any other person who does business with M.[138] In this example, L must be regarded as M's customer and not M's lawyer.

[111] Suppose L's next-door neighbor is a dentist and L's client. L is also Dr. D's patient. Dr. D owns a 1990 Mercedes Benz sedan that she has taken good care of but does not need anymore. She asks L if this would be a good car for his granddaughter. It is reliable and safe. Dr. D asks the local Mercedes dealer what the car is worth. The dealer tells Dr. D it is worth $2,000 and Dr. D passes this information to L. Dr. D agrees to sell it to L for $2,000. L never gives any consideration to raising with Dr. D the prospects of her retaining counsel. L's legal skills never came into play and it never occurred to him that Dr. D's offer to sell the car to him or to ask for a certain amount was due to anything but the fact that they were longtime neighbors and friends. In this transaction Dr. D dealt with L as a friend and neighbor, not as her lawyer.[139] In other words, this was not a case of a lawyer doing business with a client; it was a transaction between two friends and neighbors.

[112] Suppose M has an opportunity to purchase a very rare old Rolls-Royce from the estate of a former customer for $2 million. M is satisfied that this is a sound investment. Over the last fifteen years, according to the Historic Automobiles Group International, the value of classic collectible vehicles has increased 413%. M's bank refuses to lend M $2 million. M asks L if he would lend him $2 million so that he could purchase the classic Rolls-Royce. M offers to pay L the greater of fifty percent of the difference between the price M sells the car for and the $2 million he paid for it or five percent monthly compound interest plus the principal payable within thirty days after M receives the sale proceeds of the car. M understands that L requires reasonable security. L agrees

unless each of the following requirements has been satisfied") & Comment [6] ("This rule does not apply … (ii) to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client") & Restatement (Third) of the Law Governing Lawyers §126, Comment c (2000) ("Standard Commercial Transactions. The requirements of informed consent and objective fairness are satisfied when lawyer and client enter into standard commercial transactions in the regular course of business of the client, involving a product or service as to which the lawyer provides no legal services. This Section therefore does not apply to such transactions. Standard commercial transactions are those regularly entered into between the client and the general public, typically in which the terms and conditions are the same for all customers. In such circumstances, the client's interests in the transaction with the lawyer need no special protection").

[138] Restatement (Third) of the Law Governing Lawyers § 126, Comment c ("In … [the case of standard commercial transactions], the client's interests … need no special protection").

[139] See *Lucas v. Gilbert*, Claim No. H10CL093, County Court, Central London (February 9, 2022) per Saggerson, HHJ. ("Whilst the relationship of these parties was one of solicitor and client – a fiduciary relationship – with regard to the act of purchasing and conveyancing matters relevant to the property and the 2013 Bow County Court litigation about the new commercial lease for one of the tenants, this fiduciary relationship did not arise with regard to or extend to or include the 2011 agreement. This was a separate joint venture commercial investment agreement [between two commercial property developers]. … The fiduciary obligation of loyalty reflected in the prohibition on acting in a situation where a potential conflict of duty and interest could arise and the prohibition on making a profit out of the fiduciary position, if applicable, would make a mockery of the fundamentals of the 2011 agreement").

to lend M $2 million on the terms M proposes. L is not only a prudent businessman but a careful and ethical lawyer aware of the onerous demands that the law – common law and equity – and his professional regulator[140] imposes on a lawyer who does business with a client. L informs M that, while the interests of L and M are equally advanced by the sale of the Rolls-Royce for the highest price possible, their interests as creditor and debtor are not aligned. L insists that M retain independent counsel to review the loan and security agreements and the promissory note that L drafted. L asks M to have the lawyer he retains provide L with a certificate signed by both the lawyer and M informing L that the writer has provided M with legal advice and that M is satisfied the proposed terms are fair and reasonable. M retains independent counsel. Independent counsel provides the certificate L requested. M subsequently agrees to the terms L proposes. M sells the Rolls-Royce two years later for $3 million and pays L $2.5 million, the amount due under the loan agreement.

[113] Over time L and M become good friends. M took excellent care of L's Rolls-Royces and Bentleys. L provided timely legal assistance whenever M required it and introduced M to several new customers. When the Canadian and American dollars are at par, L and M decide to purchase a fully furnished home in California for the use of both their families. L and M and their wives discuss the issues likely to arise during the time they jointly own the home – when each family may use the home, how the operating expenses will be shared, who is responsible for selecting the businesses needed to maintain the pool, house and grounds, who is responsible for the interior décor, what events might cause one or more of the parties to want to sell – a death or divorce, for example – and what will happen if they cannot agree on when the home should be sold or the sale price. L prepares an agreement that incorporates all the agreed-upon terms. In the letter forwarding the agreement to M and his wife, L recommends that M and his wife retain a California lawyer to review the proposed agreement and Canadian tax counsel to review the tax implications of the transaction. L retains California counsel to review for him the draft agreement. L forwards to M the changes the California attorney recommended. M informs L that he will not retain a California attorney but has retained Canadian counsel to advise him on the transaction's tax implications. When M declined to retain California counsel, L writes to M. He explains the promises that the parties have made and reminds him of the events that could impair the ability of any promisor to keep his or her commitments. L also reminds M that he had recommended earlier the advisability of M retaining independent counsel. He suggests selecting a closing date ten days later in the event M changes his mind and decides to retain independent counsel. After receiving L's letter, M informs L in writing, as L requested, that M give careful consideration to L's recommendation that he retain independent counsel, that M understands his commitments under the agreements between the two families and what might prevent L or him from discharging their promises, the consequences of nonperformance, and that M and his wife are both satisfied the proposed terms are fair and reasonable. L believes that M readily grasps the nature of the transaction. M is an

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[140] The Law Society of Alberta, Code of Conduct, r. 3.4-13, Commentary [14] (2024) ("If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must disclose and explain the nature of the conflicting interest to the client, recommend that the client receive independent legal representation, and obtain the client's consent.").

intelligent person with good business sense. L asked himself this question: Have I raised all the issues that independent counsel would flag for M or I would have raised if M was entering into this transaction with a third party?[141] Both families enjoy the California property and sell it ten years later for a handsome profit.

[114] Suppose L and M decide that they would like to become a Rolls-Royce dealer. L's law practice has flourished. M's repair business has done well. And M has invested heavily in rental properties and is a wealthy man. L contacts Rolls-Royce. Rolls-Royce tells L what it looks for in a prospective dealer. L and M enter into an agreement and put in place the legal structures Rolls-Royce insists upon. L prepares all the documents relating to the transactions between L and M, including a unanimous shareholders agreement that contains a shotgun provision. Rolls-Royce prepares the legal documents that it requires L and M to execute. L explains, in writing, to M in plain English in detail why the interests of L and M are in conflict, that while L is satisfied the documents incorporate terms that L and M have agreed upon, and that it is clearly, not only in the best interests of M, but also L, that M retain counsel to provide him with independent legal advice about the transactions. L, in the letter, urges M to retain independent legal counsel and, if he does, to instruct his independent counsel to inform L in writing that M retained her or him and that M is satisfied that the proposed terms are fair and reasonable. L's letter also explains the obligations that the Rolls-Royce documents impose on the corporation that M and L are the shareholders of, on M and L as shareholders and as guarantors of the corporation's obligations to Rolls-Royce, as well as the risks associated with nonperformance of these obligations. For example, the letter records the essential features of the shotgun provision in the unanimous shareholders' agreement and discusses the risks M might encounter – for example, if L offered to purchase M's shares at a price less than fair market value and M, at the time, was not in a position to raise the money needed to purchase L's shares at the same price, M could be out of the business and deprived of the benefits associated with the fair market of his shares. The letter also informs M that Rolls-Royce has the

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[141] *McPherson v. Watt*, 3 A.C. 254, 266 (H.L. 1877) per Lord O'Hagan ("An attorney is not affected by the absolute disability to purchase which attaches to a trustee. But, for manifest reasons, if he becomes a buyer of his client's property, he does so at his peril. He must be prepared to show that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self-interest, that he has not misrepresented anything, or concealed anything, that he has given an adequate price, and that *his client has had the advantage of the best professional assistance which if he had been engaged in a transaction with a third party he could possibly have afforded*")(emphasis added); *Gibson v. Jeyes*, 31 Eng. Rep. 1044, 1050 (Ch. 1801) per Lord Eldon, L.C.("if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, *manifest that he has given her all that reasonable advice against himself, that he would have given her against a third person*. … *It would have been his duty, advising her as against a third person*, to have said, that in the natural course of things that person of the age of eighty, nine or ten years older than herself, might die in her life; and she, surviving perhaps several years, would have to go, not in any specific fund, the stock or the money …. but to get administration as a creditor, or to follow the representatives. It was his duty to say that as against himself. … If he had been dealing to the best advantage with a stranger, it would have been his duty to make accurate inquiries to her state of health") (emphasis added) & *Iowa Supreme Court Attorney Disciplinary Bd. v. Wintroub*, 745 N.W.2d 469, 474 (Iowa Sup. Ct. 2008) per Appel, J. ("the attorney [doing business with a client] must give [the client] the same kind of legal advice that the client would have received if the transaction involved a stranger and not the attorney").

right to cancel their dealership agreement if L and M do not agree to increase the size of the dealership's showroom and maintenance facilities as dictated by Rolls-Royce. This demand may come at a time when L and M do not want to invest more in the dealership. M retains counsel and instructs counsel to provide L with the certificate L asked for. M subsequently signs the necessary documents.

[115] Is there anything else that equity, the common law, and the governing code of professional conduct demands of L in these situations? What more could L have done to ensure that the legitimate interests of M as a client of L and L as M's lawyer are protected?

[116] When M agreed to purchase L's Rolls-Royce and L agreed to buy Dr. D's Mercedes-Benz, L provided no legal services. L derived no advantage because he was M's or Dr. D's lawyer.[142] L and M signed the sales agreement that L drafted fifteen years earlier and M always used when he bought and sold Rolls-Royces and Bentleys. L and M were a buyer and seller. M and Dr. D were not interacting with L wearing his lawyer's hat; nor were M and Dr. D wearing client hats. L acted appropriately.

[117] In the third hypothetical, L and M interacted in a fundamentally different way. L drafted the loan agreement. L drew on his legal skills to prepare a document that contained promises on the part of L and M. The interests of L as creditor and M as debtor were in conflict. To ensure that M's interests were protected – and that L discharged his fiduciary obligations to M – L insisted that M retain independent legal counsel. L took steps that ensured M's legitimate interests were protected. In addition, L wisely asked M to have independent counsel certify that he had advised M on the merits of the transaction and that M is satisfied the terms were fair and reasonable. To reduce the risk M fails to remember this in the future, L asked independent counsel to have M sign the certificate. If M had not agreed to retain independent counsel and provide the certificate signed

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[142] American Bar Association, Model Rules of Professional Conduct, r. 1.8, Comment (2024) ("[Rule 1.8] does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client and the restrictions in paragraph (a) are unnecessary and impracticable"); The State Bar of California, California Rules of Professional Conduct, r. 1.8.1 (2023) ("A lawyer shall not enter into a business transaction with a client … unless each of the following requirements has been satisfied") & Comment [6] ("This rule does not apply … (ii) to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client") & Restatement (Third) of the Law Governing Lawyers §126, Comment c (2000) ("Standard Commercial Transactions. The requirements of informed consent and objective fairness are satisfied when lawyer and client enter into standard commercial transactions in the regular course of business of the client, involving a product or service as to which the lawyer provides no legal services. This Section therefore does not apply to such transactions. Standard commercial transactions are those regularly entered into between the client and the general public, typically in which the terms and conditions are the same for all customers. In such circumstances, the client's interests in the transaction with the lawyer need no special protection").

by the lawyer and M, L would have refused to enter into the financial transaction with M. The law required nothing more of L.

[118] The fourth hypothetical introduced a wrinkle. There were parties to the California-home agreement that were not clients of L. Neither of the wives were L's clients. This meant that M was the only party to the agreement that was a client of L. And what did L do to reduce the risk that M's legitimate interests arising from the fact that he was doing business with his lawyer would not be protected? L reminded M that, while L was his lawyer for other transactions, L was not acting as M's lawyer for this transaction. L urged M to retain counsel to advise M and his wife. When M declined to do so, L provided him with all the information L would have had M been pursuing the California transaction with a third party. Their interests were not completely identical. Circumstances might change and one or more of the parties may want to sell the property. This may happen if one of the couples divorced, one of the spouses become seriously ill or died, or one of the families suffered adverse financial circumstances and could no longer afford to pay all the maintenance, insurance, home ownership association fees, and tax costs.

[119] The fifth hypothetical does not incorporate actors who were not L's clients. But the transaction with Rolls-Royce was much more complicated than the simple loan transaction featured in the third hypothetical. There were aspects to it that increased the likelihood L had a much better grasp of potential problems than M. In this scenario, a prudent lawyer would insist that a client retain independent legal counsel. L could not have done anything else to adequately protect the legitimate interests of M.

[120] In these five hypotheticals L discharged the duties the common law, equity, and the governing professional code of conduct imposed on him. L honored his fiduciary obligations. In the first two hypotheticals, L's status as a lawyer had no impact whatsoever on the terms of the transactions. L derived no advantage from being a lawyer. In the other three, where the playing field was clearly uneven, L insisted that M seek legal counsel or encouraged him to do so, so that M would have the benefit of an independent assessment by a third party capable of providing M with an unbiased assessment from M's perspective of the merits of the transaction. As a result, M understood the obligations imposed on him under all the agreements, events that might impair M's ability to discharge his obligation, the obligations imposed on other parties to the transaction, and the events that might impair the ability of other parties to discharge their obligations. Consequently, M was able to independently assess the merits of the transactions and determine for himself that the burdens or obligations associated with the transactions were fair and reasonable. In the California-house transaction, the one in which M did not retain counsel to provide him with nontax advice, L identified for M, in writing, all the issues and key considerations independent counsel would have brought to M's attention.

[121] I will now compare L's exemplary behavior with the lawyer who is an actor in the next hypothetical.

[122] Suppose S, a lawyer who has been practising law for over forty years and is a successful entrepreneur, is the solicitor for W, an ophthalmic surgeon in her thirties who recently inherited $100 million upon the death of her father. W knows that S had frequently alerted her father to good investment opportunities of which he had become aware because of his legal practice and business connections. W asks S to keep her in mind if something of substantial interest comes up. Several years later S tells W that SF Co., a client of his, is in the development business and has its eye on six contiguous lots in a desirable urban area. His client is contemplating purchasing the lots and constructing twelve luxury townhouses. SF Co. needs $20 million to purchase the six lots and construct the twelve townhouses. S does not tell W that S owns thirty percent of the SF Co. shares and that SF Co. is a newcomer in the development business with only a handful of relatively small projects under its belt. Relying solely on S's advice, W agrees to lend SF Co. $15 million on reasonable commercial terms. W's mortgage is a first charge on each of the six lots. Prospective purchasers made deposits on the twelve townhouses early in the life of the project. But no purchaser has taken possession or paid the balance of the purchase price after a townhouse was built. SF. Co requires an additional $5 million to complete construction of the four townhouses on the final two lots. S does not recommend that W advance SF Co. an additional $5 million. But he tells W that SF Co. would have an easier time to raise the needed funds and complete the project as planned and payout W's mortgage if it could inform a potential lender that it would have a first charge on the last two lots. S tells W that he has retained a respected appraiser to give an opinion on the value of the eight completed townhouses. The appraiser reports that the value of the eight completed townhouses is $20 million, more than enough to protect W's $15 million loan to SF Co. On the advice of S, W agrees to remove her mortgage charge on the two vacant properties. When SF Co. experiences some difficulties raising the $5 million, S lends SF Co. $5 million and registers the mortgage on the two lots. S's mortgage is a first charge. Unforeseen circumstances lead to a recession and the collapse of the high-end townhouse market. All the purchasers walk away from their obligations to SF Co. SF Co. goes bankrupt. W forecloses SF Co.'s mortgage. The sale of the eight townhouses on which W's mortgage is the first charge produces $8 million. The sale of the four townhouses on which S's mortgage is the sole charge raises $4 million. W sues S for breach of trust, breach of contract, negligence, and fraud.[143]

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[143] A client may sue a lawyer whose conduct does not meet the standards imposed by the common law or equity. A lawyer's misconduct may meet the essential elements of several different causes of actions. See *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 405-06 per La Forest, J. ("[there are] often subtle differences between ... [breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation] ... . [T]he fiduciary duty is different in important respects from the ordinary duty of care. ... [W]hile both negligent misrepresentation and breach of fiduciary duty arise in reliance-based relationships, the presence of loyalty, trust, and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus, while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty. ... [W]hereas undue influence focuses on the sufficiency of consent and unconscionability looks at the reasonableness of a given transaction, the fiduciary principle monitors the abuse of a loyalty reposed"); *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, ¶ 40; [2007] 2 S.C.R. 177, 207 per Binnie, J. ("the claim arises out of 'the parties' relationship of trust and confidence' but the case is pleaded as a breach of fiduciary duty of loyalty rather then breach of contract"); *Davey v. Woolley, Hames, Dale & Dingwall*,

[123] Had S followed L's lead what would S have done differently?

[124] First, S would have informed W that S owned thirty percent of SF Co.'s shares.[144] A client is entitled to know when he or she is doing business with his or her own lawyer.[145] A client cannot

133 D.L.R. 3d 647, 653 (Ont. C.A. 1982) per Wilson, J.A. ("the plaintiff's claim [against the defendant lawyer] was framed in both breach of the fiduciary duty and in negligence"); *Day v. Mead*, [1987] 2 N.Z.L.R. 443 (Ct. App. 1987) (the plaintiff client sued the defendant solicitor for breach of fiduciary duty and negligence arising from a failed investment in a company the solicitor had an interest in and that the solicitor recommended); *Ulico Casualty Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 865 N.Y.S.2d 14, 20 (Sup. Ct. App. Div. 2008) per Tom, J.P. ("Because the attorney-client relationship is both contractual and inherently fiduciary, a complaint seeking damages alleged to have been sustained by a plaintiff in the course of such a relationship will often advance one or more causes of action based upon the attorney's breach of some contractual or fiduciary duty owed to the client"); *Squire, Sanders & Dempsey LLP v. Givaudan Flavors Corp.*, 937 N.E.2d 533, 535 (Ohio Sup. Ct. 2010) (the plaintiff sued its former law firm for breach of contract, breach of fiduciary duty, fraud, legal malpractice, and unjust enrichment) & Restatement (Third) of the Law Governing Lawyers § 48 (2000) ("In addition to the other possible bases of civil liability described in §§ 49, 55, and 56, a lawyer is civilly liable for professional negligence to a person to whom the lawyer owes a duty of care within the meaning of § 50 or § 51, if the lawyer fails to exercise care within the meaning of § 52 and if that failure is a legal cause of injury within the meaning of § 53, unless the lawyer has a defense within the meaning of § 54") & § 49 ("In addition to the other possible bases of civil liability described in ¶¶ 48, 55 and 56, a lawyer is civilly liable to a client if the lawyer breaches a fiduciary duty to the client set forth in § 16(3) and if that failure is a legal cause of injury within the meaning of § 53, unless the lawyer has a defense within the meaning of § 54").

[144] *Iowa Supreme Court Attorney Disciplinary Bd. v. Wintroub*, 745 N.W. 2d 469, 474 (Iowa Sup. Ct. 2008) per Appel, J. ("full disclosure means more than simply disclosing the material terms of a transaction. Full disclosure means the use of actual diligence on the part of the attorney to 'fully disclose every relevant fact and circumstance which the client should know to make an intelligent decision concerning the wisdom of entering the agreement.' … Further, the attorney must give the same kind of legal advice that the client would have received if the transaction involved a stranger and not the attorney. … More recently, we emphasized that lawyers engaged in business transaction with clients involving conflicting interests 'have a duty to explain carefully, clearly and cogently why independent legal advice is required'").

[145] *McPherson v. Watt*, 3 A.C. 254, 266 (H.L. 1877) per Lord O'Hagan ("And although [the attorney has fulfilled all these onerous conditions], though there has been the fullest information, the most disinterested counsel and the fairest price [paid for the purchase of the client's property], if the purchase be made covertly in the name of another, without communication of the fact to the [client] vendor, the law condemns and invalidates it utterly"); *London Loan and Savings Co. of Canada v. Brickenden*, [1933] S.C.R. 257, 261 per Crocket, J. ("Brickenden's position as the solicitor of both the borrower and the lender in the negotiation and completion of a mortgage loan in which he was so directly and largely interested, was one which could only be justified by the observance on his part of the utmost frankness and good faith towards both parties. That it was his imperative duty in such circumstances to fully disclose to his clients all material facts within his knowledge in relation to the transaction and treat with them upon a perfectly equal footing cannot be doubted. Moreover, it … [is] an established rule of law that when a solicitor acts for a client in a matter in which he is himself financially interested the onus rests upon him, if the propriety of the transaction is called in questions, to show that the negotiations were honestly conducted and that the transaction was fair and just and in no way disadvantageous to his client"), aff'd, [1934] 3 D.L.R. 465 (P.C.) (Can.); *Ward v. Sharpe*, 53 L.J.Ch. 313, 319 (Ch. 1883) per North, J. ("A transaction between a solicitor and client, in which … [the solicitor] takes a benefit, cannot be supported unless the solicitor has taken care that his client is fully acquainted with the facts and properly advised upon them; and the onus of proving this is upon the solicitor") & *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377,

consent to the lawyer being involved in a transaction despite the obvious conflict of interest if unaware of the lawyer's participation in the transaction. M always knew that he was dealing with L.

[125] Second, S would have informed W in writing that they had very different interests. W was a mortgagee. S was both a mortgagee and a substantial shareholder of a mortgagor, SF Co. Accordingly, S was in a conflict of interest. He should have insisted that W retain independent counsel or, at the very least, urged her in writing to obtain independent legal counsel.[146]

[126] Third, S should have provided W with an accurate account of SF Co.'s activities in the development business and the risks that developers faced.[147] Had W known that SF Co. was a relative newcomer to the development business, she might have been unwilling to lend such a large amount.

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417 per La Forest, J. ("clients in a professional advisory relationship have a right to expect that their professional advisors will act in their best interests, to the exclusion of all other interests, unless the contrary is disclosed").

[146] *Attorney Grievance Comm'n of Maryland v. Shapiro*, 108 A. 3d 394, 406 (Md. Ct. App. 2015) per Harrell, J. ("While Respondent testified that he orally advised Wisniewski [to seek independent legal counsel] there is no indication in the record, nor does Respondent anywhere assert, that Wisniewski was ever given written notice").

[147] *Korz v. St. Pierre*, 61 O.R. 2d 609, 613, 617 & 619 (C.A. 1987) per Cory, J.A. ("It was conceded that [lawyer] Korz did not advise [his clients] St. Pierre or Woods to obtain independent legal advice at any time before they signed any of the guarantees or before they invested in the company. ... In the circumstances ... [Korz] had a duty to disclose his judgment-proof status to his former clients. His failure to do so constituted a breach of his duty which he owed to former clients to disclose his status when he was entering with them into a relationship of close proximity. ... Such a result is no more than an ordinary sense of fairness demands, and that a reasonable appreciation of the duties and obligations owed by a lawyer to his clients ... . The circumstances of this case created a fiduciary relationship that cast a fiduciary duty upon Korz to disclose his financial position"), leave to app. ref'd, [1988] 1 S.C.R. x; *Iowa Supreme Court Attorney Disciplinary Bd v. Wintroub*, 745 N.W. 2d 469, 472 & 474 (Iowa Sup. Ct. 2008) per Appel, J. ("Prior to formalizing the loan, Wintroub [the lawyer] made several disclosures to Bergman [the client]. He told Bergman that (1) he had monies owed to him from his principal client; (2) he had expanded his [nonlaw] business in reliance on this client; (3) he had invested his personal financial resources to pay the expenses of his law practice; (4) he had exhausted his credit; (5) he had no other source of funds to keep his law practice in operation; (6) without the loan he might have to cut back his law practice, but would continue to represent Bergman; and (7) he had no idea when he would be able to repay the loan but that it would certainly be a while. .... Wintroub made significant material disclosures in connection with both of the Bergman transactions. In connection with the sale of the stock in Takara, Inc., however, the stipulation upon which this case was tried did not show that Wintroub disclosed the financial performance of the company thorough financial statements, annual reports, or oral summaries for the period beginning in January 1994, when Wintroub formed Takar, until the time of Bergman's investment in January 1999. .... [T]here is no record that Wintroub advised Bergman regarding the lack of liquidity ordinarily associated with minority interests in closely held corporations or the lack of control minority interests have over management") & *Comm. on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Carty*, 515 N.W.2d 32, 35-36 (Iowa Sup. Ct. 1994) per Andreasen, J. ("Carty [the lawyer] failed to make full disclosure to Brad [the client] of all material facts. There was no discussion of the current market value of the land compared with the unpaid balance, assignment of accrued interest, or the ability of the corporation to make the contract payments").

[127] Fourth, S should have provided W with a thorough explanation of the downsides associated with removing the mortgage as a charge on the two vacant lots.[148] Assessors cannot foretell the future. The value of the eight completed townhouses may change dramatically if the business climate deteriorates. This has happened before.

[128] Fifth, S should have disclosed to W that S would consider lending SF Co. $5 million if his mortgage would be a first charge on the last two lots. This disclosure might have caused W to retain counsel to advise her on the wisdom of giving up the charge on the two lots.

[129] This discussion supports this statement of sound principles:

1. A prudent lawyer should *not* enter into a business or financial transaction with a client unless

    (a) the lawyer receives a certificate signed by independent legal counsel and the client stating that the client

        (i) has retained independent legal counsel to advise about the legal aspects of the proposed transaction and the advisability of the client entering into it,

        (ii) is satisfied that the terms of the proposed transaction are fair and reasonable,[149] and

        (iii) consents to the lawyer being a party to the transaction, or[150]

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[148] American Bar Association, Model Rules of Professional Conduct, r. 1.8, Comment (2024) ("Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing, signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable").

[149] This is a subjective and not an objective test. The client must be satisfied that the terms of the proposed transaction are fair and reasonable.

[150] The Law Society of Alberta, Code of Conduct, r. 3.4-13, Commentary[4] (2024) ("When the client does not have separate independent legal representation in the transaction, the lawyer has the onus of demonstrating that · the transaction was fair and reasonable to the client · the transaction was not disadvantageous to the client · the client was fully informed · the client consented to the transaction, and · the client had independent legal advice, or was not disadvantaged by its absence") & Commentary [9] ("The client must be advised of the advantages of retaining independent counsel. The nature of the matter may require that the client have independent legal representation. At a minimum, the lawyer must recommend that the client seek independent legal advice. If the client elects to waive independent legal advice, the lawyer must still make an independent assessment of whether he or she is able to proceed, considering the nature of the transaction. All discussions with the client should be clearly documented and confirmed in writing").

(b) the lawyer explains to the client *in writing* in a manner the client is likely to understand, taking into account the client's familiarity with transactions comparable to the transaction the lawyer and client are contemplating,

(i) the essential terms of the transaction,[151]

(ii) the adverse effects the client may suffer if

(A) the client discharges the obligations the transaction imposes on the client and the lawyer benefits from the client discharging the client's obligation under the transaction, or

(B) the client or the lawyer or both of them fail to discharge the obligations the transaction imposes on either or both of them,

(iii) why the interests of the lawyer and the client in the transaction are not the same and are in conflict,

(iv) that the lawyer is not the client's lawyer for the transaction and has not advised the client on the merits of the transaction,

(v) that, in the absence of reasons of which the lawyer is not aware, the client should retain independent legal counsel to advise about the legal aspects of the proposed transaction and the advisability of the client entering into it,

(vi) that the terms of the transaction cannot be finalized for a reasonable period of time so that the client may consider the desirability of retaining independent legal counsel, and

(c) the client confirms in writing to the lawyer that the client

[151] See *Salomon v. Matte-Thompson*, 2019 SCC 14, ¶ 52; [2019] 1 S.C.R. 729, 759 per Gascon, J. ("A lawyer's duty is threefold, encompassing duties (1) to inform, (2) to explain, and (3) to advise in the strict sense. The duty to inform pertains to the disclosure of relevant facts; the duty to explain requires that the legal and economic consequences of a course of action be presented; and the duty to advise in the strict sense requires that a course of action be recommended").

(i) is satisfied that the terms of the proposed transaction are fair and reasonable,[152] and

(ii) consents to the lawyer being a party to the transaction.[153]

2. A lawyer discharges the obligations set out in 1(b)(i) and (ii) if he or she provides substantially the same information a competent lawyer would have provided to a client in substantially the same situation.[154]

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[152] This is a subjective and not an objective test. The client must be satisfied that the terms of the proposed transaction are fair and reasonable. This is exactly the same test as is set out in 1(a)(ii).

[153] Law Society of Scotland, Standards for Solicitors 10 ("Disclosure of Interest – When solicitors are consulted about matters in which they have a personal interest, they must explain that interest to the client. This will let the client decide whether or not they want the solicitor to continue working for them").

[154] *McPherson v. Watt*, 3 A.C. 254, 266 (H.L. 1877) per Lord O'Hagan ("An attorney is not affected by the absolute disability to purchase which attaches to a trustee. But, for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril. He must be prepared to show that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self-interest, that he has not misrepresented anything, or concealed anything, that he has given an adequate price, and that his client has had the advantage of the best professional assistance which if he had been engaged in a transaction with a third party he could possibly have afforded"); *Gibson v. Jeyes*, 31 Eng. Rep. 1044, 1050 (Ch. 1801) per Lord Eldon, L.C. ("With respect to the case of the attorney, I have no difficulty in saying ... [the attorney] might have dealt for this annuity: but he had two ways of proceeding; which this Court must have held it quite incumbent upon him, dealing with this lady [client], to attend to. If she [insisted that the attorney] buy ... [the stock], he would have done well to have said to her, that Gibson [the wealthy relative she disliked] would give more than any one else; that it was his interest to do so; that he would secure it upon real estate; that it was more fit for her to deal with her relation than her attorney; and that the transaction would have a better appearance in the world. It was natural enough, that she could answer, she would not deal with Gibson, but would consider herself only and her own comforts, according to Benyon's advice to her. Then it would have been right for the Defendant to have declined it. Suppose, she had insisted, that he [her attorney] should be the person [to purchase her stocks and pay her the annuity]: it would be too much for the Court to proceed upon delicacies, such as these, and to say, he should not permit himself to contract with her. Therefore I say, he might contract: but then he should have said, if he was to deal with her for this, she must get another attorney to advise her as to the value: or, if she would not, then out of that state of circumstances this clear duty results from the rule of this Court, and throws upon him the whole *onus* of the case; that, if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest, that he has given her all that reasonable advice against himself, that he would have given her against a third person. ... It would have been ... [the attorney's] duty, *advising her as against a third person*, to have said, that in the natural course of things that person of the age of eighty, nine or ten years older than herself, might die in her life; and she, surviving perhaps, several years would have to go, not to any specific fund, the stock or the money not even to Gibson's public-houses, to which as a security she had objected, but to get administration as a creditor, or to follow the representatives. It was his duty to say that as against himself") (emphasis added); *Edwards v. Meyrick*, 67 Eng. Rep. 25, 29 (Ch. 1842) per Wigram, V.C. ("If the attorney, being employed to sell, becomes himself the purchaser, his duties and his interests are directly opposed to each other, and it would be difficult – and without the clearest evidence that no advantage was taken by the attorney or his partner, and that the vendor had all the knowledge which could be given him in order to form a judgment, it would be impossible – to support the transaction"); *Iowa Supreme Court Attorney Disciplinary Bd. v. Wintroub*, 745 N.W. 2d 469, 472 (Iowa Sup. Ct. 2008) per Appel, J. ("the attorney [doing business with a client] must give [the client] the same kind

3. A business or financial transaction does not include an agreement

   (a) between the lawyer and the client for the provision by the client of goods or services that the client in the ordinary course of business provides to the public,[155]

   (b) the terms of which are not affected in any way by the fact one of the parties is a lawyer, or

   (c) that bestows a small benefit on the lawyer.[156]

[130] A prudent lawyer contemplating doing business with a client must carefully consider these standards.[157] He or she must adhere to the requirements of equity and the ethical standards imposed

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of legal advice that the client would have received if the transaction involved a stranger and not the attorney") & *Fair v. Bakhtiari*, 125 Cal. Rptr.3d 765, 779 (Ct. App. 2011) per Kline, P.J. ("Fair [the attorney] claimed to be entitled to 50 percent of all back-end profits, whether or not his ownership interests in the Stonesfair entities were voided. This claim was damaging to Bakhtiari [the client] as it was vastly disproportionate to Fair's ownership interests in the Stonesfair entities. … [I]ndependent counsel surely would have advised Bakhtiari that profits should have been distributed in accordance with the parties' ownership interests").

[155] The State Bar of California, California Rules of Professional Conduct, r. 1.8.1, Comment [6] (2023) ("This rule does not apply … (ii) to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client").

[156] Federation of Law Societies of Canada, Model Code of Professional Conduct, r. 3.4-29 (2024) ("Subject to rules 3.4-30 to 3.4-36, where a transaction included lending or borrowing money, buying or selling property or services having other than *nominal* value, ... a lawyer must ...") (emphasis added); The Law Society of Alberta, Code of Conduct, r. 3.4-13 (2024) ("A lawyer must not enter into a transaction with a client who does not have independent legal representation unless the transaction is fair and reasonable to the client and the client consents to the transaction"), Commentary [16] ("A 'transaction' includes the acceptance of a gift or bequest. ... A lawyer must refuse to accept a gift that is other than *nominal* unless the client has received independent legal advice") (emphasis added); Law Society of Ireland, Solicitor's Guide to Professional Conduct 44 (4th ed. 2022) ("Where a client wishes to leave a *token* legacy or to make a *token* gift of a nominal amount to a solicitor or member of the solicitor's staff or family, it would not be considered unprofessional to take such a gift or bequest. However, the prudent course is for the solicitor to refuse to accept any benefit under a will that the solicitor or the firm in which they work are personally drafting") (emphasis added) & The State Bar of California, California Rules of Professional Conduct, r. 1.8.3(a) (2023) ("A lawyer shall not: (1) solicit a client to make a *substantial* gift, including a testamentary gift, to the lawyer or a person related to the lawyer")(emphasis added) & Comment [1] ("A lawyer ... may accept a gift from the lawyer's client subject to general standards of fairness and absence of undue influence"). Suppose L does all the legal work for Car Wash Co. The client opens a new car wash close to where L resides. CW Co. gives L a card that allows him to access the car wash facilities for the next six months at no cost on the understanding that L will wash his car at the CW Co. carwash near his home twice a month and tell his neighbors about the new business in their neighborhood. The value of the card is roughly $250. The likelihood L's failure to honor this obligation will harm the client is exceedingly low. This is an example of an agreement between a lawyer and a client that bestows a small benefit on a lawyer.

[157] Law Society of Ireland, Solicitor's Guide to Professional Conduct 46 (4th ed. 2022) ("There may be circumstances where a solicitor enters into business or engages in a transaction with one or more clients by way of joint venture, by way of example, in either a partnership or through a limited company. While there is no rule prohibiting the solicitor,

by the lawyer's professional regulator. Adherence to them would reduce considerably the likelihood that the lawyer will contravene obligations the common law, equity, or a code of conduct imposes on a lawyer doing business with a client and impair the legitimate interests of the client and that the lawyer will become either a respondent in a disciplinary hearing or a defendant in a lawsuit, or both.

[131] I emphasize that, as a general rule, the best course for a lawyer contemplating doing business with a client is not to do so unless the client agrees to retain independent counsel and provides a certificate of independent legal representation signed by independent counsel and the client.[158]

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or their firm, from acting for such joint venture, care must be taken by the solicitor to avoid potential or actual conflicts of interest").

[158] *Reid v. Graybriar Industries Ltd.*, 2006 ABQB 519, ¶ 79; [2006] 10 W.W.R. 271, 291 per Verville, J. ("once a fiduciary relationship and a transaction giving rise to a conflict of interest have been established, the solicitor has the onus of establishing that the fiduciary duty was not breached in the circumstances. This may be established by evidence that he referred the client to an independent solicitor for advice, or that the client was not disadvantaged by its absence. While there is no absolute requirement of independent advice in every case, the solicitor bears a very heavy onus in its absence"); *Nocton v. Lord Ashburton*, [1914] A.C. 932, 969 (H.L.) per Lord Shaw ("[The defendant solicitor] was ... personally interested [in the release given by the plaintiff] and he profited as a co-speculator by the transaction of release; and I am of opinion that the duty of ... [the defendant solicitor] was ... to decline to act professionally or as the adviser of his client and to insist that a separate solicitor should be obtained"); *Law Society of New South Wales v. Moulton*, [1981] 2 N.S.W.L.R. 736, 739-40 (Ct. App.) per Hope, J.A. ("a solicitor stands in a fiduciary relationship to his clients. If he is to have business dealings with them on his own account, and in particular if he is to borrow money from them, the requirements of the law are rigorous. The need for that rigour is obvious. Commonly to a great extent, always to some extent, the solicitor is in a position of special influence in respect of his client. Clients must be able to rely upon the professional advice of the solicitor and to place in him the fullest confidence that he will protect them and handle their affairs in their interests. Where a solicitor wishes to borrow from a client, the client must be put in a position to make a free and informed decision about the proposed transaction. Since in these circumstances the interests of the client and the solicitor can and generally must conflict, the best and easiest way to achieve this result is to insist that the client have independent and informed advice. If this does not happen, a heavy burden indeed lies upon the solicitor to show that he has done everything in his power to protect the interests of his client and to ensure that the client is aware of every circumstance that is or might be relevant to his decision. If a solicitor wishes to use his client's money to finance some business he is carrying on, it is almost impossible to see how the client can be adequately protected and advised without insisting that he gets independent advice"); *Ferguson v. Yaspan*, 183 Cal. Rptr.3d. 83, 91 (Ct. App. 2014) per Hoffstadt, J. ("The law .... takes a jaundiced view of business transactions between attorneys and their clients. ... Such transactions are not prohibited, but they are disfavored") & *Iowa Supreme Court Attorney Disciplinary Bd. v. Wintroub*, 745 N.W. 2d 469, 475 (Iowa Sup. Ct. 2008) per Appel, J. ("By insisting that the client obtain independent legal advice, the attorney may avoid any perception that his communications with his client have been colored or less than candid on the transaction in question"). See Law Society of British Columbia, Code of Professional Conduct for British Columbia, r. 3.4-28 (2024) ("Subject to this Code rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction"); Law Society of Prince Edward Island, Code of Professional Conduct, r. 3.4-28 (2023) ("Subject to this rule, a lawyer must not enter into a transaction with the client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction"); Law Society of Scotland, Standards for Solicitors 13 ("Conflict of Interest. ... [A] solicitor cannot work for a client when there is a

[132] Lawyers in British Columbia [159] and Prince Edward Island [160] can only enter into a transaction with a client if "the client has independent legal representation with respect to the transaction". This rule is consistent with what I regard as a best practice. Lawyers in other Canadian jurisdictions are not subject to this restriction. But lawyers in Saskatchewan, [161] Manitoba, [162] Ontario, [163] New Brunswick, [164] Nova Scotia, [165] Newfoundland and Labrador, [166] Yukon,[167] Northwest Territories,[168] and Nunavut[169] may lend money to a client only if "the client has independent legal representation with respect to the transaction". Alberta lawyers lending money to a client are only obliged to *recommend* that the client receive independent legal

conflict between the interest of the client and the solicitor") & Law Society of Ireland, Solicitor's Guide to Professional Conduct 44-45 (4th ed. 2022) ("A solicitor should not borrow money from a client unless that client is independently represented by another firm in that transaction or it is part of the business of the client to lend money, as when the client is a bank. If the client does not come within that category of client, then best practice dictates that the solicitor should arrange for the client to obtain independent legal advice and that full supporting documentation for the loan be recorded on the client's file. Accordingly, details of the agreement for the client to lend money to the solicitor should be evidenced in writing, which should include, among other things, the amount of the loan, the date of the agreement, the terms of repayment, and evidence of the identity of the solicitor providing the independent legal advice").

[159] Law Society of British Columbia, Code of Professional Conduct for British Columbia, r. 3.4-28 (2024) ("Subject to this Code rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction") & Commentary [1] ("This provision applies to any transaction with a client, including: (a) lending or borrowing money; (b) buying or selling property; (c) accepting a gift, including a testamentary gift; (d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity; (e) recommending an investment; and (f) entering into a common business venture").

[160] Law Society of Prince Edward Island, Code of Professional Conduct (2023) (rule 3.4-28 and Commentary [1] are identical to the same-numbered provisions in the Law Society of British Columbia's Code of Professional Conduct").

[161] Law Society of Saskatchewan, Code of Professional Conduct, r. 3.4-33 (2024).

[162] The Law Society of Manitoba, Code of Professional Conduct, r. 3.4-33 (2023).

[163] Law Society of Ontario, Code of Professional Conduct, r. 3.4.29(b)(i) (2022) ("in the case of a loan to a client who is not a related person, the lawyer shall require the client to receive independent legal representation").

[164] Law Society of New Brunswick, Code of Professional Conduct, r. 3.4-33 (2023).

[165] Nova Scotia Barrister's Society, Code of Professional Conduct, r. 3.4-33 (2023).

[166] Law Society of Newfoundland and Labrador, Code of Professional Conduct, r. 3.4-33 (2020).

[167] Law Society of Yukon, Code of Professional Conduct, r. 3.4-33 (2024).

[168] Law Society of Northwest Territories, Code of Professional Conduct, r. 3.4-33 (2019).

[169] Law Society of Nunavut, Code of Professional Conduct, r. 3.4-33 (2022).

representation.[170] No Canadian jurisdiction allows a lawyer to borrow money from a client unless the client lends money to the public as part of its business.[171]

[133] Section 1(b) of the statement of sound principles set out in paragraph 129 states the protocol that is in place if the client does not provide the lawyer with a certificate of independent legal advice – is designed to increase the likelihood that the client is in *substantially* the same position the client would have been in had the client retained independent counsel to advise on the merits of the transaction. A client who receives from the lawyer the information required by § 1(b) should be in a position to independently assess the merits of the proposed transaction and make an

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[170] The Law Society of Alberta, Code of Conduct, r. 3.4-13, Commentary [14] (2024) ("If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must disclose and explain the nature of the conflicting interest to the client, recommend that the client receive independent legal representation, and obtain the client's consent").

[171] Federation of Law Societies of Canada, Model Code of Professional Conduct, r. 3.4-31 (2024) ("A lawyer must not borrow money from a client unless (a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public; or (b) the client is a related person as defined by the *Income Tax Act* (Canada)"); The Law Society of Alberta, Code of Conduct, r. 3.4-13, Commentary [13] (2024) ("A lawyer must not borrow money from a client unless: · the client is a lending institution whose business includes lending money to members of the public, or · the client is a related person and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by independent legal advice"); Law Society of British Columbia, Code of Professional Conduct of British Columbia, r. 3.4-31 (2024) ("A lawyer must not borrow money from a client unless (a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public; or (b) the client is a related person as defined by the *Income Tax Act* (Canada)"); Law Society of Saskatchewan, Code of Professional Conduct (2024) (rule 3.4-31 is identical to the same-numbered rule in the Federation of Law Societies of Canada's Model Code of Professional Conduct); The Law Society of Manitoba, Code of Professional Conduct (2023) (rule 3.4-31 is identical to the same-numbered rule in the Federation of Law Societies of Canada's Model Code of Professional Conduct); Law Society of Ontario, Rules of Professional Conduct, r. 3.4-28.1 (2022) ("Except for borrowing from a regulated lender or from a related person, a lawyer shall not borrow from a client"); Barreau du Québec, Code of Professional Conduct of Lawyers, § 91 (2024) ("A lawyer may not borrow money from a client, or from a person related to the client within the meaning of the Taxation Act (chapter I-3), except in the following cases: (1) the client is a financial institution or a similar enterprise whose business includes lending money to the public; or (2) the client is a person with whom the lawyer does not deal at arm's length within the meaning of the Taxation Act, the client's interests are properly protected and independent legal advice regarding the matter was obtained"); Law Society of New Brunswick, Code of Professional Conduct (2023) (rule 3.4-31 is identical to the same-numbered rule in the Federation of Law Societies of Canada's Model Code of Professional Conduct); Nova Scotia Barristers' Society, Code of Professional Conduct (2023) (rule 3.4-31 is identical to the same-numbered rule in the Federation of Law Societies of Canada's Model Code of Professional Conduct); Law Society of Prince Edward Island, Code of Professional Conduct (2023) (rule 3.4-31 is identical to the same-numbered rule in the Federation of Law Societies of Canada's Model Code of Professional Conduct); Law Society of Newfoundland and Labrador, Code of Professional Conduct (2020) (rule 3.4-31 is identical to the same-numbered rule in the Federation of Law Societies of Canada's Model Code of Professional Conduct); Law Society of Yukon, Code of Professional Conduct (2024) (rule 3.4-31 is identical to the same-numbered rule in the Federation of Law Societies of Canada's Model Code of Professional Conduct); Law Society of the Northwest Territories, Code of Professional Conduct (2019) (rule 3.4-31 is identical to the same-numbered rule in the Federation of Law Societies of Canada's Model Code of Professional Conduct) & Law Society of Nunavut, Code of Professional Conduct (2022) (rule 3.4-31 is identical to the same-numbered rule in the Federation of Law Societies of Canada's Model Code of Professional Conduct).

informed decision as to whether it is in *his or her best interests* to do business with his or her lawyer on the proposed terms. This is not an objective test. It is a subjective test. It focuses on the assessment the client makes after considering all material information.

[134] A lawyer, in attempting to comply with § 1(b) of the statement of sound principles, must not provide advice to the client. This is, of course, because the interests of the lawyer and the client conflict. But the lawyer must provide the information the client needs to make an informed decision. These competing norms place a lawyer in a difficult position. The lawyer is, in effect, walking on a tightrope without a safety net. Lawyers doing business with a client who is not represented by independent counsel have taken this risk for hundreds of years.[172] This conundrum

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[172] *McPherson v. Watt*, 3 A.C. 254, 266 (H.L. 1877) per Lord O'Hagan ("An attorney is not affected by the absolute disability to purchase which attaches to a trustee. But, for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril. He must be prepared to show that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self-interest, that he has not misrepresented anything, or concealed anything, that he has given an adequate price, and that his client has had the advantage of the best professional assistance which if he had been engaged in a transaction with a third party he could possibly have afforded"); *Gibson v. Jeyes*, 31 Eng. Rep. 1044, 1050 (Ch. 1801) per Lord Eldon, L.C. ("With respect to the case of the attorney, I have no difficulty in saying that ... [the attorney] might have dealt for this annuity: but he had two ways of proceeding; which this Court must have held it quite incumbent upon him, dealing with this lady [client], to attend to. If she [insisted that the attorney] buy ... [the stock], he would have done well to have said to her, that Gibson [the wealthy relative she disliked] would give more than any one else; that it was his interest to do so; that he would secure it upon real estate; that it was more fit for her to deal with her relation than her attorney; and the transaction would have a better appearance in the world. It was natural enough, that she should answer, she would not deal with Gibson, but would consider herself only and her own comforts, according to Benyon's advice to her. Then it would have been right for the Defendant to have declined it. Suppose, she had insisted, that he [her attorney] should be the person [to purchase her stocks and pay her the annuity]: it would be too much for the Court to proceed upon delicacies, such as these, and to say, he should not permit himself to contract with her. Therefore, I say, he might contract: but then he should have said, if he was to deal with her for this, she must get another attorney to advise her as to the value: or, if she would not, then out of that state of circumstances this clear duty results from the rule of this Court, and throws upon him the whole *onus* of the case; that, if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest, that he has given her all that reasonable advice against himself, that he would have given her against a third person. ... It would have been ... [the attorney's] duty, *advising her as against a third person*, to have said, that in the natural course of things that person of the age of eighty, nine or ten years older than herself, might die in her life; and she, surviving perhaps, several years would have to go, not to any specific fund, the stock or the money, not even to Gibson's public-houses, to which as a security she had objected, but to get administration as a creditor, or to follow the representatives. It was his duty to say that as against himself") (emphasis added); *Edwards v. Meyrick*, 67 Eng. Rep. 25, 29 (Ch. 1842) per Wigram, V.C. ("If the attorney being employed to sell, becomes himself the purchaser, his duties and his interest are directly opposed to each other, and it would be difficult – and without the clearest evidence that no advantage was taken by the attorney or his partner, and that the vendor had all the knowledge which could be given him in order to form a judgment, it would be impossible to support the transaction"); *Iowa Supreme Court Attorney Disciplinary Bd. v. Wintroub*, 745 N.W.2d 469, 472 (Iowa Sup. Ct. 2008) per Appel, J. ("The attorney [doing business with a client] must give [the client] the same kind of legal advice that the client would have received if the transaction involved a stranger and not the attorney") & *Fair v. Bakhtiari*, 125 Cal. Rptr.3d 765, 779 (Ct. App. 2011) per Kline, P.J. ("Fair [the lawyer] claimed to be entitled to 50 percent of all back-end profits, whether or not his ownership interests in the Stonefair entities were voided. This claim was damaging to Bakhtiari [the client] as it was vastly disproportionate to Fair's ownership interests in the Stonesfair

reinforces the desirability of a lawyer doing business with a client only if the client has retained independent counsel.

[135] The best practice protocol protects both the interests of the client and the lawyer who does business with a client. But need the law concern itself with terms compliance with which constitutes discharge of any obligations the professional regulator imposes on a lawyer who does business with a client? Can the law not focus solely on the criteria that a fiduciary must abide by to protect the interests of the client?

[136] I think so.

[137] The law governing the fiduciary obligations of a lawyer who does business with a client has changed very little over the centuries[173] and is as follows:

> 1. A lawyer who enters into a business or financial transaction with a client discharges his or her fiduciary obligations to the client if
>
> (a) the client confirms to the lawyer that the client
>
> (i) has retained independent legal counsel to advise about the legal aspects of the proposed transaction and the advisability of the client entering into it,[174]

entities. … [I]ndependent counsel surely would have advised Bakhtiari that profits should have been distributed in accordance with the parties' ownership interests").

[173] *Gibson v. Jeyes*, 31 Eng. Rep. 1044, 1050 (Ch. 1801) per Lord Eldon, L.C. ("if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest that he has given her all that reasonable advice against himself, that he would have given her against a third person. … It would have been his duty, advising her as against a third person, to have said, that in the natural course of things that a person of the age of eighty, nine or ten years older than herself, might die in her life; and she, surviving perhaps several years, would have to go, not to any specific fund, the stock or the money …. but to get administration as a creditor, or to follow the representatives. It was his duty to say that as against himself. … If he had been dealing to the best advantage with a stranger, it would have been his duty to make accurate inquiries as to her state of health"). *Cf.* Restatement (Third) of the Law Governing Lawyers § 126 (2020) ("A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction in which the lawyer does not render legal services, unless: (1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement in it; (2) the terms and circumstances of the transaction are fair and reasonable to the client; and (3) the client consents to the lawyer's role in the transaction under the limitation and conditions provided in § 122 after being encouraged and given a reasonable opportunity, to seek independent legal advice concerning the transaction").

[174] *Dunn v. Dunn*, 7 A. 842, 846 (N.J. Ct. Err. & App. 1886) per Magie, J. ("There is no ground for the contention that complainant in this transaction resorted to or relied on independent advice. When that circumstance appears, transactions of this sort may often be sustained, because it shows that *in hac re* the relation of confidence has been superseded and the client deals at arm's length with his attorney"); *Longstaff v. Birtles*, [2001] EWCA Civ 1219, ¶ 1;

(ii) is satisfied the terms of the proposed transaction are fair and reasonable,[175] and

(iii) consents to the lawyer being a party to the transaction, or

(b) the lawyer explains[176] to the client in a manner the client is likely to understand, taking into account the client's familiarity with

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[2002] 1 W.L.R. 470, 471 per Mummery, L.J. ("This case powerfully demonstrates the importance of the paramount duty of a solicitor to observe *fiduciary* obligations in his personal dealings with a client ... A solicitor proposing either to buy property from, or to sell property to, a client is under a duty to cause the client to obtain independent advice. ... As long as that confidential relationship exists the solicitor must not place himself in a position where his duty to act in the interests of the confiding party [the client] and his personal interest in acting for his own benefit may conflict. Breach of that duty may result in the setting aside of the transaction or, if that is no longer possible, in the award of equitable compensation for resulting loss")(emphasis in original) & *Reid v Graybriar Industries Ltd.*, 2006 ABQB 519, ¶ 79; [2006] 10 W.W.R. 271, 291 per Verville, J. ("once a fiduciary relationship and a transaction giving rise to a conflict of interest have been established, the solicitor has the onus of establishing that the fiduciary duty was not breached in the circumstances. This may be established by evidence that he referred the client to an independent solicitor for advice, or that the client was not disadvantaged by its absence. While there is no absolute requirement of independent advice in every case, the solicitor bears a very heavy onus in its absence. Not only must he establish the terms of any agreement, that the client was fully informed, that negotiations were honestly conducted and that the transaction was fair and just and in no way disadvantageous to his client; he must also establish that the client was freed from the solicitor's influence and entered into the bargain on the basis of full information and acting solely of his own free and independent will. He must establish that the client was placed in a position that enabled him to act meaningfully, voluntarily and with an independent and informed judgment").

[175] This is a subjective and not an objective test. The client must be satisfied that the terms of the proposed transaction are fair and reasonable.

[176] *Reid v. Graybriar Industries Ltd.*, 2006 ABQB 519, ¶¶ 79 & 100; [2006] 10 W.W.R. 271, 291 & 296 per Verville, J. ("While there is no absolute requirement of independent advice in every case, the solicitor bears a very heavy onus in its absence. Not only must he establish the terms of any agreement, that the client was fully informed, that negotiations were honestly conducted and that the transaction was fair and just and in no way disadvantageous to his client; he must also establish that the client was freed from the solicitor's influence, and entered into the bargain on the basis of full information and acting solely of his own free and independent will. He must establish that the client was placed in a position that enabled him to act meaningfully, voluntarily and with an independent and informed judgment. …. Lloyd [had a duty] to ensure not only that the terms of the Mortgage were fair, and that Graybriar was fully informed, but also that Graybriar was freed from his influence and acted solely of his own free and independent will, and that the transaction was in no way disadvantageous to Graybriar"); *BGJ Associates v. Wilson*, 7 Cal. Rptr.3d 140, 146-47 & 149 (Ct. App. 2003) per Epstein, P.J. ("In entering into this business transaction with his client, Janger was required to satisfy all three requirements of rule 3-300 [of the California Rules of Professional Conduct]. First, the transaction and its terms had to be fair and reasonable to Brittan [the client], and had to be 'fully disclosed and transmitted in writing' to Brittan in a manner which should reasonably be understood. … Janger failed to satisfy this disclosure requirement. The agreement he seeks to enforce is an oral agreement… . Having failed to transmit the transaction and its terms to Brittan in writing, he did not comply with rule 3-300. Janger was also required to advise Brittan in writing that Brittan could seek the advice of an independent lawyer, and give Brittan a reasonable opportunity to do so. … The final requirement is that the client consent in writing to the terms of the transaction. … Janger did not satisfy the requirements of rule 3-300. …. Where an attorney enters into a business arrangement with a client, 'he must make it manifest that he gave to his client' 'all that reasonable advice against himself that he would have given him against a third person'. … Janger was unable to make this showing … . For these reasons, we agree

transactions comparable to the transaction the lawyer and the client are contemplating,

(i) the essential terms of the transaction,

(ii) the adverse effects the client may suffer if[177]

with the trial court's conclusion that the alleged agreement … was a violation of Janger's fiduciary duties … . Nevertheless, the agreement is voidable, not void"); *Dunn v. Dunn*, 7 A. 842, 844 (N.J. Ct. Err. & App. 1886) per Magie, J. ("When two parties stand towards each other in any relation which necessarily induces one to put confidence in the other, and gives to the latter the influence which naturally grows out of such confidence, and a sale is made by the former to the latter, equity raises a presumption against the validity of the transaction. To sustain it the buyer must show affirmatively that the transaction was conducted in perfect good faith, without pressure of influence on his part, with complete knowledge of the situation and circumstances, and entire freedom of action on the part of the seller. When the confidential relation is that of attorney and client, the attorney, who buys, must also show that he gave to his client, who sells, full information and disinterested advice") & The Law Society of Alberta, Code of Conduct, r. 3.4-13, Commentary [4] (2024) ("When the client does not have separate independent legal representation in the transaction, the lawyer has the onus of demonstrating that · the transaction was fair and reasonable to the client, · the transaction was not disadvantageous to the client, · the client was fully informed, · the client consented to the transaction, and · the client had independent legal advice, or was not disadvantaged by its absence").

[177] *Reid v. Graybriar Industries Ltd.*, 2006 ABQB 519, ¶¶ 112-13 &120; [2006] 10 W.W.R. 271, 298 & 300 per Verville, J. ("I am not satisfied that [Lloyd the lawyer] brought home to Gray the fact that interest would be required to be paid after 6 months and that the Mortgage was to be paid out after 18 months, failing which he would face foreclosure of the entire Graybriar Lands. I find that it was reasonable for Gray, in the circumstances, to understand that the 'deal' involved more than short term financing, especially in light of the discussions regarding the option to purchase which contemplated a joint venture. In this respect, … Lloyd failed to ensure that Gray fully understood Graybriar's position, including the very real risk of foreclosure. … There were no letters in evidence between Lloyd and Gray regarding the nature of the transaction. … Lloyd did not have any discussions with Graybriar about its assets or how the Mortgage would be repaid if long term funding was not available. No investigation was done by Lloyd to determine if the terms he believes were negotiated were capable of being satisfied by Graybriar"); *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, ¶ 1; [2007] 2 S.C.R. 177, 189-90 per Binnie, J. ("A fundamental duty of a lawyer is to act in the best interests of his or her client to the exclusion of all other adverse interests, except those duly disclosed by the lawyer and willingly accepted by the client"); *McPherson v. Watt*, 3 A.C. 254, 266 (H.L. 1877) per Lord O'Hagan ("An attorney is not affected by the absolute disability to purchase which attaches to a trustee. But, for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril. He must be prepared to show that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self-interest, that he has not misrepresented anything, or concealed anything, that he has given an adequate price, and that his client has had the advantage of the best professional assistance which if he had been engaged in a transaction with a third party he could possibly have afforded") & *Felton v. Le Breton*, 28 P. 490, 493-94 (Cal. Sup. Ct. 1891) per Harrison, J. ("While an attorney is not prohibited from having business transactions with his client, yet, inasmuch as the relation of attorney and client is one wherein the attorney is apt to have very great influence over the client, especially in transactions which are a part of, or intimately connected with, the very business in reference to which the relation exists, such transactions are always scrutinized by courts with jealous care, and are set aside at the mere instance of the client unless the attorney can show by extrinsic evidence that his client acted with full knowledge of all the facts connected with such transaction, and fully understood their effect; and in any attempt by the attorney to enforce an agreement on the part of the client growing out of such transaction, the burden of proof is always upon the attorney to show that the dealing was fair and just, and that the client was fully advised").

(A) the client discharges the obligations the transaction imposes on the client and the lawyer benefits from the client discharging the client's obligations under the transaction, or

(B) the client or the lawyer or both of them fail to discharge the obligations the transaction imposes on either or both of them,

(iii) why the interests of the lawyer and the client are not the same and are in conflict,

(iv) that the lawyer is not the client's lawyer for the transaction and has not advised the client on the merits of the transaction,

(v) that in the absence of reasons, of which the lawyer is not aware, the client should retain independent counsel to advise about the legal aspects of the proposed transaction and the advisability of the client entering into it,

(vi) that the terms of the transaction cannot come into effect for a reasonable period of time[178] so that the client may carefully consider the advisability of retaining independent counsel, and

(c) the client confirms to the lawyer that the client,

(i) is satisfied the terms of the proposed transaction are fair and reasonable,[179] and

(ii) consents to the lawyer being a party to the transaction.

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[178] Restatement (Third) of the Law Governing Lawyers § 126(3) ("A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction in which a lawyer does not render legal services, unless: … (3) the client consents to the lawyer's role in the transaction … after being encouraged and given reasonable opportunity to seek independent legal advice concerning the transaction").

[179] This is a subjective and not an objective test. The client must be satisfied that the terms of the proposed transaction are fair and reasonable. This is exactly the same test as set out in 1(a)(ii).

2. A lawyer discharges the obligations set out in 1(b)(i) and (ii) if he or she provides substantially the same information a competent lawyer would have provided to the client in substantially the same situation.[180]

3. A business or financial transaction does not include an agreement

[180] *McPherson v. Watt*, 3 A.C. 254, 266 (H.L. 1877) per Lord O'Hagan ("An attorney is not affected by the absolute disability to purchase which attaches to a trustee. But, for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril. He must be prepared to show that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self-interest, that he has not misrepresented anything, or concealed anything, that he has given an adequate price, and that his client has had the advantage of the best professional assistance which if he had been engaged in a transaction with a third party he could possibly have afforded"); *Gibson v. Jeyes,* 31 Eng. Rep. 1044, 1050 (Ch. 1801) per Lord Eldon, L.C. ("With respect to the case of the attorney, I have no difficulty in saying that ... [the attorney] might have dealt for this annuity: but he had two ways of proceeding; which this Court must have held it quite incumbent upon him, dealing with this lady [client], to attend to. If she [insisted that the attorney] buy ... [the stock], he would have done well to have said to her, that Gibson [the wealthy relative she disliked] would give more than any one else; that it was his interest to do so; that he would secure it upon real estate; that it was more fit for her to deal with her relation than her attorney; and the transaction would have a better appearance in the world. It was natural enough, that she should answer, she would not deal with Gibson, but would consider herself only and her own comforts, according to Benyon's advice to her. Then it would have been right for the Defendant to have declined it. Suppose, she had insisted, that he [her attorney] should be the person [to purchase her stocks and pay her the annuity]: it would be too much for the Court to proceed upon delicacies, such as these, and to say, he should not permit himself to contract with her. Therefore I say, he might contract: but then he should have said, if he was to deal with her for this, she must get another attorney to advise her as to the value: or, if she would not, then out of that state of circumstances this clear duty results from the rule of this Court, and throws upon him the whole *onus* of the case; that, if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest, that he has given her all that reasonable advice against himself, that he would have given her against a third person. ... It would have been ... [the attorney's] duty, *advising her as against a third person*, to have said, that in the natural course of things that person of the age of eighty, nine or ten years older than herself, might die in her life; and she, surviving perhaps, several years would have to go, not to any specific fund, the stock or the money, not even to Gibson's public-houses, to which as a security she had objected, but to get administration as a creditor, or to follow the representatives. It was his duty to say that as against himself") (emphasis added); *Edwards v. Meyrick*, 67 Eng. Rep. 25, 29 (Ch. 1842) per Wigram, V.C. ("If the attorney being employed to sell, becomes himself the purchaser, his duties and his interest are directly opposed to each other, and it would be difficult – and without the clearest evidence that no advantage was taken by the attorney or his position, and that the vendor had all the knowledge which could be given him in order to form a judgment, it would be impossible – to support the transaction"); *Iowa Supreme Court Attorney Disciplinary Bd. v. Wintroub*, 745 N.W.2d 469, 474 (Iowa Sup. Ct. 2008) per Appel, J. ("the attorney [doing business with a client] must give [the client] the same kind of legal advice that the client would have received if the transaction involved a stranger and not the attorney") & *Fair v. Bakhtiari*, 125 Cal. Rptr.3d 765, 779 (Ct. App. 2011) per Kline, P.J. ("Fair [the lawyer] claimed to be entitled to 50 percent of all back-end profits, whether or not his ownership interests in the Stonesfair entities were voided. This claim was damaging to Bakhtiari [the client] as it was vastly disproportionate to Fair's ownership interests in the Stonesfair entities. … [I]ndependent counsel surely would have advised Bakhtiari that profits should have been distributed in accordance with the parties' ownership interests").

(a) between the lawyer and the client for the provision by the client of goods or services that the client in the ordinary course of business provides to the public,

(b) the terms of which are not affected in any way by the fact one of the parties is a lawyer, or

(c) that bestows a small benefit on the lawyer.

[138] This last version strips out the lawyer's obligations to secure a *written* certificate from independent counsel confirming that the client has retained independent legal representation or to inform the client *in writing* of the terms of the transaction, the adverse effects if the parties do not fulfil their promises, and the presence of a conflict of interest. The skeletal version does not relieve the lawyer of the burden to prove that he or she has nonetheless communicated these messages to the client. Without a certificate of independent legal representation or a letter from the lawyer to a client confirming the steps the client took to obtain independent legal representation, the lawyer may face an insurmountable evidentiary problem if a dispute arises.[181]

[139] The Law Society of Alberta has never prohibited a member from doing business with a client unless the client has retained independent counsel to provide advice regarding the legal aspects of the transaction and the advisability of the client entering the transaction. The rule in force in 2008 stated that a "lawyer must not engage in a business transaction with a client of the lawyer who does not have independent legal representation unless the client consents and the transaction is fair and reasonable to the client in all respects".[182] The rule in force today is almost identical to the 2008 version[183]: "A lawyer must not enter into a transaction with a client who does not have independent legal representation unless the transaction is fair and reasonable to the client and the client consents to the transaction".

[140] If The Law Society of Alberta amended its Code of Conduct and adopted more onerous obligations for lawyers doing business with clients – as is the case in British Columbia[184] and

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[181] *Reid v. Graybriar Industries Ltd.*, 2006 ABQB 519, ¶ 130; [2006] 10 W.W.R. 271, 302 per Verville, J. ("Gray's informal business attitude made it all the more necessary for Lloyd to ensure that Gray seek independent legal advice. Lloyd could easily have facilitated evidence that such advice had been given, either by letter, or by having an independent witness present during such discussions") & *London Loan & Savings Co. of Canada v. Brickenden*, [1933] S.C.R. 257, 261 per Crocket, J. ("when a solicitor acts for a client in a matter in which he is himself financially interested the onus rests upon him, if the propriety of the transaction is called in question, to shew that the negotiations were honestly conducted and that the transaction was fair and just and in no way disadvantageous to his client"), aff'd, [1934] 3 D.L.R. 465 (P.C.).

[182] The Law Society of Alberta, Code of Conduct, r. 3.4-13 (2024).

[183] Id.

[184] Law Society of British Columbia, Code of Professional Conduct for British Columbia, r. 3.4-28 (2024) ("Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the

Prince Edward Island[185] – one could reasonably expect that this Court would follow the lead of the Law Society and revise the law governing the lawyer's obligations as a fiduciary to ensure that the common law and equity did not demand less of lawyers who do business with clients than the lawyers' professional regulator does.

[141] A law stating that a lawyer's fiduciary duty prevents him or her from doing business with a client unless the client has retained independent counsel to advise about the legal aspects of the proposed transaction and the advisability of the client entering into it would neither unduly interfere with the legitimate freedom of contract interests of the lawyer and client nor increase the costs of most transactions to an unacceptable degree.

D. Mr. Brown Did Not Discharge the Fiduciary Duties He Owed to Mr. Sprague and Canar Rock Products and He Cannot Enforce the Terms of the Employment Agreement Imposing Joint and Several Liability on Mr. Sprague and Canar Rock Products

[142] A lawyer's fiduciary duties when doing business with a client are onerous. He or she must establish either or both of two distinct conditions. Each condition contains demanding components.

[143] The first condition has three components.[186] A lawyer must prove that the client confirmed to the lawyer that the client has (a) retained independent counsel to advise about the legal aspects of the proposed transaction and the advisability of the client entering into it, (b) is satisfied that the terms of the proposed transaction are fair and reasonable, and (c) consents to the lawyer being a party to the transaction.

[144] This is the best possible position for a lawyer who does business with a client to be in.

[145] If a lawyer cannot prove the facts that support the first condition, a lawyer must be in a position to prove the components of the second condition. The failure to do so places the lawyer in a very vulnerable situation – he or she has breached his or her fiduciary duty to the client and the transaction is likely unenforceable.

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client, the client consents to the transaction and the client has independent legal representation with respect to the transaction") & Commentary [1] ("This provision applies to any transaction with a client, including: (a) lending or borrowing money; (b) buying or selling property; (c) accepting a gift, including a testamentary gift; (d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity; (e) recommending an investment; and (f) entering into a common business venture").

[185] Law Society of Prince Edward Island, Code of Professional Conduct (2023) (rule 3.4-28 and Commentary [1] are identical to the same-numbered provisions in the Law Society of British Columbia's Code of Professional Conduct").

[186] Supra, ¶ 123.

[146] There are four components of the second condition.[187] If the four conditions exist, the client is in substantially the same position as if the client had retained independent counsel to advise on the legal aspects of the proposed transaction. First, the lawyer must explain to the client why the interests of the lawyer and the client are in conflict and urge the client to obtain independent counsel to advise about the legal aspects of the proposed transaction and the advisability of the client entering into it. Second, the lawyer must insist that the terms of the transaction cannot come into effect for a reasonable period of time so that the client may carefully consider the advisability of retaining independent counsel. Third, the lawyer must provide the client with substantially the same information a competent lawyer would provide to the client in the same situation – without providing advice. In addition, the client must have confirmed to the lawyer that the client is satisfied the terms of the proposed transaction are fair and reasonable and that the client consents to the lawyer being a party to the transaction.

[147] There is no doubt that Mr. Brown was the respondents' lawyer when he and Mr. Sprague signed the employment agreement. He acknowledged this.[188]

[148] Because Mr. Brown was the respondents' lawyer, he owed the respondents onerous fiduciary duties.

[149] Mr. Brown did not discharge the onerous duties he bore as a fiduciary to the respondents. He breached the duty of loyalty that he owed them.

[150] This is so even if I disregard Mr. Sprague's evidence regarding the statements he attributed to Mr. Brown at the March 19, 2008 meeting – Mr. Brown told him that Mr. Brown was his lawyer and that Mr. Sprague did not require independent counsel – and accept that Mr. Jessamine had authority to negotiate on behalf of the respondents.

[151] Mr. Brown did not prove the existence of either of the two conditions that must exist before a lawyer doing business with a client can be adjudged to have discharged his or her fiduciary duties to the client.

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[187] Id.

[188] Transcript 18:9-11 & 19:27-28 ("A … [I]f we're going to be entering into some kind of negotiations about me joining you … that would be a conflict … . I'm your lawyer") & ("A … I knew … what Sprague-Rosser was because I was their lawyer").

[152] Mr. Brown did not prove that Mr. Sprague,[189] Mr. Jessamine[190] or any other representative of the respondents confirmed to Mr. Brown that the respondents had retained independent legal counsel to advise about the legal aspects of the proposed transaction and the advisability of entering into it and that they were satisfied the terms of the proposed transaction were fair and reasonable.

[153] As a result, Mr. Brown failed to meet the first condition.

[154] Nor did he prove the facts needed to successfully invoke the second condition.

[155] Mr. Brown relied heavily on the following segments of the preamble to the employment agreement:[191]

> C. Brown, prior to negotiating the terms of this Offer of Employment and Commitment to Key Employee ("the Agreement"), advised The Sprague Group that any negotiation concerning the proposed position would represent a conflict of interest given his position as barrister and solicitor with the law firm of McLennan Ross and his capacity as legal counsel to The Sprague Group;
>
> D. As a result of the possible conflict of interest, The Sprague Group agrees that they have been given the opportunity to engage independent legal representation and that this Agreement is fair and reasonable to The Sprague Group in all material respects;

[156] This reliance is unjustified for, at least, two reasons

[157] First, these segments do not adequately explain why Mr. Brown was in a conflict of interest and could not act for the respondents in this transaction. This is a significant omission. The preamble should have clearly stated that Mr. Brown's interests as a potential employee of Sprague-Rosser Contracting and Sprague-Rosser Contracting's interests as the potential employer were fundamentally at odds. It should also have stated that Mr. Brown's interests as a potential purchaser of the shares of Sprague-Rosser Contracting and the interests of the current owners of the shares were not the same.[192] In addition, there should have been a statement that the interests of Messrs.

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[189] Transcript 132:19-21 ("Q … Do you know whether Earl [Sprague] obtained any legal advice before he signed the agreement? A I don't have any personal knowledge").

[190] Mr. Brown led no evidence that Mr. Jessamine told him the respondents had retained independent counsel. The evidence revealed that Mr. Jessamine's personal lawyer suggested that the respondents should retain their own counsel. Transcript 30:32-35.

[191] Appellant's Extracts of Key Evidence 45-48.

[192] *Edwards v. Meyrick*, 67 Eng. Rep. 25, 29 (Ch. 1842) per Wigram, V.C. ("If the attorney, being employed to sell, becomes himself the purchaser, his duties and his interest are directly opposed to each other").

Brown and Sprague conflicted because Mr. Sprague assumed responsibility for any breach by another respondent of a promise made to Mr. Brown. A lawyer must inform a client in unambiguous terms why a conflict exists to ensure that the client appreciates the fundamental nature of the problem and carefully considers the benefits of independent counsel. Finally, it should also have stated that Mr. Brown could not and did not act for the respondents in this transaction.

[158] The preamble downplayed the conflict of interest dilemma by incorrectly referring to it as a "possible conflict of interest". This was not a "possible conflict of interest". There were clear and obvious conflicts of interest between Mr. Brown and each of the respondents.

[159] Second, the preamble did not assert that Mr. Brown either recommended or urged the respondents to retain independent counsel. All it did was contain an acknowledgment from the respondents that "they have been given the opportunity to engage independent legal representation". This is not good enough.

[160] One will recall that Justice Kraus held that Mr. Brown never, at any time, recommended to Mr. Sprague or Canar Rock Products that the respondents retain independent counsel.[193]

[161] Mr. Brown did not take the position that the terms of the employment agreement could not come into effect until the respondents had a reasonable period of time within which to consider the desirability of obtaining independent legal advice. Just the opposite is the case. According to the trial judge's fact findings, Mr. Sprague did not see the employment agreement until March 19, 2008. Instead of encouraging Mr. Sprague to take the time he needed to consider the benefits of retaining independent counsel, Mr. Brown pressed him to sign the employment agreement immediately.[194]

[162] The fact that Mr. Jessamine had the authority to negotiate on behalf of the respondents does not diminish in any way the fiduciary obligations Mr. Brown bore for the benefit of the respondents. For the purposes of the fiduciary-obligations analysis, Mr. Sprague is the client.[195]

[163] As well, Mr. Brown failed to provide Mr. Sprague with the same information that a competent commercial lawyer would have presented to them had they retained independent counsel. Mr. Brown did not prove that he explained to Mr. Sprague[196] the essential terms of the

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[193] Oral Judgment. Appeal Record 109:12-15, 109:27-28 & 109:41-110:12.

[194] Id. 114:23-27.

[195] Had the respondents authorized Mr. Jessamine to sign the employment agreement on their behalf, it may have been appropriate to consider Mr. Jessamine as the client, for the purpose of the fiduciary-obligations analysis.

[196] Transcript 140:9-16 ("Q: … [D]uring the course of negotiating the offer of employment … , did you at any time meet with Earl [Sprague] and explain to him the specific terms of the agreement? A No. Q And during the period of

transaction including the adverse effects a respondent may suffer if another respondent did not discharge the obligations imposed on it. There is certainly nothing in the employment agreement to this effect. If someone other than Mr. Brown was Sprague-Rosser Contracting's new prospective general counsel and Mr. Sprague asked Mr. Brown as a McLennan Ross lawyer to review an employment contract identical to the one Mr. Brown prepared, he, as a competent commercial lawyer, most certainly would have brought these risks to Mr. Sprague's attention and probably advised him not to sign it in its current form.

[164] Because Mr. Brown breached his fiduciary duty to Mr. Sprague and Canar Rock Products, the employment agreement is voidable at the respondents' option.[197] The respondents have clearly pleaded that Mr. Brown was a fiduciary, that he breached his fiduciary obligations, and that the contract is void due to Mr. Brown's undue influence. As a result, Mr. Brown cannot enforce the terms of the employment agreement that impose liability on Mr. Sprague and Canar Rock Products for the failure of any other party to the employment agreement to honor its commitments to Mr. Brown.

VII. Conclusion

[165] I dismiss this appeal.

Appeal heard on October 29, 2024

Memorandum filed at Edmonton, Alberta
this 7th day of February, 2025

Wakeling J.A.

negotiations, did you at any time talk to Earl [Sprague] on the phone and explain to him the express terms of the agreement? A No").

[197] *Ferguson v. Yaspan*, 183 Cal. Rptr.3d 83, 91 (Ct. App. 2014) per Hoffstadt, J. ("The presumption [that transactions between an attorney and client are a breach of the attorney's fiduciary duty] is rebuttable, and the attorney's inability to do so renders the transaction voidable at the client's option"); *BGJ Associates v. Wilson*, 7 Cal. Rptr.3d 140, 149 (App. Ct. 2003) per Epstein, Acting P.J. ("the alleged agreement was the result of undue influence and hence was a violation of ... [the attorney's] fiduciary duties ... . Nevertheless, the agreement is voidable, not void") & *Clark Boyce v. Mouat*, [1994] A.C. 428, 437 (P.C. 1993) (N.Z) per Lord Jauncey ("In such a case there is an obligation on the solicitor to disclose his interest and, if he fails so to do, the transaction, however favourable it may be to the client, may be set aside at his instance").

Appearances:

J.A. Agrios, KC
for the Appellant

R.J. Wasylyshyn
for the Respondent, Earl Sprague, 561845 Alberta Ltd. amalgamation successor of Canar Rock Products Ltd. (also previously known as 398739 Alberta Ltd.) and Sprague Transport Ltd.

Respondent, Sprague-Rosser Contracting Co. Ltd.