File No. 39931

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

ANTOINE PONCE

DANIEL RIOPEL

APPELLANTS
(Appellants)

- and -

SOCIÉTÉ D'INVESTISSEMENTS RHÉAUME LTÉE

MICHEL RHÉAUME INVESTISSEMENT LTÉE

AGENCE ANDRÉ BEAULNE LTÉE

9098-3289 QUÉBEC INC.

RESPONDENTS
(Respondents)

APPELLANTS' FACTUM

(Rule 42 of the *Rules of the Supreme Court of Canada*)

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APPELLANTS' FACTUM

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal raises three issues that strike at the core of Quebec civil law: (i) the boundary between the good faith duty to inform and the duty of loyalty in commercial negotiations; (ii) whether the remedy of disgorgement can be ordered absent a breach of the duty of loyalty; and (iii) whether loss of chance to negotiate is compensable, and if so, on what terms.

2. In the context of buyout negotiations amongst sophisticated parties, the Court of Appeal held that the Appellant buyers had the duty to inform the Respondent shareholder sellers that a third party, l'Industrielle Alliance ("**IA**"), was also interested in acquiring the business. With this information, the Court of Appeal held, the Respondents could have negotiated for a higher price. The Court of Appeal thus awarded the Respondents damages in the form of the Appellants' profits when they eventually sold their interests to IA, even though IA testified that it would not have made the same deal with the Respondents, because a "*sine qua non*" and key part of the value of the transaction for IA was the Appellants' agreement to stay on and run the business.

3. The Court of Appeal committed two fundamental legal errors. **First**, although the Court of Appeal rightly overturned the trial judge's finding that the Appellants, as directors, owed a fiduciary-type duty of *loyalty* to the Respondents, as shareholders – a duty owed only to the corporation – it imposed precisely the same substantive duty on the Appellants by way of the good faith duty to inform. A duty to inform akin to such a duty of loyalty is neither desirable nor feasible in commercial negotiations where the buyer naturally wants to buy at a lower price and the seller naturally wants to sell at a higher price. As this Court stated in *Churchill Falls*, "a party must, in meeting the requirements of good faith, also be able to satisfy his or her own interests."[1]

4. More concretely, by imposing on the buyer a duty to inform the seller about other prospective buyers, the judgment essentially makes it the buyer's duty to inform the seller about the market for the sale. By failing to consider the nature of the information, the Court of Appeal eviscerated the necessary corollary to the duty to inform – the duty to inform oneself – and altered the reasonable allocation of risks amongst sophisticated commercial parties.[2]

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[1] *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, para. 117.
[2] *6362222 Canada inc. v. Prelco inc.*, 2021 SCC 39, para. 5.

5. **Second**, the Court of Appeal failed to consider the difference, from a remedies and damages perspective, between a breach of the duty of loyalty and a breach of the duty of good faith. The former may give rise to disgorgement, the latter does not.

6. The trial judge had found that the Respondents lost the *opportunity* or *chance* to negotiate a better deal; he did not address the probability of them doing so, or the amount. Applying a duty of loyalty and the notion of "disgorgement of ill-gotten gains" from *Kuet Leong Ng*, he ordered the Appellants to pay to the Respondents what he determined to be their global profits on the ultimate sale to IA. The Court of Appeal simply upheld the damages award, without explaining its basis.

7. Absent a duty of loyalty, there is no basis for an award of disgorgement in Quebec civil law, and absent proof on a balance of probabilities that IA would have made the same deal with the Respondents, there is no basis for an award of damages for the lost chance to negotiate. Indeed, this case provides an opportunity to clarify the tortured state of the law on "loss of chance" and to confirm that absent proof on a balance of probabilities, Quebec law does not compensate "intermediate" damage, except in rare and exceptional circumstances that are not present here.

B. Facts[3]

i. Parties and Businesses

8. "**L'Excellence**" regrouped three companies that were then owned by Michel Rhéaume ("**Rhéaume**") and André Beaulne ("**Beaulne**"): Michel Rhéaume & Associés ("**MRA**"), Beaulne & Rhéaume Assurance Ltée ("**BRA**") and L'Excellence compagnie assurance vie ("**EAV**"). MRA and BRA provided insurance brokerage services and EAV provided insurance (QCCA, para. 14). Through Respondent Société d'investissements Rhéaume Ltée, Rhéaume owned 100% of MRA's shares and 50% of BRA's shares. Beaulne owned 50% of BRA's shares. As for EAV, its shares were owned by MRA (23.4%), BRA (69.7%) and the public (6.9%) (QCCA, para. 15). At all relevant times, Rhéaume was a director of BRA and MRA, and Beaulne was a director of BRA.

9. The Appellant Antoine Ponce ("**Ponce**") has been an actuary since 1978 and, as of 2002, acted as president of EAV. The Appellant Daniel Riopel ("**Riopel**") has been a lawyer since 1986,

[3] References are to *Ponce v. Société d'investissements Rhéaume ltée*, 2021 QCCA 1363 [**QCCA**], *Société d'investissements Rhéaume ltée v. Ponce*, 2018 QCCS 3538 [**QCCS**] and Appellants' Record [**A.R.**].

was vice-president of MRA and BRA as of 1990 and president as of 2002 (QCCA, paras. 16-17). Both were directors of EAV.

10. L'Excellence was an acquisition target: IA had expressed interest in 1999-2000,[4] and in 2001, Blue Cross made a purchase offer for $19.5M, minus debts, preferred shares, and minority shareholders.[5] Rhéaume and Beaulne rejected this offer and instead recruited Ponce to become president of EAV and promoted Riopel to president of BRA and MRA (QCCS, paras. 18-19).

11. On March 15th, 2002, the parties concluded the "*Entente des présidents*", an incentive-based remuneration agreement ("*convention de remunération incitative*").[6] Pursuant to the *Entente*, Ponce and Riopel were to be paid 40% of MRA and BRA's profits exceeding $1M, a bonus of 40% of EAV's profits exceeding $500,000, and 40% of the future increase in the value of the companies over what could have been obtained as per the Blue Cross offer price. They also had the option to buy 40% of Rhéaume and Beaulne's shares at the 2001 Blue Cross offer price, and a right of first refusal over any partial or total sale of the companies.

12. The Appellants were the right people for the job: "*[Ponce] s'attaque à la gestion de tous les programmes, fait des redressements avec Riopel et les profits passent de 1,3 M$ en 2001 à 10 M$ avant impôt en 2006*" (QCCS, para. 145).

ii. Rhéaume and Beaulne's Dispute and IA's Expression of Interest

13. Despite the group's success under Ponce and Riopel's management, in 2005, a bitter and very public dispute arose between Rhéaume and Beaulne regarding, among other things, the ownership of the brokerage clientele between MRA and BRA and its corollary on profit sharing. On May 11th, 2005, Rhéaume instituted proceedings against Beaulne seeking the dissolution of BRA (QCCA, para. 20; QCCS, paras. 154, 435).[7]

14. During this time, IA approached Ponce and Riopel, to express interest in l'Excellence and obtain some preliminary financial information. In July 2005, the Appellants and IA signed a confidentiality agreement, which stipulated that the information exchanged should remain

[4] Testimony of Michel Rhéaume, Oct. 5th, 2017, A.R. vol. 21, pp. 7755-7759.
[5] Exhibits P-28-30, *Offre de la Croix Bleue du 12 décembre 2001*, A.R. vol. 7, pp. 2334-2354.
[6] Exhibit D-1, A.R. vol. 10, pp. 3652-3567.
[7] See Exhibits D-5 and D-5A, A.R. vol. 10, pp. 3664-3711.

confidential and that IA would not consider a transaction without the Appellants' consent.[8] The Appellants provided some information to IA, but IA did not respond (QCCS, para. 162).

15. Meanwhile, the dispute between Rhéaume and Beaulne dragged on. Towards the end of 2005 and beginning of 2006, Rhéaume and Beaulne exchanged offers, but neither was willing to offer a price the other was willing to accept.[9]

16. Rhéaume and Beaulne also owed significant amounts to Ponce and Riopel under the *Entente*, which they disputed. The higher l'Excellence's valuation, the more Rhéaume and Beaulne owed to Ponce and Riopel. In February 2006, Ponce provided, at Beaulne's request, two scenarios to calculate the amounts owed, based on valuations of $38.4 M and $43.4M.[10] Rhéaume vehemently objected and took the position that the companies were not worth more than $32.7M.[11]

iii. The Rhéaume Transaction

17. Unable to reach a deal with Beaulne, in February 2006, Rhéaume commenced buy-out negotiations with the Appellants. Negotiating with the Appellants allowed Rhéaume to obtain concessions on the amounts owed under the *Entente* and avoid a third-party due diligence process.

18. The Appellants provided tables to Rhéaume showing they thought the company could be valued between $32.7M to $45M and that the net value Rhéaume's holdings, after deduction of the amounts owed under the *Entente*, would range between $14.9M and $21.2M.[12] They also discussed valuations up to $50M (QCCS, para. 170). On **February 17th, 2006**, Rhéaume and the Appellants signed a sale agreement for $23M, net of the several million dollars Rhéaume would owe to Ponce and Riopel under the *Entente* (the "**Rhéaume Transaction**").[13] This amount is almost $2M more than the estimated net value of his shares on a valuation of $45M.[14] The price increased to $26.5M net, pursuant to two addendas dated May 19th, 2006, and July 28th, 2006, extending the closing date (QCCA, para. 24).[15] The parties signed a full and final mutual release (QCCS, para. 548).

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[8] Exhibit P-12, A.R. vol. 4, pp. 1109-1111.
[9] Exhibit D-6, A.R. vol. 10, pp. 3712-3714; Exhibit D-8, A.R. vol. 10, pp. 3718-3719.
[10] Exhibit D-7, A.R. vol. 10, p. 3715.
[11] Exhibit D-62, A.R. vol. 12, p. 4291.
[12] Exhibit D-12, A.R. vol. 10, pp. 3728-3730.
[13] Exhibit P-1, A.R. vol. 4, p. 947.
[14] Exhibit D-12, A.R. vol. 10, pp. 3728-3729.
[15] Exhibit D-17, A.R. vol. 10, p. 3743*ff*.

19. After Rhéaume had signed the Transaction, but before he negotiated the two addendas, La Capitale's president reached out to Rhéaume to express interest in l'Excellence. Rhéaume referred him to Ponce and Riopel because, having already signed the Transaction, "*[j]e n'avais aucun intérêt à courir, accepter ou négocier les offres de qui que ce soit d'autres.*"[16]

20. Obviously, the Appellants required financing (in debt and equity issuance), and Rhéaume and Beaulne both knew that (QCCS, para 357). Beginning in March 2006, the Appellants approached numerous financial and other institutions to act as potential financing partners. IA learned of the situation and contacted Ponce to discuss financing options. This was the Appellants' first contact with IA since IA's expression of interest in 2005.[17] In May 2006, IA submitted a preliminary financing valuation of $35M,[18] while AXA indicated a valuation of 1.5 times book value for EAV only.[19] La Capitale and Desjardins submitted unsolicited purchase offers.[20] All were inferior to the basis of the Rhéaume and Beaulne Transactions (QCCS, paras. 181-185, 512-514).

21. In August 2006, the Appellants concluded a financing partnership with the Fonds de solidarité des travailleurs du Québec ("**FSFTQ**") (QCCA, para. 25). The FSFTQ would hold $33^{1/3}$% of the shares of the Appellants' holding company Corporation Financière L'Excellence ("**CFE**"), set up to acquire the Rhéaume shares, and the Appellants had a right of first refusal to buy the FSFTQ's shares.[21] IA rushed out a partnership memo around August 24th, 2006,[22] *after* the Appellants had concluded their deal with FSFTQ, and so the Appellants set it aside.

22. On September 1st, 2006, the Rhéaume Transaction closed, conditional on obtaining the Minister of Finance's approval before November 30th, 2006 (QCCA, para. 26). Rhéaume contested certain adjustments and the parties went to arbitration. The arbitral tribunal rendered an award on November 29th, 2006, ordering Rhéaume to pay $557,141.52. Rhéaume sought to have the award annulled, alleging bias. The award was homologated on July 8th, 2008 (QCCS, para. 189).[23]

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[16] Examination on discovery of Michel Rhéaume, Dec. 9, 2015, A.R., vol. 36, pp. 11959-11961.
[17] Testimony of Normand Pépin, Oct. 17th, 2017, A.R. vol. 26, pp. 9096-9097.
[18] Exhibit P-15, A.R. vol. 6, pp. 2135-2138.
[19] Exhibit P-18, A.R. vol. 7, p. 2187. This Exhibit is erroneously titled "*Offre d'acquisition*".
[20] Exhibit P-19, A.R. vol. 7, p. 2188*ff*; P-20, A.R. vol. 7, p. 2195*ff*.
[21] Exhibit P-6, para. 9 and fn°2, paras. 5-14 and 17c), A.R. vol. 4, pp. 1020-10220.
[22] Exhibit D-4, A.R. vol. 10, p. 3661.
[23] *Société d'investissements l'Excellence inc. c. Rhéaume*, 2008 QCCS 3083, appeal dismissed: 2010 QCCA 2269, leave to appeal to SCC dismissed, June 16th, 2011, n° 34089.

iv. The Beaulne Negotiations, Breakdown, and Transaction

23. Seeing that the Appellants were buying out Rhéaume, Beaulne decided to pursue a buy-out of his interest. In May 2006, Beaulne, advised by Stikeman Elliott, concluded a negotiation agreement with the Appellants which provided that if he could not reach a deal with them, BRA would be liquidated.[24] Beaulne hired financial advisor Luc Chabot to advise him, "*sachant qu'il a de l'expérience en évaluation d'entreprise*" (QCCS, para. 82) but then expressly limited his mandate to verifying whether the offer was fair relative to what Rhéaume received (QCCS, paras. 98, 100, 456). In fact, Ponce wanted Chabot to perform a valuation of the business: "*[i]l aurait pu évaluer la valeur de l'entreprise mais tel n'était pas son mandat: Ponce voulait qu'il en fasse l'évaluation.*" (QCCS, para. 134, emphasis added). Beaulne would not permit Chabot to evaluate his shares, solicit or contact other potential buyers, or make any counteroffers (QCCS, para. 83).

24. On June 1st, 2006, the Appellants made a first offer to purchase Beaulne's interests for $5.5M, net of the amounts owed under the *Entente*. This amount exceeded by $1.175M the net value of his shares based on a company valuation of $35M and was consistent with a valuation of $44M,[25] an amount well above the valuations provided by IA and La Capitale.

25. The only third party Beaulne contacted was Blue Cross, in August 2006. Blue Cross was still interested in acquiring l'Excellence, and indicated that Beaulne's shares were worth $8-9M (gross of the amounts he would owe under the *Entente*). Blue Cross also insisted that Ponce and Riopel be part of the negotiations. Beaulne did not pursue the matter.[26]

26. Beaulne testified that he asked Ponce about IA's interest in purchasing his shares in August, whereas Ponce testified that Beaulne asked him about IA in February.[27] In any event, Mr. Pépin testified that IA's Board of Directors did not want to be involved in the shareholders' dispute (QCCS, para. 283), and that "*j'avais les mains assez liées*"; for that reason, "*IA revient au dossier quand on apprend que messieurs Ponce et Riopel ont une entente avec monsieur Beaulne. Et encore là, ça prend du financement.*"[28] Regardless, Ponce and Riopel were not interested in selling the

[24] Exhibit D-33, para. 5, A.R. vol. 11, pp. 3847-3848.
[25] Exhibit D-35, A.R. vol. 11, pp. 3851-3853. The $44M valuation is indicated at p. 3853.
[26] Testimony of André Beaulne, Oct. 12th, 2017, A.R. vol. 23, pp. 8381-8383.
[27] Testimony of Antoine Ponce, Oct. 23rd, 2017, A.R. vol. 27, p. 9458.
[28] Testimony of Normand Pépin, Oct. 17th, 2017, A.R. vol. 26, pp. 9101-9104.

Rhéaume shares they had just acquired, whether to IA or anyone else, because they wanted to operate and grow the business (QCCS, para. 74).

27. The relationship amongst Beaulne, Ponce and Riopel had been difficult for some time. It broke down completely in November 2006. Beaulne accused Ponce and Riopel of misappropriating funds and wrongfully transferring employees to CFE. At this point, Beaulne and Rhéaume sufficiently reconciled to write letters about these accusations to the AMF to try to stop the Rhéaume Transaction (QCCS, paras. 84, 96). These efforts failed and the Minister of Finance approved the Rhéaume Transaction on November 29th, 2006 (QCCS, para. 521). The next day, Beaulne tried to prevent the Appellants from accessing their offices, refused to approve Riopel's replacement of Rhéaume on the BRA Board, and appointed himself as president and his son as vice-president (QCCS, para. 522). Acrimonious litigation ensued (QCCS, paras. 523-525).

28. In December 2006, Beaulne declared in an affidavit that his shares were worth $10-15M (QCCS, para. 76.). On **January 31st, 2007**, almost a year after the Rhéaume Transaction, Beaulne accepted the Appellants' offer of $10.3M, net of the several million dollars he would owe under the *Entente* (the "**Beaulne Transaction**").[29] The parties signed a release to put an end to all claims – past, present or future, direct or indirect – amongst themselves (QCCS, para. 549). The Beaulne Transaction closed on March 22nd, 2007.

29. The Appellants also required financing for the Beaulne Transaction. The FSFTQ, which financed the Rhéaume Transaction, thought the amount was too high (QCCS, para. 198). Finally, on March 15th, 2007, IA agreed to finance the Transaction with a right of first refusal on the shares for two years (QCCS, paras. 198, 474-475). In this context, IA made its first actual offer,[30] which was to flip the Beaulne shares. On March 19th, IA made another offer, this time to acquire CFE's interest and the Beaulne shares. The Appellants were not interested (QCCS, paras. 201, 476-477).

[29] Per KPMG, on a $47.5M valuation, Beaulne owed $3,686,150 profits + $4,632,630 plus-value (QCCS, para. 642). Per Quotient, on a $77.4M valuation, Rhéaume and Beaulne together owed $10,560,455 profits + $14,221,805 plus-value (QCCS, paras. 641, 667, 693).

[30] Testimony of Normand Pépin, Oct. 17th, 2017, A.R. vol. 26, pp. 9098-9099, 9197-9111.

v. *Post-Beaulne Transaction: Litigation with IA and Ultimate Settlement*

30. On June 1st, 2007, IA offered to acquire Ponce, Riopel and the FSFTQ's interests. The FSFTQ was prepared to accept the offer, but the Appellants again refused because they wanted to continue to operate and grow the business (QCCS, paras. 201, 529).

31. IA would not take no for an answer: "*IA s'engage avec la collaboration de FSFTQ dans des manœuvres dilatoires pour nuire à la conclusion de financement par les défendeurs [Appellants] et achète, contre le gré des défendeurs, les actions détenues par FSFTQ*" (QCCS, para. 533).

32. Ponce and Riopel then exercised their right of first refusal over the FSFTQ's shares. On September 17th, 2007, they were forced to seek an injunction to block the sale between IA and FSFTQ. The injunction was granted on November 29th, 2007 (QCCS, para. 206).

33. At the same time, IA sought to divide and conquer and offered Riopel $15M for his shares, which he accepted. On October 11th, 2007, Ponce indicated he was exercising his right of first refusal to acquire Riopel's shares (QCCA, para. 50). Finally, unable to obtain financing because of the litigation with IA and FSFTQ, on December 10th, 2007, Ponce reached a global agreement with IA which closed on January 31st, 2008 (QCCA, paras. 51-52). By then, the business had grown, the Rhéaume/Beaulne dispute was resolved, and the Appellants had agreed to remain in the company for the next five years (QCCS, para. 294).

34. IA confirmed that Ponce and Riopel were a "*sine qua non*" to the deal, and that in such transactions, "*les cadres supérieurs c'est souvent la moitié de la valeur de l'entreprise*".[31] IA also confirmed that had Rhéaume or Beaulne contacted IA directly, IA would not have offered them more than what the Appellants paid (QCCS, paras. 295-296).

35. Nevertheless, on May 23rd, 2008, the Respondents instituted proceedings claiming that by contracting with IA, the Appellants illegally appropriated a business opportunity that was theirs. As a result, the Respondents argued, they lost the benefit of the difference between the sale price in the Rhéaume and Beaulne Transactions and the sale price in the transactions that took place between the Appellants and IA (QCCS, paras. 2-4).

[31] Testimony of Normand Pépin, Oct. 17th, 2017, A.R. vol. 26, pp. 9143-9144, see also 9114-9115.

C. Judgment of the Quebec Superior Court (Déziel J.)

36. The Superior Court erroneously concluded that the Appellants owed a duty of loyalty, not only to the company, but to Rhéaume and Beaulne, *as shareholders*, because of the *Entente* (paras. 426-428); i.e. a duty to place the Respondents' interests ahead of their own: "*La moindre des choses était de démontrer leur loyauté envers Rhéaume et Beaulne et de faire primer les intérêts de ces derniers avant les leurs*" (para. 546). This finding permeates the trial judge's assessment of fault, causation and damages.

37. The trial judge held that the Appellants breached their duties *to the shareholders* by (1) transmitting to IA confidential information regarding the company, (2) not disclosing to Rhéaume and Beaulne the interest expressed by IA and third parties in acquiring the company, and (3) negotiating with IA while they were negotiating with Rhéaume and Beaulne, thus placing themselves in a conflict of interest (paras. 445*ff*).

38. With respect to causation, the trial judge considered that the many obstacles Rhéaume and Beaulne would have faced in trying to conclude a deal with IA were irrelevant because they would at least have had the *opportunity* to envisage a higher price or to contact another potential buyer, and it was *not impossible* that they could have put their dispute aside:

> [499] N'eût été du défaut des défendeurs de les informer de l'intérêt réel d'IA, les demandeurs auraient, au moins, eu l'opportunité d'envisager un prix plus élevé ou encore de contacter un autre acheteur.
> […]
> [539] Les défendeurs plaident que la réconciliation entre Rhéaume et Beaulne était hautement improbable, alors que ces derniers témoignent qu'ils auraient mis leurs différends de côté s'ils avaient connu l'intérêt d'IA.
> [540] Le Tribunal est d'avis qu'une telle réconciliation n'est pas impossible quand on constate d'une part, qu'ils ont déjà réglé ensemble d'autres conflits par le passé, et d'autre part, les millions en jeu.
> [541] Il s'agit d'un faux débat en regard des devoirs et obligations qu'avaient Ponce et Riopel d'agir de bonne foi, avec loyauté et d'informer les administrateurs et actionnaires des informations qu'ils détenaient et de laisser à ceux-ci l'opportunité de décider eux-mêmes de la meilleure façon de régler les problèmes de la vente de leurs intérêts.
> [542] Le Tribunal ne retient pas l'argument des défendeurs lorsqu'ils affirment que Beaulne n'aurait pu obtenir plus que le 10,3 M$ convenu.
> [543] Même si Pépin affirme qu'IA n'aurait pas offert plus que 10,3 M$ si Beaulne était allé le voir en 2007, cela ne veut pas dire qu'IA n'aurait pas augmenté la mise vu son désir ultime d'acquérir EAV pour pénétrer ce marché d'assurance. (Emphasis added)

39. As for damages, the trial judge only relied on two authorities: this Court's decision in *Kuet Leong Ng*[32] on disgorgement of ill-gotten gains in the context of a breach of the duty of loyalty, and the Quebec Court of Appeal's decision in *Baxter*,[33] where minority shareholders were induced to sell to the majority before a public offering and the court expressly held they would have been in the same position as the other shareholders, who subsequently sold their shares at a profit.

40. The trial judge largely accepted the Respondents' expert's (Quotient) calculation of damages, who calculated the "*enrichissement de Ponce et Riopel*" (paras. 389, 613-615). Quotient's premise was that: "*n'eussent été les gestes reprochés aux Défendeurs, les Demandeurs auraient obtenu une contrepartie équivalente à ce qu'IA a payé pour l'acquisition des participations des Défendeurs dans le Groupe L'Excellence plutôt que la somme obtenue des Défendeurs*" (para. 640, emphasis added). However, the trial judge never in fact drew this crucial conclusion on causation, deeming it sufficient that Rhéaume and Beaulne had lost their opportunity to negotiate a higher price or contact another buyer (para. 499). The trial judge awarded the Respondents a total of $11,884,743 representing $7,368,540 for Rhéaume and $4,516,202 for Beaulne (paras. 711, 718-720), based on Ponce and Riopel's ultimate global settlements with IA.

D. Judgment of the Quebec Court of Appeal (Mainville, Rancourt, Fournier JJ.A.)

41. The Court of Appeal held that the trial judge erred in extending the duty of *loyalty* the Appellants owed to the company to the Respondents. The Appellants were mandataries of the company, not the shareholders; the confidential information belonged to the company, not the shareholders; and indeed the vast majority of the Respondents' complaints were claims only the company could have brought (paras. 76-80).[34] However, the court held that this error was not overriding because, under the *Entente*, the Appellants had a duty to act in good faith and a duty to inform that were substantively the same as the duties identified by the trial judge (paras. 83-94).

42. The court then applied the *Bail*[35] criteria to the negotiations between the Appellants and the Respondents for the sale of their shares. Focusing solely on IA's interest in acquiring l'Excellence,

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[32] *Bank of Montreal v. Kuet Leong Ng*, [1989] 2 SCR 429.
[33] *Baxter v. Biotech electronics Ltd.*, 1998 CanLII 10406 (C.A.), para. 97.
[34] See also *Brunette v. Legault Joly Thiffault, s.e.n.c.r.l.*, 2018 SCC 55, paras. 26-28.
[35] *Bank of Montreal v. Bail Ltée*, [1992] 2 SCR 554.

the court held that the information (i) was known to the Appellants, (ii) was of decisive importance for the Respondents, and (iii) could not have been known by them (paras. 85-94).

43. The court recognized that the duty to inform does not relieve the other party from exercising due diligence, i.e. "*[le] devoir de se renseigner*" (para. 89). However, it held that it was impossible for Rhéaume and Beaulne to obtain the information, and that a "*climat de confiance*" could justify a party's failure to inform themselves. Although it expressly referred to "*la rupture du lien de confiance de Beaulne à l'endroit des appelants*" at para. 29, sixty-two paragraphs later at para. 91, the court relieved both Rhéaume and Beaulne of the duty to inform themselves in the context of multimillion-dollar transactions amongst sophisticated parties because of their *lien de confiance*.

44. With respect to causation and damages, the Court of Appeal, like the trial judge, did not find that, on a balance of probabilities, but for the Appellants' fault, the Respondents would have obtained a price comparable to what IA paid the Appellants. Instead, the court concluded that the events happened in a "continuum" and that the Appellants' fault caused *them* to make a substantial profit (para. 107), and its analysis of causation ended there. The court upheld the quantum of damages the trial judge awarded (para. 120) and dismissed the appeal.

PART II – ISSUES IN DISPUTE

1) Given its distinction in Quebec civil law with the duty of loyalty, can the duty to inform, deriving from the duty to act in good faith, go as far as placing the responsibility on a prospective buyer to inform a prospective seller about the market for the sale?

2) In the absence of a duty of loyalty, did the Court of Appeal err in upholding the trial judge's award of disgorgement? In the absence of a basis for disgorgement, did the Court of Appeal err in awarding damages for a mere loss of chance to negotiate?

PART III – STATEMENT OF ARGUMENTS

A. The Duty to Inform Does Not Place a Duty on a Prospective Buyer to Inform a Prospective Seller About the Market for the Sale

45. The Court of Appeal correctly held that the trial judge erred by "extending" the duty of loyalty the Appellants owed to the company (art. 322 CCQ and s. 122(1)a) of the *CBCA*) to the Respondents.[36] The officers' and directors' duties not to use the corporation's information and not to appropriate a business opportunity (art. 323 CCQ) are also owed to the corporation, as they are simply an illustration of their duty of loyalty.[37] Nonetheless, the Court of Appeal held that the *Entente* imposed a duty to inform that "*s'apparente à maints égards aux devoirs identifiés par le juge*" (para. 83) and imposed substantively the same duty of loyalty. In so doing, the Court of Appeal erred in law.

46. To begin, the *Entente* does not create a duty of loyalty. The *Entente* is a remuneration agreement. The Appellants are, in effect, compensated for the execution of their duties as officers, which duties are owed to the corporation.[38] The *Entente* does not and cannot create a duty of loyalty *to the shareholders* and thereby undermine this fundamental principle of corporate law.[39] In addition, the Appellants were not executing the *Entente* in concluding the Rhéaume and Beaulne Transactions. Indeed, what the Respondents complained of was not how they might have otherwise exercised their rights under the *Entente*. Rather, their complaints relate to the precontractual negotiations stage of another contract, i.e. the sale of their shares.[40]

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[36] See also P. Martel, *La société par actions au Québec*, vol. I, *Les aspects juridiques* (Montréal, QC: Wilson & Lafleur, 2022), Nos 24-226, 25-90; *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, paras. 35, 42; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, para. 66.
[37] QCCA, para. 80; *Gravino c. Enerchem Transport inc.*, 2008 QCCA 1820, paras. 39, 47; R. Crête and S. Rousseau, *Droit des sociétés par actions*, 4th ed. (Montréal, QC: Thémis, 2018), No. 846.
[38] P. Martel, *supra*, note 36, No. 25-90; *Wise*, *supra*, note 36, para. 43.
[39] *Canada Business Corporations Act*, RSC 1985, c. C-44, s. 122(3); *Énerchem Transport Inc. v. Gravino*, 2005 CanLII 29638 (QC CS), paras. 183-184, 187 (the duty of loyalty is an obligation of public order), rev'd on other grounds: *Gravino*, *supra*, note 37.
[40] The Respondents did not mention the *Entente* in their Originating Application. The first reference to the *Entente* appeared almost seven years later in their Re-amended application: cf. *Requête introductive d'instance*, May 23rd, 2008, and *Requête introductive d'instance ré-amendée*, Apr. 28th, 2015 (A.R. vol. 1, p. 201; A.R. vol. 2, p. 499).

47. It follows that the only duty at issue is the duty to inform that derives from the duty of good faith. But the duty to inform is not the duty of loyalty, or even akin to the duty of loyalty. Because of the special nature of the relationships in which it applies, the duty of loyalty requires a party to put the interests of the other party first and does not tolerate conflicts of interest. In contrast, the duty to inform must permit a party to pursue the legitimate economic self-interest at the core of freedom of contract, and is fundamentally limited by the duty to inform oneself. This is especially so at the precontractual negotiations stage, where the parties necessarily have opposing interests.

48. In any event, whether the duty to inform in this case is considered extra-contractual or contractual, both paths lead to the same conclusion: in negotiating to buy-out the Respondents, the Appellants did not have a duty to put the Respondents' interests ahead of their own, or a duty to inform the Respondents about the market for the sale. The Appellants did not breach their duty to inform with respect to either Rhéaume or Beaulne.

i. *The Duty to Inform and the Bail Framework*

49. Nearly 30 years ago in *Bail*, this Court recognized the existence of a duty to inform deriving from the general duty to act in good faith. The duty is aimed at correcting informational inequalities in situations where one party is in "a vulnerable position as regards information" (p. 587). The Court identified the following governing criteria, citing Ghestin: (1) the party which owes the obligation to inform must have knowledge of the information, either actual or presumed; (2) the information must be of decisive importance for the party to whom it is owed; and (3) it must be impossible for the party to whom the obligation to inform is owed to inform itself or legitimate for that party to rely on the debtor of the obligation (pp. 586-587).

50. *Bail* was rendered in the context of large-scale enterprise contracts, where the entrepreneur and sub-contractor were legitimately relying entirely on Hydro-Quebec. Gonthier J. highlighted three factors that conditioned the duty to inform in that context: (i) the allocation of risk; (ii) the relative expertise of the parties; and (iii) and the continuous formation of the contract (p. 590).

51. The duty to inform has been applied to all types of contracts and pre-contractual negotiations.[41] At the pre-contractual negotiations stage, the duty relates to information that is decisive for consent and a breach give rise to extra-contractual liability; post-formation, the duty

[41] *Desjardins Financial Services Firm Inc. v. Asselin*, 2020 SCC 30, para. 61.

relates to the execution of the contract and a breach gives rise to contractual liability.[42] In either case, Gonthier J. cautioned against interpreting the duty "so broadly as to obviate the fundamental obligation which rests on everyone to obtain information and to take care in conducting his or her affairs" (p. 587). In other words, a balance must be struck.

52. Since *Bail*, this balance has required constant care. To maintain it, the case law and doctrine have (i) reiterated the boundary between the duty of good faith and the duty of loyalty; (ii) fleshed out the criterion of decisiveness identified in *Bail*; (iii) anchored the duty to inform oneself as the necessary corollary and limit of the duty to inform; and (iv) recognized that the nature of the information must be carefully analyzed in order to give effect to the proper allocation of risks.

a. The Duty to Inform Is Not the Duty of Loyalty

53. The duty of loyalty is similar to the fiduciary duties of the common law.[43] At its core, the duty requires the debtor to put the interests of the beneficiary first.[44] The *Civil Code* imposes a duty of loyalty upon certain legal actors: the administrator of the property of another, the employee, the mandatary, and the director of a legal person.[45]

54. To the contrary, the duty to inform, deriving from the duty of good faith, does not impose a duty to act selflessly. This Court has indeed been resolute in distinguishing between the duty of good faith, now codified at arts. 6, 7, 1375 CCQ, and the duty of loyalty. In *Churchill Falls*, the majority noted that "a party must, in meeting the requirements of good faith, also be able to satisfy his or her own interests."[46] Similarly, in *Bhasin*, Cromwell J. drew a clear distinction between the duties: "[u]nlike fiduciary duties, good faith performance does not engage duties of loyalty to the

[42] F. Terré, P. Simler and Y. Lequette, *Les obligations*, 11th ed. (Paris: Dalloz, 2013), No. 258, pp. 284-285; M. Fabre-Magnan, *De l'obligation d'information dans les contrats*, nº 3, (Paris: L.G.D.J., 1992), No. 3, p. 3.; J-L. Baudouin, P.-G. Jobin and N. Vézina, *Les obligations,* 7th ed., (Cowansville, QC: Yvon Blais, 2013), No. 307.
[43] QCCA, para. 78; *Gravino*, *supra*, note 37, para. 39.
[44] C. Le Breton-Prévost, "Loyalty in Quebec Private Law." J. Civ. L. Stud. 9 (2016): 329, pp. 338-339.
[45] Arts 1309, 2088, 2138 and 322 CCQ, respectively; *Morgan Bank of Canada c. Gulf International Bank*, 2001 CanLII 7885 (QC CA), para. 68.
[46] *Churchill Falls*, *supra*, note 1, para. 117.

other contracting party or a duty to put the interests of the other contracting party first."[47] More recently, in *Wastech*, the majority specified that Quebec law "does not require, as a general rule, the parties to act as the law would require of a fiduciary."[48] Likewise in *Callow,* the majority cautioned that "[c]are must be taken…not to confuse the **'**duty to act faithfully**'…**with the fiduciary duty of loyalty that stands outside of good faith in both legal traditions."[49]

55. Confusion may arise because there is, in civil law terminology, a "frequent but risky association between 'loyalty' and 'good faith'" and this "terminological conflation of loyalty with good faith certainly contributes to the conceptual confusion".[50] A "duty to act faithfully" flows from the duty of good faith.[51] But this duty to act faithfully stands apart from the duty of loyalty. It imposes primarily negative duties, namely, not to increase the burden on the other party, not to jeopardize the contractual relationship and not to engage in excessive or unreasonable conduct.[52] In certain legal relationships, the duty to act faithfully may be heightened and, for instance, require franchisors to support and cooperate with franchisees.[53] Even in those cases, however, the parties are entitled to pursue "divergent interests": the duty of good faith "does not displace the 'legitimate pursuit of economic self-interest' that is at the core of freedom of contract".[54] If the duty of good

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[47] *Bhasin v. Hrynew*, 2014 SCC 71, para. 65, cited in *Quigley c. Placements Banque Nationale inc.*, 2018 QCCA 27, para. 52. See also *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, para. 82; M. A. Grégoire, *Liberté, responsabilité et utilité : la bonne foi comme instrument de justice*, (Cowansville, QC: Yvon Blais, 2010), pp. 185-190.

[48] *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, para. 110.

[49] *Callow*, *supra*, note 47, para. 86 (Emphasis added).

[50] C. Le Breton-Prévost, *supra*, note 44, p. 337.

[51] See P.-G. Jobin and N. Vézina, *supra*, note 42, No. 160; *Corporation d'Urgences-santé de la région de Montréal métropolitain c. Novacentre Technologie ltée*, 2014 QCCA 1594, para. 69. We use the terminology from *Callow*, *supra*, note 47, para. 86, to refer to the "*devoir de loyauté*" that flows from the duty of good faith.

[52] D. Lluelles and B. Moore, *Droit des obligations*, 3rd ed. (Montréal, QC: Thémis, 2018), No. 1981; P.-G. Jobin and N. Vézina, *supra*, note 42, No. 161; see e.g. *Hydro-Québec c. Construction Kiewit cie*, 2014 QCCA 947, para. 92.

[53] *Dunkin' Brands Canada Ltd. c. Bertico inc.*, 2015 QCCA 624, para. 70.

[54] *Dunkin' Brands*, *supra*, note 53, para. 74, citing *Bhasin*, *supra*, note 47, para. 70.

faith requires a form of loyalty, it is "loyalty to the bargain, not loyalty to [the other party]".[55] Simply put, it is "not a duty to look after a co-party's interests."[56]

56. As such, even if the civil law duty to inform is a "positive obligation",[57] "*à géométrie variable*",[58] it cannot be stretched into a duty to advise,[59] or a duty to look after a co-party or place their interests ahead of one's own. This is especially so at the pre-contractual stage,[60] where the issue is market value and ultimately price, on which buyer and seller naturally have competing interests.[61] As the *Stühler* decision explains, even when the buyer acted as the seller's mandatary, in accepting to negotiate with the buyer, the seller cannot expect the buyer to avoid conflicts of interest and to "*négocier avec et contre lui-même*".[62] In *Stühler*, the sellers negotiated with and eventually sold their property to their real estate agent, who then re-sold the property at a profit. The court dismissed the sellers' claim for the agent's profits.

b. Maintaining the Integrity of the Duty to Inform

57. To prevent the duty to inform from becoming a duty of loyalty, (1) the decisiveness of the information, (2) the duty to inform oneself, and (3) the nature of the information and allocation of risks must be carefully examined.

1) Information Must Be Legitimately Decisive and Decisiveness Must Be Known

58. The decisiveness criteria identified in *Bail* is "*probablement le critère le plus mal interprété par la jurisprudence*"; yet, it is essential in differentiating between a genuine breach of the duty to inform and "*un simple prétexte dans une tentative d'inexécution contractuelle*."[63]

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[55] *Wastech*, *supra*, note 48, para. 107.
[56] C. Le Breton-Prévost, *supra*, note 44, p. 337; C. Fabien, "Le nouveau droit du mandat", in *La réforme du Code civil*, t. 2, *Obligations, contrats nommés,* (Sainte-Foy, QC: P.U.L., 1993), pp. 895-896.
[57] *Bail*, *supra*, note 35, p. 587. Compare *Callow*, *supra*, note 47, paras. 38, 81.
[58] D. Lluelles and B. Moore, *supra*, note 52, No. 2006.
[59] *Asselin*, *supra*, note 41, para. 61.
[60] P. Legrand Jr., "Information in Formation of Contracts: A Civilian Perspective", 19 Can. Bus. L.J. 318 (1991), p. 344.
[61] P.-G. Jobin and M. Cumyn, *La vente*, 4th ed. (Montréal, QC: Yvon Blais, 2017), No. 174; *Weiss v. Schad*, [1999] O.J. No. 4356 (QL), para. 101, aff'd 2002 CanLII 53267 (ON CA).
[62] *Stühler c. Hasenberger*, 2014 QCCS 1960, para. 169; Appeal dismissed: 2014 QCCA 1797.
[63] M. A. Grégoire, *Le rôle de la bonne foi dans la formation et l'élaboration du contrat*, (Cowansville, QC: Yvon Blais, 2003), p. 42.

59. Three factors have emerged to maintain the integrity of this criterion. The first is threshold: the information must be more than *relevant*, it must be determinative: "*[c]ertes, pour être déterminante une information doit être pertinente mais l'inverse n'est pas toujours vrai*".[64]

60. The second is knowledge: to have an obligation to inform, the debtor must be aware that the information is decisive for the other party.[65] The duty relates to "a fact [the party] knows to be of decisive importance to the other party".[66] The conduct of the parties is important: "*Qui a été trop laconique décharge d'autant le partenaire de sa responsabilité.*" The duty "*est allégée lorsque son partenaire se conduit comme s'il savait, et alors qu'il peut savoir.*"[67]

61. Third but not the least is timing: especially in the context of pre-contractual negotiations where the information is said to be decisive for consent, decisiveness must be evaluated at the time the contract is formed, not *ex post facto*.[68] Contractual stability is based on foresight, not hindsight.

62. These characteristics delineate the duty to inform and ensure it remains consonant with the boundary between good faith and loyalty.

2) The Duty to Inform Oneself Is the Necessary Corollary to the Duty to Inform

63. The duty to inform oneself is likewise integral to this boundary, and places the responsibility first and foremost on each party to look after their own interests: "*[c]hacun doit supporter le poids de la responsabilité de gérer ses propres affaires sans quoi on ouvre clairement la voie à des abus de toutes sortes dans l'application de cette notion.*"[69] In its 2021 decision in *Écodev*[70], the Quebec Court of Appeal stressed that the duty to inform oneself is the flipside of the duty to inform:

> [69] [L'obligation de renseignement] a également comme corollaire l'obligation du

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[64] M. A. Grégoire (2003), *supra*, note 63, p. 76; P.-G. Jobin and N. Vézina, *supra*, note 42, No. 313; *Biron c. 150 Marchand Holdings inc.*, 2020 QCCA 1537.
[65] M. Fabre-Magnan, *supra*, note 42, Nos 242-243, pp. 188-190; P. Le Tourneau, "De l'allégement de l'obligation de renseignements ou de conseil", D. 1987. Chron., 101, p. 103; *Biron*, *supra*, note 64, para. 63; *Labelle c. Banque Toronto-Dominion*, 2022 QCCS 2801, para. 53.
[66] *Bail*, *supra*, note 35, p. 586 (emphasis added), citing J. Ghestin, *Les obligations : Le contrat : formation* (Paris: L.G.D.J., 1988), No. 508, p. 566.
[67] P. Le Tourneau, *supra*, note 65, p. 103; see also *Aliments C & C inc. c. Banque Royale du Canada*, 2014 QCCA 1578, para. 58.
[68] *Banque nationale du Canada c. Goulet*, 1997 CanLII 10411 (QC CA), p. 7; *Dionne c. Garneau*, 2017 QCCS 4060, para. 201; *Canada Life Assurance Company c. Protection VAG inc.*, 2021 QCCS 3725, para. 456; *Weiss*, *supra*, note 61, para. 177; *Labelle*, *supra*, note 65, para. 50.
[69] M. A. Grégoire (2003), *supra,* note 63, p. 39.
[70] *Développements Banlieue-Ouest inc. c. Écodev inc.*, 2021 QCCA 1341, italics in original; internal citations omitted. See also: P.-G. Jobin and N. Vézina, *supra*, note 42, Nos 313-314.

> cocontractant de se renseigner. En effet, *l'obligation de se renseigner est l'envers de la médaille de l'obligation d'information : c'est la limite qui lui est imposée*. Le cocontractant doit faire preuve de prudence et diligence raisonnable ; *celui qui s'apprête à passer un contrat doit prendre les mesures raisonnables pour en bien connaître les enjeux importants, les faits susceptibles d'influer sa décision*.

64. Because a party must exercise due diligence, its professed lack of knowledge is insufficient to ground a breach of the duty to inform. The party must show informational vulnerability: "*l'obligation de renseignement n'est pas une formalité impérative…cette obligation 'ne s'imposera que si une partie se retrouve dans une position informationnelle vulnérable'*".[71]

65. Informational vulnerability may arise from the parties' relative expertise or a relationship of trust.[72] While the duty to inform is not excluded amongst sophisticated parties, "*le fait d'être expérimenté en affaires, d'être un professionnel ou un commerçant aura pour effet d'imposer une plus grande diligence dans l'obligation de se renseigner*."[73]

66. In short, to maintain the balance struck in *Bail*, the duty to inform must be confined to information that a party could not have known. Indeed, "*une partie doit pouvoir présumer légitimement que son cocontractant … fera les efforts nécessaires pour se [] procurer [l'information pertinente]. Autrement, conclure les contrats serait impraticable.*"[74]

3) The Nature of the Information and the Allocation of Risks

67. Finally, while in theory the duty to inform can include "*toute information déterminante pour une partie à un contrat*" (QCCA, para. 85), the nature of the information at issue must be examined with care so as not to upset the balance at the heart of the duty to inform.

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[71] *Lacharité c. Caisse populaire Notre-Dame de Bellerive*, 2005 QCCA 577, para. 51 citing *Trust la Laurentienne du Canada Inc. c. Losier*, 2001 CanLII 12759 (C.A.), para. 28. See also *Ecodev*, *supra*, note 70, para. 68; *Gestion Biltmore inc. c. Fiducie familiale 2D,* 2020 QCCA 43, paras. 37-41; *Mignacca c. Provigo inc.,* 2004 CanLII 76687 (QC CA), para. 96; *Banque Laurentienne du Canada c. Mackay*, 2002 CanLII 41095 (QC CA), para. 34.
[72] D. Lluelles and B. Moore, *supra*, note 52, No. 2007; P.-G. Jobin and N. Vézina, *supra*, note 42, No. 313.
[73] B. Lefebvre, *La bonne foi dans la formation du contrat,* (Cowansville, QC: Yvon Blais, 1998), pp. 174-175.
[74] P.-G. Jobin and N. Vézina, *supra*, note 42, No. 314.

68. As the Quebec Court of Appeal explained in *Losier*,[75] the nature of the information at issue is crucial to a proper application of the *Bail* criteria. In that case, the court held that a breach of the duty could not be imputed to a lender where the information in question was financial information about the guarantor's own business. Noting that the guarantor's thesis had "*ni assise juridique, ni appui factuel*", the court held that the very nature, "*la nature même de l'information*", made the duty to inform inapplicable.

69. From the perspective of the allocation of risks, it would rarely be reasonable to require a party to inform the other party about its own prestation. To hold otherwise would import a fraternalist theory of contract law and would be an end-run around the civil law prohibition on economic error.[76] This is why French courts have found that the buyer does not owe any duty to inform the seller of the value of the object of the sale.[77] The Court of Appeal made this point in *Churchill Falls*,[78] citing Professor Grégoire and the example of the party who sells a valuable painting at a flea market:

> L'acheteur devrait-il révéler au vendeur la valeur réelle du bien vendu même si ce dernier avait la possibilité de s'en enquérir lui-même? … [L]'ignorance du vendeur est la résultante de sa négligence à veiller à la sauvegarde de ses intérêts en s'informant valablement sur la valeur réelle du tableau vendu qui était jusqu'alors en son entière possession. Or, si nous adoptons le discours des tenants de la théorie de la bonne foi fraternelle, il semblerait qu'un contractant répondant aux exigences d'une telle bonne foi devrait fournir à son cocontractant les informations relatives à sa propre prestation. … [D]ans un tel cas, comment pourrions-nous concilier une telle obligation avec le principe de l'erreur inexcusable?

70. Likewise, in the context of negotiations, parties cannot be expected to inform each other about their respective bottom lines or the potential market value of the transaction. Though rendered in the common law context, this Court's statements in *Martel Building*, are apposite: "[t]he primary goal of any economically rational actor engaged in commercial negotiation is to achieve the most advantageous financial bargain. […] It would defeat the essence of negotiation and hobble the

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[75] *Losier*, *supra*, note 71, paras. 43-45. See also *Québec (Procureure générale) c. Consortium ad hoc Katz, Gendron, Jodoin, Perron, Rousseau, Babin & Associés, Roussy, Michaud & Associés, Cadoret, Savard, Tremblay & Associés, Jean Roy, a.g.*, 2015 QCCA 159, para. 46.
[76] D. Lluelles and B. Moore, *supra*, note 52, No. 539.
[77] Cass. Civ. 1ère, 3 mai 2000, *Bull. civ.* I No. 131; Cass. Civ., 3e, 17 janvier 2007, *Bull. civ.* III No. 5.
[78] *Churchill Falls (Labrador) Corporation Ltd. c. Hydro-Québec*, 2016 QCCA 1229, para. 139, citing M. A. Grégoire (2010), *supra*, note 47, pp. 186-187 (emphasis added).

marketplace to extend a duty of care to the conduct of negotiations, and to label a party's failure to disclose its bottom line, its motives or its final position as negligent."[79]

71. Of course, parties can bargain for certain protections through adjustment clauses, "anti-flip" provisions or similar covenants. As Professor Martel explains, "anti-flip" provisions can form part of freely negotiated contracts and impose a duty to inform the seller about contemplated transactions and share future profits. However, "*[e]n l'absence d'une clause 'anti-flip', l'acheteur est tout à fait libre de revendre les actions à qui et au prix qu'il voudra*".[80]

ii. There Is No Breach of the Properly Calibrated Duty to Inform

72. In this case, the Court of Appeal failed to consider the nature of the information and its timing. As a result, it undermined the duty to inform oneself and the decisiveness criterion, effectively imposing a duty of loyalty on the Appellants where none applied to them.

73. The Court of Appeal focused solely on IA's interest in l'Excellence and its subsequent valuations and offers. This information is said to be decisive because it would have allowed Rhéaume and Beaulne to decide not to sell or to negotiate a higher price (paras. 87-88). However, once the nature of the information is properly considered, there is nothing magical about IA; its interest is no more than an indication of the market for the sale. Market value is relevant to *any* sale; it is not the type of information parties are expected to provide each other, just as neither party is expected to disclose its bottom line. Moreover, requiring the *buyer* to inform the *seller* about the market for the sale requires the buyer to inform the seller about its own prestation, which Quebec law rejects.

74. Properly construed, it was certainly not impossible for the Respondents to inform themselves about the market for the shares. The Respondents were keenly aware of the market's interest in l'Excellence; if this information was of decisive importance, they were free and able to solicit third-party offers and survey the market from the outset. The Court of Appeal failed to consider this.

75. The Respondents' failure to inform themselves about the market moreover belies the decisiveness of the information. Decisiveness must be determined at the time the Transactions were entered into and made known to the other party at that time. The Respondents' and the Court of

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[79] *Martel Building Ltd. v. Canada*, [2000] SCC 60, paras. 62, 67 (emphasis added).
[80] P. Martel, in collaboration with L. Martel, *Les conventions entre actionnaires: une approche pratique,* 12th ed. (Montréal, QC: Wilson & Lafleur, 2017), p. 233. See also *Harris v. Leikin Group Inc.*, 2014 ONCA 479, paras. 61-63.

Appeal's focus on IA is classic impermissible hindsight: IA's interest became decisive because the Appellants ultimately sold to IA (despite their best efforts not to) and made a profit, as they were perfectly entitled to do. Indeed, the Respondents, experienced businesspeople with legal counsel, did not bargain for an anti-flip clause. To the contrary, they bargained for extensive mutual releases (QCCS, paras. 548-549). The Court of Appeal gave short shrift to the decisiveness criterion, relying on Rhéaume and Beaulne's mere assertions, instead of analyzing their conduct as required.

76. This case is a far cry from *Baxter* where unsuspecting shareholders were induced to sell at a derisory price, while there was a "serious proposal" for a public offering, at four to seven times the price, that all shareholders could have accepted.[81] Minority shareholders cannot generally negotiate a public offering; the Respondents had every possibility to obtain third-party valuations. Besides, it is apparent from the litigation with IA and FSFTQ that there was no grand plan to flip the shares all along as in *Baxter*. More fundamentally, IA was unequivocal that it would not have made the same deal with the Respondents as it made with Riopel and Ponce (QCCS, para. 283).

77. This case encapsulates the difference between the duty of loyalty and the duty to inform. Looking through the trial judge's faulty duty of loyalty lens, where the Appellants must put the Respondents' interests ahead of their own, the balance is not the same: "*[m]ême en admettant que Rhéaume et Beaulne connaissaient l'intérêt des assureurs dans le marché couvert par EAV et qu'ils auraient pu solliciter des offres, cela ne libère pas les défendeurs de leurs obligations*." (para. 545). But looking through a properly calibrated duty to inform lens, as the Court of Appeal should have, the fact that the Respondents knew of the market's interest, and could easily have solicited third-party offers, is determinative. The Respondents' duty to inform themselves goes to the heart of the balance of the duty to inform and the proper allocation of risks discussed in *Bail*.

78. The courts below went so far as to fault the Appellants for making a first offer to Beaulne that was based on a $35M valuation *plus* a $1.175M premium, because Ponce had stated that selling at that price would be a "*vente de feu*", considering what the Appellants would have to pay to buy out the Respondents, net of the amounts owed under the *Entente*.[82] On this view, a buyer would not only need to inform the seller about third-party valuations, but would also have to provide their

[81] *Baxter*, *supra*, note 33, paras. 15-16, 32, 97.
[82] Exhibit P-16, A.R. vol. 6, p. 2142.

opinion about such valuations. Such an obligation plainly exceeds a good faith duty to inform that leaves room for commercial negotiations and the conclusion of rational financial bargains.

79. Finally, *even if* this Court determines that IA's interest is the relevant inquiry, the Court of Appeal erred in treating the Rhéaume and Beaulne Transactions as one and the same, and in failing to analyze the duty to inform *in concreto* as required.[83] Rhéaume and Beaulne are different parties, with different interests, who sold at different points in time, on different terms. The Court of Appeal failed to properly analyze the criteria of decisiveness (threshold, timing, and knowledge) and the duty to inform oneself as applied to each transaction individually.

a. Rhéaume Transaction

80. IA's interest did not meet the threshold of decisiveness at any point during the negotiations preceding the Rhéaume Transaction. Rhéaume accepted the Appellants' offer on February 17th, 2006. At that time, there was no feedback, valuation, negotiation, or offer of l'Excellence from IA. By July 28th, 2006, when Rhéaume signed the second addendum, IA had provided a valuation of $35M for financing purposes, which was lower than the Appellants paid (QCCS, paras. 513-514), considering the amounts owed under the *Entente*. IA finally rushed out a partnership memo around August 24th, 2006,[84] *after* the Appellants had concluded their financing deal with FSFTQ. The Appellants set it aside since they had achieved their objective of finding a financing partner so they could continue to run the business.[85] The Rhéaume Transaction closed on September 1st, 2006. IA made its first actual offer in March 2007.

81. Rhéaume's conduct at the relevant time belies the decisiveness of IA's interest. His objective was "*une vente globale, rapide et comptant*".[86] Rhéaume did not express any interest in third-party valuations, or take any steps to contact third parties, including IA, despite stating he could sell the companies "*demain matin*".[87] To the contrary, when La Capitale called after Rhéaume had accepted the Appellants' offer, he referred them to the Appellants because "*[j]e n'avais aucun intérêt à courir, accepter ou négocier les offres de qui que ce soit d'autres*,"[88] thus, demonstrating he was

[83] M. Fabre-Magnan, *supra*, note 42, No. 260, pp. 202-204; B. Lefebvre, *supra*, note 73, p. 174.
[84] Exhibit D-4, A.R. vol. 10, p. 3661.
[85] Examination on discovery of Normand Pépin, June 26th, 2012, A.R. vol. 14, pp. 5266-5267.
[86] Exhibit D-13, A.R. vol. 10, p. 3731.
[87] Exhibit D-62, A.R. vol. 12, p. 4265.
[88] Examination on discovery of Michel Rhéaume, Dec. 9, 2015, A.R. vol. 36, pp. 11959-11961.

not interested in third-party valuations. Even while negotiating for more money to extend the closing, because the Appellants had not yet secured financing, Rhéaume did not inquire about valuations from IA, or anyone else.

82. Meanwhile, Rhéaume knew the business was growing: "*si tu achètes la business aujourd'hui ou tu l'achètes dans un mois, tu l'achètes dans trois mois, dans six mois, ce n'est pas la même chose. L'ascension est en place...*" and he testified that it was for this reason he had insisted on an adjustment clause.[89] At no point did he seek an anti-flip clause.

83. Properly analyzed, the Appellants did not breach their duty to inform Rhéaume. A mere undefined, unquantified expression of interest, five months' prior with no follow-up, does not meet the threshold of decisive information, nor even of "negotiation",[90] much less of "offer". Nor can the Appellants have been expected to inform Rhéaume about valuations received for financing, or offers received *after* the parties already had a deal.[91] Moreover, Rhéaume took no steps to inform himself. His stated confidence in the Appellants to run the business is not the type of relationship that creates an informational vulnerability in a buy-out negotiation, where Rhéaume had a duty to look after his own interests.

b. Beaulne Transaction

84. Beaulne accepted the Appellants' offer on January 31st, 2007, after several months of refusing offers, without explanations. The agreement contained strict "lock-in" clauses that prevented any further negotiations.[92] Beaulne ultimately obtained $10.3M net for his shares.

85. Again, at this point, IA's interest did not meet the decisiveness criterion. Even accepting that Beaulne had asked Ponce whether IA was interested in buying his shares in August 2006 and not February 2006, Pépin was clear that his hands were tied and that IA did not want to get involved in the shareholders' dispute,[93] which was still ongoing.[94] If anything, this may explain why IA's

[89] Exhibit D-83, A.R. vol. 12, p. 4476.
[90] P.-G. Jobin and N. Vézina, *supra*, note 42, No. 136, cited in *Singh c. Kohli*, 2015 QCCA 1135, para. 68.
[91] *Benoît c. Gestion Tex-Di inc.*, 1993 CanLII 4147 (QC CA), paras. 4, 6.
[92] See paras. 4.1 to 4.4 of Exhibit D-46, A.R. vol. 11, pp. 3896-3897.
[93] Testimony of Normand Pépin, October 17, 2017, A.R. vol. 26, pp. 9101-9104.
[94] Rhéaume and Beaulne only settled their dispute in November 2006 (QCCS, para. 74).

president did not return Beaulne's call if he received the message; the confidentiality agreement between IA and the Appellants, by its plain language, certainly did not prevent him from doing so.

86. IA thus only made its first offers, which were to acquire the Beaulne shares, in March 2007, *after* Beaulne had made an agreement with the Appellants. The Court of Appeal ignored this timing. Yet, timing is crucial: information cannot be decisive retroactively. The Beaulne Transaction had already been accepted, and the Appellants had no duty to renegotiate.[95] In any event, the Appellants rejected IA's offers because they wanted to operate and grow the business.

87. Beaulne's conduct also belies the decisiveness of IA's interest and underscores his failure to inform himself. Beaulne's emphatic position was that his sole preoccupation was to ensure he was treated equitably as compared to Rhéaume (QCCS, para. 49), despite having no equity in MRA, the main owner of the brokerage clientele. Recall that Beaulne hired an expert but refused to allow him to undertake a proper valuation of the business, or his 50% of BRA, or to approach other potential buyers (QCCS, paras. 49, 83, 134). Ponce *wanted* him to do a proper valuation (QCCS, para. 134). Advised by Chabot and experienced legal counsel, Beaulne moreover never sought an anti-flip clause. Instead, the parties concluded an even broader release than in Rhéaume's case, given all the pending litigation amongst them.

88. Finally, the Court of Appeal's conclusion that Beaulne was justified in relying on the Appellants because of their relationship of trust and confidence is untenable. Beaulne sold his interests to the Appellants at a time when there was a total, and very public, breakdown of confidence, including extremely damaging allegations by Beaulne.[96]

89. In sum, properly calibrated and examined *in concreto*, the Appellants did not breach their duty to inform Rhéaume or Beaulne. By ignoring the nature of the information and its timing, the Court of Appeal undermined the decisiveness criterion and the duty to inform oneself, and imposed a duty of loyalty that is out of step with commercial reality and the duty of good faith.

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[95] *Churchill Falls*, *supra*, note 1, para. 121.
[96] Exhibits D-22, D-23, D-24, D-26, D-27, D-28, A.R. vol. 11, pp. 3811*ff*.

B. There Is No Basis in Law to Support the Award of Damages

90. Civil liability is grounded in the theory of corrective justice. A person cannot be held liable for their fault without evidence that it caused an injury.[97] A breach of the duty to inform is no different: the plaintiff must also prove an injury to be awarded damages.[98]

91. Yet, the conflation of the duty of loyalty and the duty to inform spilled over into the lower courts' assessment of damages. Based on his conclusion that the Appellants owed a fiduciary duty to the Respondents, the trial judge found that the Respondents lost the opportunity to negotiate a better deal (QCCS, para. 499) and ordered disgorgement of the Appellants' gains. While the Court of Appeal corrected this erroneous premise, it failed to consider how it affected the trial judge's analysis of damages and simply confirmed the award.

92. Thus, there are only two possibilities: either the courts below ordered disgorgement in the absence of a duty of loyalty, which is unknown to civil law, or they awarded damages for the Respondents' loss of chance to negotiate a better deal based on a standard that is impossible to ascertain. In either event, this Court's intervention is required.

i. There Was No Legal Basis to Order Disgorgement

93. This appeal provides an opportunity for this Court to clarify the basis and scope of disgorgement in civil law which remain "*incertains en droit québécois*",[99] an issue that this Court had not considered since 1989 in the case of *Kuet Leong Ng*.

94. Although some refer to this remedy as "restitution of profits",[100] Quebec scholars and this Court (in the common law context) note that disgorgement is not a "true" restitution because it is strictly based on the defendant's gain rather than a response to "circumstances in which a benefit

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[97] Arts 1457-1458 CCQ; *Dallaire v. Paul-Émile Martel Inc*, [1989] 2 SCR 419, p. 425 (per Gonthier J.); *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, para. 22.
[98] See, e.g., *Mignacca*, *supra*, note 71, para. 101; M. A. Grégoire (2010), *supra*, note 47, p. 224.
[99] P. Fréchette, *La restitution des prestations*, (Montréal, QC: Yvon Blais, 2018), p. 155.
[100] See, e.g. P.-G. Jobin and N. Vézina, *supra*, note 42, No. 164; M. Cumyn, "L'encadrement des conflits d'intérêts par le droit commun québécois", in P. Blachèr, ed, *Les conflits d'intérêts : journées nationales*, t. XVII, (Paris: Dalloz, 2013), p. 62; *Abandonato c. 9227-1584 Québec inc.*, 2020 QCCS 2895, para. 22.

moves from the plaintiff to the defendant, and the defendant is compelled to restore that benefit."[101] Here, as in *Atlantic Lottery*, the Respondents sought "*disgorgement*, not restitution: they say that they are entitled to a remedy quantified solely on the basis of [the Appellants'] gain, without reference to damage that [they] may have suffered".[102] The Respondents' appeal factum states this clearly: "*il n'est pas pertinent de savoir si IA aurait payé plus aux Intimés que ce que les Appelants ont eu […] contrairement à une action en responsabilité civile plus traditionnelle, la partie lésée dans un tel cas n'a même pas à faire la preuve qu'elle a subi un préjudice*."[103] But, since the Appellants did not breach a duty of loyalty to the Respondents, they cannot be liable for disgorgement.

a. Disgorgement Cannot Be Ordered in the Absence of a Breach of the Duty of Loyalty

95. In Quebec civil law, disgorgement is an exception to the compensatory nature of damages, ordered only in rare circumstances where a duty of loyalty has been breached.[104] Disgorgement serves to deter parties who owe a duty of loyalty from being swayed by their personal interests and to restore to the party to whom a duty of loyalty is owed the profit that rightfully belongs to them.[105] The debtor of a duty of loyalty must disgorge profits in breach of its duty because "*il s'est enrichi en privilégiant ses intérêts au détriment de ceux sur lesquels il était tenu de veiller*."[106]

96. As such, disgorgement can only be ordered where the *Code* imposes a duty of loyalty or perhaps in analogous legal relationships where loyalty is "*particulièrement névralgique*".[107] The nature of the relationship must be such that a person must place another's interests ahead of their

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[101] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, para. 23. See also D. Lluelles and B. Moore, *supra*, note 52, No. 2035; P. Fréchette, *supra*, note 99, p. 159 (who use "*reddition de comptes*").
[102] *Atlantic Lottery*, *supra*, note 101, para. 25 (emphasis in the original).
[103] Respondents' Factum before the Court of Appeal, para. 82, Respondents' Record [**R.R.**], pp. 25-26.
[104] Arts 1366 and 2146 al. 2 CCQ. See also M. Cantin Cumyn and M. Cumyn, *Traité de droit civil : L'administration du bien* d'autrui, 2nd ed. (Cowansville, QC: Yvon Blais, 2014), No. 376; D. Lluelles and B. Moore, *supra*, note 52, Nos 2035-2037; C. Le Breton-Prévost, *supra*, note 44, p. 371; Québec, Ministère de la Justice, *Commentaires du ministre de la Justice : Le Code civil du Québec*, vol. 1, (Québec: Les Publications du Québec, 1993), art. 1366.
[105] *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, paras. 74-77.
[106] *Gravino*, *supra*, note 37, para. 40.
[107] Arts 322, 1309, 2138, 2088 CCQ; D. Lluelles and B. Moore, *supra*, note 52, No. 2035.

own (e.g., the legal person, the beneficiary of the administration of the property of another, the mandator, or the employer). These relationships are generally "imbued with the concept of trust."[108]

97. Not all legal relationships give rise to a duty of loyalty. A person has a duty of loyalty (i.e., a duty to put the interests of another ahead of their own) when they are acting on behalf of another or when they have control over their affairs.[109] When the relationship "makes one person's interests entirely subject to another's discretion, [it] must have as one of its incidents the duty of loyalty owed by the latter to the former".[110] The duty of loyalty attaches to the exercise of "legal powers" with respect to another person or their property,[111] which are "legal prerogative[s] exercised in furtherance of another's interest."[112] As this Court noted in *Resolute*, the duty of loyalty "prohibits using the powers in the personal interest of the person in whom they are invested."[113] Accordingly, "[a] holder of legal powers who uses his powers to further a purpose other than that for which they were granted to him necessarily breaches his duty of loyalty."[114] Since the debtor of the duty of loyalty must exercise their powers in furtherance of another's interest, they must be prohibited from keeping the profits made by virtue of the relationship.[115]

b. Disgorgement Is Not a Sanction for All Breaches of the Duty of Good Faith

98. The account of disgorgement as a sanction for disloyalty can be traced back to this Court's decision in *Kuet Leong Ng*. In that case, a bank instituted an action to recover profits made by an employee, a trader, who had carried out unauthorized transactions. Although the *Civil Code* at the

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[108] *Laflamme v. Prudential-Bache Commodities Canada Ltd.*, 2000 SCC 26, para. 28 (mandate); *Concentrés scientifiques Bélisle inc. c. Lyrco Nutrition inc.*, 2007 QCCA 676, para. 39 (employment); *Brassard c. Brassard*, 2009 QCCA 898, para. 109 (administration of the property of another); *Centre de santé et de services sociaux de Laval c. Tadros*, 2015 QCCA 351, paras. 43-46.
[109] M. Cantin Cumyn and M. Cumyn, *supra*, note 104, No. 296.
[110] E. J. Weinrib, "Restitutionary Damages as Corrective Justice" (2000), 1 Theor. Inq. L. 1, p. 33; R. Crête and S. Rousseau, *supra*, note 37, No. 811 (regarding the duty of loyalty in corporate law).
[111] M. Cantin Cumyn and M. Cumyn, *supra*, note 104, No. 299.
[112] *Private Law Dictionary and Bilingual Lexicons: Property*, (Cowansville, QC: Yvon Blais, 2012) "power".
[113] *Resolute FP Canada Inc. v. Hydro-Québec*, 2020 SCC 43, para. 63, citing M. Cantin Cumyn, "Le pouvoir juridique" (2007) 52 McGill L.J. 215, p. 231.
[114] C. Le Breton-Prévost, *supra*, note 44, p. 347.
[115] C. Le Breton-Prévost, *supra*, note 44, p. 372; L. Smith and J. Berryman, "Disgorgement of profits in Canada", in E. Hondius and A. Janssen eds., *Disgorgement of Profits: Gain-Based Remedies throughout the World* (Springer, 2015), p. 295; *Wise, supra*, note 36, para. 38; E. J. Weinrib, *supra*, note 110, pp. 33-34.

time only expressly required *mandataries* to pay over all that they had received under the authority of the mandate, this Court held that the Respondent was required to disgorge his profits.

99. Gonthier J. explained that the absence of an express provision on disgorgement was not determinative: the principle whereby the mandatary is bound to pay over all that he has received under the authority of the mandate is not exclusive to mandate contracts; it "attaches rather to the underlying function and relationship between the parties to the contract" (p. 436). The obligation to turn over profits depends on the nature of the control exercised over another's property:

> The obligations of directors and senior officers are imposed upon them not because they are true mandataries of their corporation or of the shareholders, but because of the nature of the control they exercise over the affairs of the corporation. This control resembles in many aspects the control a mandatary may have over the affairs of his mandator, and thus the responsibilities and obligations imposed on senior officers and directors correspond to those fixed by the *Civil Code* for mandataries. [pp. 442-443, emphasis added]

100. It is true that in discussing the breach of the duty of good faith and loyalty in that case, *Kuet Leong Ng* referred to the "principle that one should not profit from one's own bad faith or wrongdoing" (p. 441). But this general statement, particularly in a case that proceeded *ex parte* before this Court, cannot be understood as having the radical effect of extending disgorgement to all cases of "bad faith or wrongdoing". The Court of Appeal appears to have adopted this inaccurate reading of *Kuet Leong Ng* in *Electrolux*. In that case, the court gave effect to the Appellant's concession that the Respondent's damages, although not proven, could be equivalent to the Appellant's profit resulting from its unilateral resiliation of contract. The court then ordered the Appellant to pay "damages" equivalent to its profit based on "wrongdoing and bad faith as contemplated in [*Kuet Leong Ng*]".[116] Since then, the Superior Court relied on *Electrolux* to conclude that "damages can be awarded even in the absence of any proof if…[a party] benefited from [its] bad faith".[117] This cannot be a proper reading of *Kuet Leong Ng*.

101. *Kuet Leong Ng* must be read in context. At the time, the *Code* contained no express provisions of good faith nor of loyalty in employment contracts, so the Court grounded the employee's duty in these general principles. In the same paragraph, however, the Court was careful to add that the

[116] *Electrolux Canada Corp. c. American Iron & Metal*, 2016 QCCA 1692, para. 24.
[117] *Yale Capital Inc. c. Sofame Technologies Inc.*, 2018 QCCS 2313, para. 39.

obligation to disgorge profits is related to "situations inducive to persons turning to personal benefit activities which are to be carried out for the benefit of others" (p. 442, emphasis added).

102. On the facts, Gonthier J. found that the Respondent's actions constituted a breach of good faith and loyalty. The Respondent's control over the affairs of his employer was crucial to the analysis: "[a]n employee… who enjoys control over large sums of the employer's money must be held accountable for his disposition of those funds and is required to turn over to the employer profits made through the abuse of his position" (p. 444, emphasis added).[118]

103. The *Abbas-Turqui* decision illustrates that disgorgement turns on the control over the affairs of another.[119] In that case, the Court of Appeal reversed a decision ordering an employee to disgorge profits obtained in breach of a non-competition clause. The court held that disgorgement was not an appropriate remedy. It distinguished *Kuet Leong Ng* on the basis that the employee had not earned profits while using funds made available by his employer and that he did not earn the profits while acting as representative of his employer (para 13). Properly understood, disgorgement is thus a sanction for disloyalty, when the debtor is acting as a representative of another or has control over its affairs. Only then can courts order disgorgement to restore to the party to whom a duty of loyalty is owed the profit that rightfully belongs to them.

104. The conflation between good faith and loyalty may be inconsequential in certain cases, since the debtor of the duty of loyalty who fails to act with the best interest of the beneficiary of the duty often simultaneously breaches the duty of good faith. But it does not follow that the breach of the duty of good faith itself gives rise to disgorgement. For instance, a mandatary must disgorge the profits obtained in the execution of the mandate even if they acted in good faith.[120] Conversely, a mere breach of the duty of good faith does not exempt the plaintiff from adducing evidence of its damages – even where there is a heightened duty to act faithfully, as in franchise contracts.[121]

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[118] See also *Marque d'or inc. c. Clayman*, EYB 1988-77910 (C.S.), para. 29 (per Gonthier J); see also *Entreprises Rock Ltée (In re)*, AZ-86021486 (SOQUIJ), p. 5 (cited in *Kuet Leong Ng*, *supra*, note 32, p. 441).
[119] *Abbas-Turqui c. Labelle Marquis Inc.*, 2004 CanLII 26082 (QC CA).
[120] *Mongeau et al. v. Mongeau et al.*, [1973] SCR 529, p. 534.
[121] See, e.g., *Provigo Distribution Inc. v. Supermarché A.R.G. Inc.*, 1997 CanLII 10209 (QC CA).

105. Although it has been suggested that *Kuet Leong Ng* introduced disgorgement as a "*véritable recours en équité*",[122] most authors agree that it introduced disgorgement as a remedy for a breach of the duty of loyalty.[123] In fact, courts and scholars have raised concerns about some of *Kuet Leong Ng*'s abstract statements. Professor Cumyn notes that *Kuet Leong Ng* "*suscite un certain malaise dans la doctrine et la jurisprudence québécoises*" and cautions against deriving from this decision a general principle of disgorgement based on any breach of the duty of good faith.[124] Professor Masse similarly notes that the effects of the decision are "*confondants*", since it generates "*un cas de compensation ou d'enrichissement sans dommages ou risque*". He warns: "*les suites prochaines de cette décision pourraient bien être encore plus surprenantes si on n'y prend garde*."[125] This Court should heed these concerns and make plain that *Kuet Leong Ng* does not stand for the proposition that mere breaches of the duty of good faith gives rise to disgorgement.

c. Disgorgement Should Not Be Extended to Remedy Breaches of the Duty of Good Faith

106. Besides the fact that *Kuet Leong Ng* does not stand for that proposition, there are at least four other reasons why it would be contrary to Quebec civil law to extend disgorgement as a remedy for breaches of the duty of good faith that do not constitute a breach of a duty of loyalty.

107. *First*, since *Kuet Leong Ng*, the legislature codified the duty of loyalty in employment contracts (art. 2088 CCQ) and opted for a "compartmentalized" approach to the duty of loyalty, codifying it in specific relationships rather than laying down a general principle.[126] Courts should be cautious before extending this duty, and the corollary remedy of disgorgement, in other contexts.

108. *Secondly*, disgorgement based on breaches of the duty of good faith would be untethered to the recognized theory of damages in civil law. The function of damages is to compensate, not to

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[122] See e.g., P.-G. Jobin and N. Vézina, *supra*, note 42, No. 164.
[123] M. Cantin Cumyn and M. Cumyn, *supra*, note 104, No. 376; P. Fréchette, *supra*, note 99, p. 159; D. Lluelles and B. Moore, *supra*, note 52, Nos 2035-2037; C. Le Breton-Prévost, *supra*, note 44, pp. 373-374; M. A. Grégoire, "La bonne foi en droit québécois" *Analele Universității Bucureşti– Seria Drept (AUB)*, 2021, (1), 1, p. 4.
[124] M. Cumyn, *supra*, note 100, p. 62.
[125] C. Masse, "Chronique de droit civil québécois: session 1988-1989", (1990) 1 Sup. Ct L.R. (2d) 325, pp. 337, 340; see also, e.g. L. H. Richard, "L'obligation de loyauté des administrateurs de compagnies québécoises: une approche extracontractuelle", (1990) 50 R. du B. 925, pp. 952-954; M. A. Grégoire (2010), *supra*, note 47, pp. 50-52 and fn 179; *Unisac inc. c. Verret*, EYB 1992-79404 (C.S.), para. 15.
[126] P. Martel, *supra*, note 36, No. 23-197.

sanction the defendant's wrongful conduct: "*il ne peut être question de leur donner un caractère punitif. Le caractère volontaire ou intentionnel de l'acte … n'entre pas non plus en ligne de compte.*"[127] The principle of *restitutio in integrum* leaves "no room for awarding compensation that exceed[s] the loss suffered and the earnings lost."[128] A defendant's bad faith has no bearing on the plaintiff's damages; it "is only relevant in the context of exemplary or punitive damages".[129]

109. Rather than compensating for the plaintiff's injury, disgorgement based on a breach of the duty of good faith provides a gain to the plaintiff and a loss to the defendant. As Professor Grégoire puts it, "*[l]a règle de l'indemnisation sans préjudice n'est donc pas cohérente aux principes de responsabilité civile*."[130] Similarly, in the common law, this Court recently held that waiver of tort is not a cause of action and that, in the contractual realm, disgorgement is an exceptional remedy since "it is difficult to explain disgorgement for breach of contract from the standpoint of corrective justice".[131] Ordering disgorgement for any breach of the duty of good faith would expand its reach to the extracontractual realm, which is unknown to civil law.[132]

110. Nor can disgorgement be indirectly awarded by arbitrarily fixing the plaintiff's "damages" at the defendants' gain under art. 1611 CCQ, without evidence of the extent of the plaintiff's

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[127] J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile,* 9th ed., (Montréal, QC: Yvon Blais,2020), No. 1-371; *Chaput v. Romain*, [1955] SCR 834, p. 841; M. A. Grégoire (2010), *supra*, note 47, p. 52.

[128] *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 SCR 345 (per Gonthier J.).

[129] *Desroches c. Commission des droits de la personne*, 1997 CanLII 17450 (QC CA), para. 130. There is a caveat. The defendant's intentional fault is relevant in contractual matters, and it allows the plaintiff to recover unforeseeable damages at the time the obligation was contracted (art. 1613 CCQ). Still, the objective is solely to compensate the victim: "even then, the damages include only what is an immediate and direct consequence of the nonperformance."

[130] M. A. Grégoire (2010), *supra*, note 47, p. 36, see also P. Fréchette, *supra*, note 99, p. 160.

[131] *Atlantic Lottery*, *supra*, note 101, para. 56.

[132] *Cinar Corporation v. Robinson*, 2013 SCC 73, para. 86; *Guindon c. Bayer inc.,* 2018 QCCS 3407, para. 41, leave to appeal ref'd: 2018 QCCA 1911; D. Gardner, "Réflexions sur les dommages punitifs et exemplaires", (1998) 77 R. du B. can. 198, pp. 212-213.

damages, as the Court of Appeal appears to have done in *Electrolux* and *Uni-Sélect*.[133] Scholars have criticized this approach for being incompatible with the compensatory function of damages.[134]

111. *Thirdly*, and relatedly, awarding disgorgement based on a breach of the duty of good faith would only serve a punitive function, thwarting the legislative choice to limit the scope of punitive damages.[135] Unlike at common law, punitive damages are exceptional under Quebec civil law. They can only be awarded when provided by law and the amount awarded "may not exceed what is sufficient to fulfil their preventive purpose" (art. 1621 CCQ). Importantly, punitive damages can encompass a form of disgorgement, but only within the circumscribed scope of art. 1621 CCQ.[136]

112. Punitive damages serve a "preventive and deterrent role"[137] and "ai[m] at expressing special disapproval of a person's conduct."[138] Similarly, as they explained on appeal, the Respondents sought disgorgement to fulfill "*une fonction préventive ou dissuasive*" based on the "*caractère répréhensible du manquement*".[139] Simply put, they sought disguised punitive damages. Professor Richard raised this concern, if *Kuet Leong Ng* extended disgorgement based on a general moral principle: "*Ne risque-t-on pas d'assimiler cette condamnation à une condamnation au paiement de dommages exemplaires lesquels sont inadmissibles dans l'état actuel du droit québécois?*"[140]

113. The legislative history of art. 1621 CCQ confirms that the legislature consciously decided not to introduce punitive damages based on the nature of the fault in the realm of civil liability. Initially, the Civil Code Revision Office suggested that courts be entitled to award punitive damages in an action in civil liability "in cases of intentional fault or gross fault".[141] This suggestion was rejected. The *Advisory Committee on the Legislative Policy* of the *Civil Code*

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[133] *Uni-Sélect Inc. c. Acktion Corp.*, 2002 CanLII 41226 (QC CA).
[134] M. A. Grégoire (2010), *supra*, note 47, pp. 50-54; see also P. Fréchette, *supra*, note 99, pp. 160-161.
[135] See, by analogy, *Nova Chemicals Corporation v. Dow Chemical Company*, 2020 FCA 141, para. 29, leave to appeal granted, 2021 CanLII 42376 (SCC) (under reserve).
[136] *Richard v. Time Inc.*, 2012 SCC 8, para. 206.
[137] *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211, para. 122.
[138] *de Montigny v. Brossard (Succession)*, 2010 SCC 51, para. 47.
[139] Respondents' Factum before the Court of Appeal, para. 82, R.R., pp. 25-26.
[140] L. H. Richard, *supra*, note 125, p. 954.
[141] *Hinse v. Canada (Attorney General)*, 2015 CSC 35, para. 159; J.-L. Baudouin, P. Deslauriers and B. Moore, *supra*, note 127, No. 1-373; Civil Code Revision Office, *Report on the Québec Civil Code* (1978), vol. II, t. 2, *Commentaries*, Québec: Éditeur officiel, No. 290.

advised the Minister of Justice, having "*longuement discuté cette question délicate et controversée*" that "*il n'est pas opportun de généraliser le principe de l'octroi des dommages punitifs dans le Code civil*."[142] As this Court underlined in *Churchill Falls* and *Prelco*, courts should be cautious not to indirectly introduce policies advanced by the Civil Code Revision Office but rejected by the legislature.[143] Yet, ordering disgorgement based on bad faith would indirectly introduce the rejected notion of punitive damages based on the nature of the fault.

114. *Finally*, while innovations by judges are "not unknown in the civil law",[144] judicial creations must be "in keeping with the relevant articles of the *Civil Code* and with the principles on which they are based."[145] For these reasons, even authors in favour of ordering disgorgement of profit as a general sanction of civil liability consider that *legislative* action is necessary to resolve what they perceive as a lacuna in civil law.[146] They propose an extension of punitive damages or the recognition of other forms of non-compensatory damages to punish and deter wrongful acts that benefit the defendant. Rather than shoehorning disgorgement into compensatory damages (as in *Uni-Sélect* and *Electrolux*), this approach has the benefit "*de ne pas contredire les fondements établis de la responsabilité, tout en la faisant progresser de façon cohérente*."[147]

115. The recent French reform of civil liability illustrates that recognizing disgorgement-like remedies is a matter for the legislature and that it raises a host of intricate policy decisions.[148] The *Projet de loi* suggested introducing a civil penalty "*lorsque l'auteur du dommage a délibérément commis une faute en vue d'obtenir un gain ou une économie*".[149] This penalty would have been awarded to non-profit organizations or the Public Treasury, rather than the victim, to avoid unjust

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[142] J.-L. Baudouin, "Le comité aviseur sur la politique législative", in *Du Code civil du Québec : Contribution à l'histoire immédiate d'une recodification réussie* (Montréal, QC: Thémis, 2005), p. 355.
[143] *Churchill Falls*, *supra*, note 1, para. 105; *Prelco*, *supra*, note 2, paras. 52, 63.
[144] *Prelco*, *supra*, note 2, para. 58.
[145] *General Motors Products of Canada v. Kravitz*, [1979] 1 SCR 790, p. 814.
[146] See, e.g., G. Viney, "La condamnation de l'auteur d'une faute lucrative à restituer le profit illicite qu'il a retiré de cette faute", in B. Moore (ed.), *Mélanges Jean-Louis Baudouin*, (Cowansville, QC: Yvon Blais, 2012), p. 963; M. Lacroix, "Pour une reconnaissance encadrée des dommages-intérêts punitifs en droit privé français contemporain, à l'instar du modèle juridique québécois", (2006) 85 R. du B. can. 569, p. 604.
[147] P. Fréchette, *supra*, note 99, p. 161.
[148] See e.g. Z. Jacquemin, *Payer, réparer, punir: étude des fonctions de la responsabilité contractuelle en droits français, allemand et anglais*, (Paris: L.G.D.J., 2021), No. 441.
[149] *Projet de réforme de la responsabilité civile*, March 13th, 2017, art. 1266-1.

enrichment.[150] Even then, this proposition was so controversial – namely because it "*heurte de plein fouet le principe de la réparation intégrale*"[151]– that it was abandoned by the Senate.[152]

116. All in all, the extension of disgorgement as a remedy for breaches of the duty of good faith would be incoherent with several institutions of the *Civil Code*, namely, the codification of the duty of loyalty solely in particular legal relationships, the compensatory nature of damages, and the limited scope of punitive damages.

d. No Legal Basis for Disgorgement in This Case

117. In sum, disgorgement is only available for certain breaches of the duty of loyalty where the defendant is acting on behalf of the plaintiff or controlling its affairs. Here, the Appellants could not have owed any duty of loyalty to the Respondents. Their duty of loyalty as directors and officers was owed to the company, not the shareholders. And, under the *Entente des présidents*, the Appellants did not have a duty to place the Respondents' interests before their own. In any event, the Appellants were not executing the *Entente* when negotiating with the Respondents.

118. If this Court concludes that the Appellants breached a good faith duty to inform during the buyout negotiations (whether this duty is precontractual or derives from the *Entente*), this fault does not give rise to disgorgement because it does not involve a duty of loyalty. Unlike *Kuet Leong Ng*, the Appellants were clearly not controlling the Respondents' affairs or acting as their representatives in the context of the Transactions.

ii. The Court of Appeal Improperly Awarded Damages for Loss of Chance to Negotiate

119. Since there is no legal foundation for the remedy of disgorgement, the only other possible basis is loss of chance. The trial judge found that the Respondents had lost the *opportunity* to try to negotiate a higher price or contact another buyer (QCCS, para. 499). The Court of Appeal upheld this finding (QCCA, para. 93), but failed to consider whether, in the absence of a duty of loyalty, the mere lost opportunity or chance to negotiate is compensable under Quebec civil law. It is not.

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[150] J. Prorok, "L'amende civile dans la réforme de la responsabilité civile ", (2018) R.T.D.C. 327, p. 330.
[151] J.-L. Baudouin, P. Deslauriers and B. Moore, *supra*, note 127, No. 1-374.1, referring to B. Javaux, "L'amende civile, entre sanction pénale et *punitive damages*?", in *La Semaine Juridique*, ed. générale, No. 6, Feb. 11th, 2019, p. 276.
[152] *Proposition de loi portant réforme de la responsabilité civile***,** nº 678, July 29th, 2020.

a. Loss of Chance and Its Uneasy Reception in Quebec Civil Law

120. In civil law, "loss of chance" refers to "a type of damage" which aims to compensate for what is often called the "intermediate damage", i.e. the loss of the opportunity of obtaining a gain or avoiding a loss, and not for the gain or the loss itself (the "final damage").[153] This type of damage is intrinsically hypothetical and uncertain, as the "chance" or "opportunity" does not always materialize itself. It fits uneasily with the requirement that a loss be certain to be compensable (art. 1611 CCQ). In jurisdictions where the "intermediate damage" can be compensated, such as France and Belgium, if a plaintiff shows that, but for the defendant's fault, there was a 40% chance that a certain outcome would have materialized, courts can compensate this lost chance by awarding 40% of the "final damage".[154]

121. In *Lawson*, this Court examined the "theoretically troublesome" concept that is loss of chance and held that, unlike French and Belgian law, Quebec law does not recognize, much less compensate, "intermediate damage" as a general rule (p. 602). Gonthier J. accepted that "intermediate damage" could be compensated in the "exceptional loss of chances cases" where the damage can only present itself "in probabilistic or statistical terms and where it is impossible to evaluate sensibly whether or how the chance would have been realized" (p. 603). An example would be that of "the lottery ticket which is not placed in the draw due to the negligence of the seller of the ticket" (*ibid.*). Otherwise, Quebec courts only analyze the "final damage" and compensate it if it has been established according to the general rules of causation and the balance of probabilities (pp. 600-601). In *St-Jean*, Gonthier J. reiterated this principle: "causation must be established on a balance of probabilities and…the loss of a mere chance cannot be a compensable harm."[155]

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[153] *Laferrière v. Lawson*, [1991] 1 SCR 541, pp. 559-560.
[154] See *Lemieux c. Aon Parizeau inc.,* 2018 QCCA 1346, para. 78. In French law, see L. Vitale, *La perte de chances en droit privé* (Paris: L.G.D.J., 2020), Nos 546-573; G. Viney and P. Jourdain, *Les conditions de la responsabilité,* (Paris: L.G.D.J., 2013), No. 284.1, pp. 148-149.
[155] *St-Jean v. Mercier*, 2002 SCC 15, para. 106. See also J.-L. Baudouin, P. Deslauriers and B. Moore, *supra*, note 127, No. 1-361; S. Gaudet, "La perte de chances : un miroir aux alouettes?" in B. Moore (ed.) *Mélanges Jean Pineau*, (Montréal, QC: Thémis, 2003), pp. 293-297.

122. Likewise, recognizing that negotiations are inherently uncertain, Quebec courts have refused to award damages based on the ultimate contract hoped for, even where a party has established that negotiations were ruptured in bad faith:

> Quebec law may recognize… that the loss of an advantage that could reasonably be anticipated may be compensated, but the rupturing of negotiations does not lead to the loss of such an advantage and, certainly, does not allow for compensation of the profits that the "négociateur déçu" was hoping for, had the contract been concluded, or the loss of the chance to make such profits.[156]

Simply put, absent evidence, on a balance of probabilities, of the outcome of the lost negotiation, the loss of a chance to negotiate is not compensable under civil law.[157]

123. Nevertheless, in the years since *Lawson*, Quebec's lower courts and doctrinal writers have struggled with the concept of loss of chance: it remains "mysterious"[158] and "confusion reigns".[159] Purporting to apply *Lawson*, some cases have admitted loss of chance as a compensable loss, but addressed only the final damage.[160] Others have awarded compensation for the intermediary damage in seemingly non "exceptional" cases.[161] Finally, some have interpreted *Lawson* as rejecting loss of chance altogether.[162]

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[156] *Singh*, *supra*, note 90, para. 106.
[157] *Ratelle c. S.L.*, 2010 QCCA 415, para. 50; *Immeubles Jean-Robert Grenier inc. c. Allard,* 2011 QCCS 7480, paras. 41-42.
[158] S. Gaudet, *supra*, note 155, p. 271.
[159] C.-O. Lessard, "Les réclamations pour pertes de chance: perdez-vous votre temps?", in *Repères*, Oct. 2012.
[160] See e.g.: *Aon Parizeau*, *supra*, note 154, paras. 77-95; *Ville de Sainte-Marthe-sur-le-Lac c. Expert-conseils RB inc.*, 2017 QCCA 381, paras. 64-66; *Dupuis c. Syndicat canadien des communications, de l'énergie et du papier, section locale 130*, 2008 QCCA 837, paras. 94-103 and 109-124, leave to appeal to the SCC dismissed, October 16th, 2008, No. 32711.
[161] See e.g.: *Aon Parizeau*, *supra*, note 154, paras. 134-142 (Rochette J.A., dissenting); *Raschella c. Brodeur (Succession de)*, 2011 QCCS 4745, paras. 131-137; P. Deslauriers, "Notes de terminologie juridique autour de la notion de chance" in G. B. Miranda and B. Moore (eds) *Mélanges Adrian Popovici : Les couleurs du droit* (Montréal, QC: Thémis, 2010), pp. 228-231 and caselaw accompanying fn n° 28-34; *Commission des droits de la personne et des droits de la jeunesse (M.R.) c. Société de transport de Montréal (STM)*, 2021 QCTDP 35, and the caselaw accompanying fn No. 56.
[162] See e.g. *Billards Dooly's inc. c. Entreprise Prébour ltée*, 2014 QCCA 842, para. 103; *IBM Canada ltée c. D.C.*, 2014 QCCA 1320, para. 97; *Ratelle*, *supra*, note 157, para. 40.

124. The Court of Appeal acknowledged the confusion in *Aon Parizeau*, in 2018.[163] In that case, an insurance broker resigned from Aon without giving the required 2-weeks' notice, immediately joined a new firm, and several of his clients followed. Aon alleged, among other things, that it lost the opportunity or chance to convince the clients to stay. The majority attempted to reconcile the contradictory case law by holding that, for "loss of chance" to be compensated, "*il faut donc que la preuve établisse que 'la chance perdue soit réelle et sérieuse* ***et*** *que sa réalisation soit probable'*" (para 80, emphasis in the original).

125. *Aon Parizeau* has unfortunately failed to dissipate the confusion in the wake of *Lawson*. Ironically, just as the majority in *Aon Parizeau* remarked about *Lawson*, some decisions have interpreted *Aon Parizeau* as affirming that loss of chance exists in Quebec law,[164] others have interpreted it as affirming that it does not,[165] and still others as affirming that it exists but only in limited circumstances.[166] This confusion cannot continue.

126. Yet, the present case perpetuates the confusion and is in conflict with the case law on damages in context of negotiations. The trial judge found that Rhéaume and Beaulne lost the chance to negotiate a better deal (QCCS, para. 499) and then awarded damages based on the deal ultimately concluded with IA. By confirming this award despite finding that the trial judge erroneously focused on the duty of loyalty, the Court of Appeal set a precedent for loss of chance to negotiate that is untethered to any recognized theory of damages.

b. Loss of Chance Should Be Confined to the Exceptional Cases Identified in *Lawson*

127. This case provides this Court with the opportunity clarify the notion of "loss of chance". First, this Court should reaffirm *Lawson*'s core holding: loss of chance that does not rise to a balance of probabilities – "intermediary damage" – is not compensable in Québec law, apart from the exceptional cases where the damage can only be understood in probabilistic terms.

128. Second, "final damage" that *is* established on a balance of probabilities should no longer be referred to as "loss of chance" since it is an erroneous application of the concept and creates

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[163] *Aon Parizeau*, *supra*, note 154, para. 80.
[164] E.g. *Ateliers Présiko inc. c. Usinage Prolc inc.*, 2021 QCCQ 7100, para. 22; *NBSC inc. c. Wilhelmina International Inc.*, 2020 QCCS 790, para. 27.
[165] E.g. *Presmy c. Branco*, 2021 QCCS 2922, para. 166.
[166] E.g. *Cansica Holding Inc. c. Boidman*, 2018 QCCA 2130, paras. 15-18.

confusion.[167] It is erroneous because when a plaintiff establishes that they have sustained a probable loss, this is not a "true" loss of chance: courts are not compensating for the loss of a chance itself (the intermediate damage), but rather the loss of the outcome of the chance (the final damage).[168] And it creates confusion because, as Deslauriers and Fernandez note,[169] *Aon Parizeau*'s requirement that a chance be "real and serious" and its realization probable, does not (and should not) differ from the burden required to establish lost profits within the meaning of art. 1611 CCQ:

> [U]ne telle utilisation élargie de la notion de « perte de chance », qui englobe toute perte réelle et sérieuse et dont la survenance peut être établie selon la balance des probabilités, s'avère inutile et est de nature à créer de la confusion. […]
> Ainsi, lorsqu'un créancier parvient à démontrer selon la balance des probabilités (donc à plus de 50 %) [que la chance se serait concrétisée] il ne s'agit alors pas, à proprement parler, d'une perte de chance de profit, mais tout simplement d'une perte de profit, donc d'un préjudice certain au sens de l'article 1611 C.c.Q. [Emphasis added]

129. The requirement that a chance be "real and serious" only adds confusion, because it comes from the "intermediate damage" context recognized in French law (*Lawson*, p. 600). "Real and serious" is qualitative, meaning that the lost chance must be well-founded.[170] It is not quantitative: "*une chance minime, chiffrée à un pourcentage très faible, suffit à justifier l'indemnisation*".[171] In sum, apart from the exceptional cases identified in *Lawson*, there is no need to resort to "loss of chance". This terminology creates confusion and obscures the central holding in both *Lawson* and *Aon Parizeau* that the loss alleged must be proven on a balance of probabilities.[172]

c. No Legal Basis to Award Damages to the Respondents

130. The Respondents' loss of chance to negotiate does not support an award of damages based on the Appellants' ultimate transactions with IA. Absent a basis for disgorgement, the Court of Appeal erroneously compensated the Respondents for the loss of chance to negotiate (the

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[167] See, e.g., J.-L. Baudouin, P. Deslauriers and B. Moore, *supra*, note 127, No. 1-361.1; *Boidman*, *supra*, note 166, paras. 17-18; *Fermes Benallan c. Ferme Lemay et Frères*, 2018 QCCS 1693, paras. 76-79 and fn 80; S. Gaudet, *supra*, note 155, pp. 295-296.
[168] P. Deslauriers, *supra*, note 161, pp. 224, 231.
[169] P. Deslauriers and S. Fernandez, "Pour en finir avec la perte de chance ?", in S.F.C.B.Q., *Développements récents en droit de la santé* (Montréal, QC: Yvon Blais, 2020), p. 161.
[170] L. Vitale, *supra*, note 154, Nos 546-547.
[171] G. Viney and P. Jourdain, *supra*, note 154, No. 283, p. 146.
[172] *Aon Parizeau*, *supra*, note 154, para. 81. See also J.-L. Baudouin, P. Deslauriers and B. Moore, *supra*, note 127, No. 1-361.1 and *Fermes Benallan*, *supra*, note 167, para. 76.

intermediate damage) without considering whether the Respondents had proven, on a balance of probabilities, that they would have concluded a deal with IA on substantially the same terms (the final damage). Instead, the Court of Appeal simply concluded that the Appellants' fault resulted in a profit (QCCA, para. 107). Applying the proper legal test, the Respondents' claim must fail.

131. The Respondents' expert's calculation of damages rested on the hypothesis that but for the Appellants' faults, Rhéaume and Beaulne would have obtained an amount equivalent to what the Appellants ultimately obtained from IA (QCCS, para. 640). The trial judge never however made such a finding, deeming it sufficient that Beaulne and Rhéaume had lost the opportunity to negotiate a higher price or to contact another buyer and that it was "not impossible" they would have reconciled (QCCS, paras. 499, 539-543). But when a party's expert relies on assumptions to evaluate the damages, it is the party's role to prove these assumptions by other means, otherwise the estimated damages will be "without value."[173]

132. Here, the Respondents did not adduce evidence of the price they would have obtained for their shares had they known about IA's interest – let alone that they would have obtained the same deal as the Appellants, with IA or anyone else. The evidence is to the contrary: IA confirmed that it would not have offered the Respondents more than what the Appellants paid, and that a significant part of the value of the transaction for IA was that Ponce and Riopel would stay on to run the business (QCCS, para. 294). The trial judge's assertion that "*cela ne veut pas dire qu'IA n'aurait pas augmenté la mise*" (QCCS, para. 543) is not a substitute for proof of damages on a balance of probabilities.[174]

133. Moreover, once the timing of the Rhéaume and Beaulne Transactions is properly considered, it is even more apparent that neither Rhéaume nor Beaulne established any compensable damages. Recall that almost one year separates the Rhéaume and Beaulne Transactions, and the Appellants' ultimate settlements with IA occurred almost two years later. Rhéaume knew unequivocally that the business was growing.[175] When Rhéaume transacted with the Appellants in February 2006, IA had not demonstrated any interest since its initial conversation with the Appellants in July 2005

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[173] *Sunrise Tradex Corporation c. Tri-Caddi International Inc.*, 2011 QCCA 2064, paras. 50-53, 64-65, leave to appeal to the SCC dismissed, No. 34605, May 24th, 2012; *Abattoirs Laurentides (1987) Inc. c. Olymel*, 2003 CanLII 8729 (QC CS), paras. 55-57, 70-71 (per Gascon J.).
[174] See also *Allard*, *supra*, note 157, para. 42; *Aon Parizeau*, *supra*, note 154, paras. 86-87.
[175] *Supra*, para. 82.

and all the third-party valuations received between May and August 2006, including IA's, were lower than the basis of the Rhéaume Transaction.

134. Beaulne, on the other hand, retained the services of an expert but specifically asked him not to evaluate his shares (QCCS, para. 134). Meanwhile, as with the Rhéaume Transaction, all the third-party valuations received between May and August 2006, including IA's, were inferior to the basis of the Beaulne Transaction (QCCS, paras. 181-185, 512-514). In August 2006, Beaulne himself approached Blue Cross, which estimated that Beaulne's shares were worth $8-9M, considerably less than he bargained for and obtained from the Appellants ($10.3M, net of several million owed under the *Entente*).[176]

135. Finally, it is only months later, after IA's dilatory manoeuvres and in settlement of litigation with IA, that first Riopel, and then Ponce, sold their shares and their gain crystallized (QCCS, paras. 290-291, 533). This is not a "continuum", no matter how one defines it (QCCA, para. 97). Moreover, by the time the Appellants finally sold, the business had grown and the Appellants had agreed to remain in the company for the next five years.[177] Despite this, the courts below concluded as though IA had the obligation to contract with the Respondents on the same terms, which is untenable legally and commercially.

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136. The Court of Appeal's decision sets a misguided precedent for core civil law principles regarding the limits of the duty of loyalty and the scope of the duty to inform in commercial negotiations; the remedy of disgorgement in the absence of a duty of loyalty; and the evaluation of damages for an alleged loss of chance to negotiate a better deal. This decision must be overturned.

PARTS IV AND V – ORDERS SOUGHT

137. The Appellants seek an order allowing the appeal and dismissing the Respondents' *Requête introductive d'instance modifiée en date du 4 octobre 2017*, with costs throughout.

PART VI – SUBMISSIONS ON CONFIDENTIAL INFORMATION

138. The file does not contain any material subject to sealing or confidentiality orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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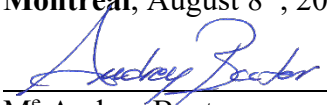
[176] Testimony of André Beaulne, Oct. 12th, 2017, A.R. vol. 23, pp. 8381-8383.
[177] QCCS, para. 294; Testimony of Normand Pépin, Oct. 17th, 2017, A.R. vol. 26, pp. 9126-9128.

Montréal, August 8th, 2022



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PART VII –TABLE OF AUTHORITIES

Legislation **Paragraph(s)**

Jurisprudence

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Jurisprudence ***(cont'd)*** **Paragraph(s)**

Jurisprudence ***(cont'd)*** **Paragraph(s)**

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