CV 01688

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE COMMISSIONER OF THE NORTHWEST TERRITORIES and THE NORTHWEST TERRITORIES BUSINESS CREDIT CORPORATION

Plaintiffs

- and -

DONALD PORTZ

Defendant

Trial of claim on a guarantee and counter claim alleging negligent misrepresentation.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on December 18, 19 and 20, 1995

Reasons filed: January 22, 1996

Counsel for the Plaintiff: Douglas G. McNiven

The Defendant represented himself.

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REASONS FOR JUDGMENT

1 The plaintiffs seek judgment on a personal guarantee. The defendant counterclaims for damages caused by alleged negligent misrepresentations which induced him to leave his secure employment and take on a risky venture. By a previous order of this court, the claim and counterclaim were tried together.

2 The evidence at trial came from witnesses as well as extensive documents and statements of agreed facts. The defendant Portz represented himself at the trial although he did have legally-trained representation at earlier stages of these proceedings. I compliment him on the organization and presentation of his case at the trial.

Facts:

3 The plaintiffs are in reality one entity: the Government of the Northwest Territories. The Commissioner is the chief executive officer; the Business Credit Corporation is a body corporate established by the government as a source of financial

assistance to locally-based businesses. It is, to use the common term, a "lender of last resort". The loan fund is commonly referred to as the "Business Loan Fund" ("BLF"). It comes under the direction of the Minister of the Department of Economic Development and Tourism ("EDT"). That department also administers other funds which are used to assist small businesses. One is a direct contribution or grant fund; another is a fund financed by the territorial and federal governments known as the "Economic Development Agreement" programme ("EDA"). I mention all of these now because they all play a part in the background to this case.

4 In March, 1986, a company called Agriborealis Ltd. ("Agriborealis") was incorporated. The objective of its owners was to build and operate a dairy in Yellowknife, specifically a fluid milk production and processing facility. It was believed that a local facility could market dairy products locally at a much lower price since it would eliminate the high costs of transporting such products from southern producers. The project was also viewed, in the long run, to be a potential catalyst for the development of other northern-based agricultural production sources. I think it is fair to say, however, that everyone who evaluated the project objectively recognized that it was a high risk venture.

5 The moving force behind the project was Joe Kronstal ("Kronstal"). He was, in association with his wife, the major investor. He was also president and chief financial officer of the company. At all relevant times he was also employed full-time as a financial manager in one of the territorial government departments. Indeed a number of the initial investors in Agriborealis were territorial civil servants. The company's board of directors

was composed of Kronstal, his wife, and John Westergreen, another major participant in the project.

6 In 1986, Agriborealis received an EDA grant of $166,000.00 as start-up capital. It then sought long-term financing. This was finally obtained through the Toronto-Dominion Bank. The Bank loaned Agriborealis $320,000.00 with a first fixed and floating charge security on all of the company's assets. Personal guarantees were given to the Bank in October, 1986, by both Kronstal and Westergreen. At the time, the defendant Portz was the manager of the Bank's Yellowknife branch and he dealt directly with Kronstal on the loan.

7 Also in 1986, the company applied for a BLF loan from the territorial government. This loan was to be used to retire interim financing provided by the Bank. On September 8, 1986, EDT offered a BLF loan of $119,000.00 to the company. The security requirements were a promissory note, a fixed and floating charge on all assets to be in second position behind the Bank's charge, and (as set out in the letter of offer):

> Guarantee of the following individuals or corporations for the following amounts.
>
> | | |
> |---|---|
> | Board of Directors | $119,000.00 |
> | J. Kronstal | $119,000.00 |

8 While the reference to "Board of Directors" is not the best, it seems to me that no one could mistake that requirement as calling for anything but the personal guarantees of the board members. That was the understanding of Michael Mageean, the EDT business service officer who was managing this loan account in 1986. But that apparently

was not the understanding of the company's principals, their solicitor, or whoever in government authorized disbursement of the loan, because the only personal guarantee obtained was one from Kronstal (and even that was defective). At trial, both Kronstal and Westergreen testified that they thought the requirement was for a "corporate" guarantee from the Board (whatever that meant). Westergreen could not recall ever being asked to sign a guarantee.

9 The BLF security documents were prepared by a local solicitor, Clark Rehn. The witnesses at the trial were unclear in describing Mr. Rehn's role but there is no doubt he was the company's lawyer. In fact he was listed as a shareholder of the company. The BLF, as is customary among some lending agencies, allowed the borrower's lawyer to prepare the security documents. What he prepared, in addition to a promissory note and a debenture executed by the company, was a guarantee executed by the company as well. So the company guaranteed payment of the loan it had already obligated itself to pay. With respect to Kronstal, Rehn prepared a promissory note for the loan amount signed personally by Kronstal (which of course was ineffective because no funds were advanced to Kronstal personally) and a guarantee from Kronstal with respect to satisfaction of his promissory note (something that was irrelevant). So, BLF had a promissory note and debenture from the company but no personal guarantee from anyone, not even Kronstal. Someone at BLF, or EDT, or some other government office (perhaps their legal division), must have reviewed the documents because funds were disbursed although no witness at the trial could explain just what did happen.

10 The BLF loan was to be paid off by regular monthly payments. As it turned out the only payment made on the BLF loan was the first scheduled payment in December, 1986. No further payments were made. No one could tell me what, if any, arrangements had been made for making the monthly payments.

11 In late 1986 and early 1987 the company had ever-increasing financial and operational difficulties. Supervision of the company's BLF loan file was taken over by Egil Lomeland, the BLF manager, in January, 1987. At that time Kronstal met with him to discuss the prospect of additional financial assistance. Lomeland testified that he did not know what specific security arrangements were in place but he was aware that, in the event of liquidation, there were insufficient assets to satisfy the Toronto-Dominion Bank's first charge as well as the $119,000.00 BLF loan.

12 On January 26, 1987, Lomeland forwarded to his regional superintendent in EDT an application from Agriborealis for a further BLF loan of $161,000.00. Among the items listed as proposed security were "personal guarantees of the majority shareholders". Before this application was acted on, financial circumstances had deteriorated to the point that emergency assistance was necessary. In February the Minister of EDT approved a grant of $25,000.00 to cover immediate cash needs.

13 The defendant Portz, as branch manager, supervised the Toronto-Dominion Bank loan. Payments on that loan were started in November, 1986, and were kept current up until the end of April, 1987. The only problem came in February, 1987, when the monthly payment was late but eventually paid before the end of the month. I note that this

coincides with the emergency EDT grant. There was no evidence that Portz knew about the grant. In addition, the Bank set up a line of credit for the company's operations. This was limited to 2/3 of the company's outstanding receivables on a monthly basis. Portz monitored this monthly and he testified — and there is no evidence to contradict this — that it was under control. Accordingly, as of late February and early March, 1987, Portz had no knowledge that the company was in serious financial difficulty.

14 The company's difficulties escalated. They were unable to market their product due to health concerns. Their accounts payable were increasing. Equipment had to be replaced. Further capital was required. Kronstal, in consultation with officials from EDT, explored other avenues. What they were now considering was a direct contribution from the territorial government through EDT. Lomeland testified that there was a great deal of "political pressure" from "upstairs" in the offices of the Minister and Deputy Minister of EDT to fund the project. It was a "high profile" item and fit in with the government's desire to develop an agricultural industry (no matter how modest).

15 In late March Kronstal told Portz about his negotiations with the government. He invited Portz to a large meeting of interested participants, including government representatives and creditors, in early April. It was then that Portz realized there were substantial financial problems with the company. The accounts payable were in excess of $270,000.00 and there was no income. He realized that the company required an infusion of cash.

16 Shortly after this meeting Kronstal was given a draft list of conditions for a financial contribution of $300,000.00 from the territorial government. This was not a loan; it was a grant. It was repayable only if the company breached the conditions and then only on some reduced basis. The conditions called for, among other things:

(a) a further equity infusion of $100,000.00 (this was eventually achieved mainly through the conversion of debt to equity by some of the creditors);

(b) the recruitment of a new partner who will make a significant financial investment as well as become an active member of the board of directors;

(c) a personal guarantee of the company's BLF loan from the new partner;

(d) a revised management structure with a full-time operations manager and government representation on the board; and,

(e) a specified disbursement programme with initial emphasis on payment of outstanding payables.

17 The list of conditions also contained one final provision:

> Agriborealis may apply for further assistance from the G.N.W.T. or the new EDA, over the three year term covered by this agreement.

18 Kronstal showed the draft conditions to Portz. He mentioned to Portz that he needed to find a manager. Several names were discussed. Portz said that he may be interested in taking it on. Kronstal told him that it was the government's decision so he took Portz to meet with Lomeland so that Lomeland could assess Portz's suitability. There were several meetings over the next few days, some with Kronstal present, some between only Portz and Lomeland. They reviewed the proposed contribution agreement. Portz did not want to give a personal guarantee of the company's BLF loan but Lomeland said it

was a requirement. In Lomeland's opinion a guarantee was necessary to confirm Portz's commitment to the project as well as to shore up the government's deficient security situation. Portz agreed to invest $25,000.00 so he and Lomeland agreed that his guarantee would be limited to that sum. Portz agreed to take on the manager's role.

19 During these discussions, a great deal of information was reviewed. The government had already conducted several studies of the operation. The accounts payable were reviewed. Lomeland told Portz that they had all been verified by the government. Lomeland testified that he knew, during those meetings, that the BLF loan was in arrears. Portz did not know that. I am satisfied from the evidence, however, that he did not discuss with Portz during those meetings the status of that loan. I am also satisfied that Portz was under the impression, from his knowledge of the BLF loan arrangements in 1986, that all of the directors of Agriborealis had personally guaranteed repayment of that loan.

20 A formal contribution agreement was prepared by EDT and signed by the Minister and by Kronstal, on behalf of the company, on April 28, 1987. It contained a list of payments under the heading "Disbursement Program". That list, indeed the entire agreement, did not contain any reference to the BLF loan arrears.

21 Portz left his job with the Bank and joined Agriborealis as manager and board chairman at the end of April. The initial phase of the contribution, being $200,000.00, was eventually received and disbursed. On May 1, 1987, Portz attended on Rehn and signed a personal guarantee of the BLF loan but limited to $25,000.00.

22 Over the course of the next three months, Portz became more and more familiar with the financial circumstances of the company. He also came to the conclusion that the processing system had to be replaced. He realized that far more money was required than even the contribution agreement provided. He met with Lomeland and other senior EDT officials but was told that no additional funds would be made available. They discussed the option of putting the company into voluntary receivership. Eventually the Toronto-Dominion Bank, in early August of 1987, appointed a receiver upon being informed of the company's insolvency. The receiver sold off the company's assets and whatever funds were received eventually went to the primary secured creditor, the Toronto-Dominion Bank. The receiver was discharged on January 31, 1989.

23 The government made demand on Portz for payment pursuant to his guarantee in March, 1989. By that time the total indebtedness of Agriborealis on the 1986 BLF loan was, with accumulated interest, in excess of $160,000.00. The government commenced action against Agriborealis, Kronstal and Portz a few months later. Eventually it came down to simply being an action against Portz. I was told that Kronstal, even though his personal guarantee was defective, made a relatively nominal voluntary settlement with the government.

24 There is no evidence of dishonesty, bad faith, or financial machinations on the part of anyone involved with this sorry state of affairs. Certainly Kronstal and his partners were sincere in their efforts to establish a viable enterprise. But, in all fairness, I think it is also accurate to describe this venture as one giant pit into which government officials

kept pouring the public's money (by my estimate over $500,000.00 in loans and contributions). And now the parties have been in litigation for over 6 years in this attempt to recover $25,000.00.

Claim on the Guarantee:

25 In his article "Discharging a Guarantee" (1994), 73 Canadian Bar Review 121, Paul M. Perell describes an analytical model for cases respecting guarantees. He points out that there are general legal principles, usually emanating from contract law, and special equitable rules that may operate to discharge sureties in whole or in part. He writes (at page 122):

> Guarantees involve three relationships: (1) between creditor and principal debtor; (2) between creditor and surety; and (3) between principal debtor and surety. These relationships are governed by the general law, which is not unique to guarantees, and by unique or special rules of law, equity, or statute. As will be seen the creditor's conduct in the two relationships in which it is directly involved may discharge a surety in whole or in part. What is required then is a model that will describe when and to what extent a discharge occurs.
>
> In describing when a surety is discharged by the conduct of the creditor, the first step is to ask whether the creditor's conduct discharges the surety under the general law. If the general law produces a complete discharge of the surety, then it may not be necessary to move to the next steps, which explore whether the surety is discharged in whole or in part by the special rules...

This case involves the application of a special rule arising out of the relationship between the creditor (the government) and Portz (the surety).

26 The defendant does not dispute his liability on the basis of a defence found under general contract law: mistake, non est factum, duress, unconscionability, undue

influence, illegality, or faulty contract formation. Portz had many years of banking experience. He knew and understood the significance of executing a personal guarantee.

27 The defence relies, however, on what is known as the "disclosure rule". This rule was described by Perell (at page 131):

> The authorities establish that while the contract between creditor and surety is not a contract *uberrimae fidei* and a creditor is not obliged to make full disclosure to the surety of all information material to the risk, a creditor must reveal to the surety every fact that under the circumstances the surety would ordinarily or naturally expect not to exist. The omission to mention the presence of the unexpected is viewed as a misrepresentation, and the guarantee may be set aside; for this special rule, the surety's discharge is absolute.

28 K.P. McGuinness, in The Law of Guarantee (1986), notes that the primary obligation to inquire into and determine the facts relevant to a proposed guarantee rests on the surety. Non-disclosure becomes an issue in two instances: (1) when the creditor fails to answer or answers misleadingly a direct inquiry from the surety with respect to a relevant fact; or (2) when the creditor fails to disclose a material fact in respect of which no inquiry is made. In the first instance, the concealment or distortion of the true facts is said to be a misrepresentation. In the second case, it is the silence of the creditor that is said to be tantamount to a misrepresentation. But, in the second instance, the type of information that must be disclosed even without inquiry is very limited. As McGuinness puts it (at page 81), the pertinent test is: "Does this information disclose a situation materially different from that which the surety would naturally expect to exist?"

29 Canadian courts have long recognized the proposition that a creditor must reveal to the surety every material fact which under the circumstances the surety would expect

not to exist. Ruthenian Farmers Elevator Co. Ltd. v. Hrycak, [1924] 3 D.L.R. 402 (Sask. C.A.); Canadian Imperial Bank of Commerce v. White (1975), 61 D.L.R. (3d) 185 (Alta. C.A.); Royal Bank of Canada v. Hislop (1989), 62 D.L.R. (4th) 228 (B.C.C.A.). The question in every case as to whether some fact is so important that it ought to have been disclosed is one of fact.

30 The defence argues that there were two facts which were material and should have been disclosed: (1) the fact that the company was in arrears in its payments on the BLF loan; and, (2) the fact that the government did not have personal guarantees from all of the directors. Plaintiffs' counsel argues, however, that there was no disclosure obligation in the absence of inquiries by Portz. He was brought into the company by Kronstal so, in counsel's submission, the government officials could assume that Portz had sufficient information available to him.

31 There is no dispute over the fact that Portz made no inquiries about the status of the BLF loan or the security supporting it. According to plaintiffs' counsel, this shows that Portz was negligent or, at least, did not care about the situation. In any event, it is argued, Portz should have assumed that something was amiss because of the information he did have about the company's financial problems. Reliance is placed on the following principles outlined by McGuinness (at page 86):

> However, there is no duty to disclose a contractual arrangement or factual situation which the surety ought naturally to expect. Moreover, a surety relying in his defence upon his ignorance of the facts relevant to a transaction must show that he did not have the necessary information, and that he could not have obtained that information through the exercise of due diligence.

32 What information was known or available to Portz when he signed his guarantee? He knew the company was in financial difficulty and had to restructure its operations. But, at that time, he also knew that the Toronto-Dominion Bank loan payments and line of credit were current. He had no way of knowing, unless Kronstal or Lomeland told him, that the BLF loan was in arrears. Would he assume or think it was in arrears? The fact that one secured creditor's requirements were being met should ordinarily lead one to think that the other secured creditor's requirements were being met. In addition, the government was about to contribute, not loan, a further $300,000.00. Would one expect such a contribution if a loan obligation to the same creditor was in default? I think not. Furthermore, the fact that there was no reference to the BLF loan arrears in the "Disbursement Program" contained in the contribution agreement would naturally lead Portz to conclude that the BLF obligation was in good standing. There was no evidence that Kronstal told Portz about the status of the BLF loan. I therefore conclude that Portz did not have the necessary information available to him and, in the circumstances, he was not under a duty to make specific inquiries regarding the BLF loan.

33 On the other hand, Lomeland knew that the loan was in arrears. He cannot recall if he knew the exact details of the security arrangements but he should have known. Indeed, I cannot help but conclude that various government officials must have known about the defective security arrangements. The requirement for personal guarantees from the board members was explicit in the September, 1986, letter of offer. The importance of personal guarantees in strengthening the government's security was recognized by Lomeland in the aborted loan application of January, 1987, and then the contribution agreement. I find it incredible to think that Lomeland, and other government officials, did

not know that they lacked personal guarantees from the directors and that the one guarantee they did have from Kronstal was not legally effective for anything. Portz, though, had every right to expect that the government, as a prudent lender of the public's money, would have in hand the security required in its loan offer (otherwise it would not have disbursed the funds). Portz said, and I accept, that he did not actually learn that there were no other valid guarantees of the BLF loan until after the government launched this law suit.

34 Was it reasonable for Portz to rely on the government for information? In this case, and with respect to his undertaking a financial risk, I think it was. The government was playing a major role in the attempts to make the company financially viable. It had conducted studies; it verified debts; and, people as high up as the Deputy Minister of the department had personal involvement in the contribution arrangements. It seems to me that anyone would have looked to the government officials for the most complete information at that time.

35 Were the fact that the BLF loan was in arrears and the fact that there were no other guarantees material? In my opinion they were. This was not simply a matter of the possible default of the debtor. It was, in April, a situation where the debtor company was already in default and there was a security shortage. Portz stepped into a situation when he signed the guarantee where he was already exposed to liability. In addition, because there were no other guarantors, his potential risk was greater than he anticipated. This takes on added significance since the other guarantees were supposed to be for the full amount of the loan. When a creditor fails to disclose that other sureties, who were

expected to share in the risk, were not bound to the risk, then that has been held to be material non-disclosure: Holland-Canada Mortgage Co. v. Hutchings et al, [1936] 2 D.L.R. 481 (S.C.C.).

36 These circumstances are, to say the least, not the usual ones found in commercial lending cases. The government and Agriborealis were not typical lender and borrower. They had a special relationship as evidenced by the amount of money the government was willing to contribute to see this project succeed. This was also evidenced by the willingness to consider further funding requests (as stated in the conditions for the contribution of $300,000.00 in April). For that reason as well there was an obligation on the government to make sure that a new investor and manager, someone who the government had a say in choosing, and one who was expected to assume a personal risk, was given all the material facts. Portz was not involved in the company's operations prior to this time nor was he getting information from Kronstal. Insofar as his knowledge of the risk specifically related to the BLF loan, he was entitled to expect nothing less than complete disclosure from Lomeland and other government officials.

37 Plaintiffs' counsel argues that, even if there was material non-disclosure when Portz signed the guarantee, he should have taken steps to withdraw his guarantee once he became aware of the true state of affairs. Counsel relies on Mantle Lamp Co. v. Nixon, [1924] 3 D.L.R. 1073 (N.B.C.A.), where it was held that a failure to repudiate a guarantee after becoming informed as to the true nature of the liability vitiates any defence on the basis of misrepresentation. The answer to this argument is that, while Portz learned about the arrears over time after he joined the company, he still expected that the original

security arrangements for the BLF loan were in place. He had every right to think that all the directors had signed personal guarantees for the full amount of the loan. They had not. He did not learn that until much later. I find no merit in this argument.

38 Finally, there was evidence from Portz that on two occasions he was reassured that he would not be held to account on his guarantee. First, he testified that prior to signing the guarantee Lomeland assured him that the government never pursues people on their guarantees. Lomeland testified, on rebuttal, that he "could not recall saying anything specifically" but he "would never say that". Second, Portz testified that after he took over as manager and when he was discussing the possibility of voluntary receivership with government officials, the then Deputy Minister, George Braden, reassured him that he would "be looked after" and would not be pursued on his guarantee. I did not have the benefit of Braden's evidence on this point. Having come to the conclusion that there was material non-disclosure, I do not have to make a finding as to this evidence. In my view it is immaterial. I think the parties recognized this since very little reliance was placed on these alleged representations in argument.

39 Based on all the evidence, I have concluded that the government was under an obligation to disclose, without the necessity of inquiry, the state of the BLF loan and the lack of other guarantees. These are facts which, in the totality of these circumstances, were material. Portz would not have expected these circumstances to exist. Hence I conclude that these facts were material; the failure to disclose them amounts to a misrepresentation, albeit an innocent one; and, Portz is therefore entitled to be discharged from his guarantee.

40 Accordingly, for these reasons, the plaintiffs' claim is dismissed.

Counterclaim for Negligent Misrepresentation:

41 The defendant seeks damages not for the notional misrepresentation due to non-disclosure; he claims damages for active misrepresentation due to negligent statements and inducements. Misrepresentation in the non-disclosure sense is a sin of omission, while the counter-claim alleges a sin of commission.

42 Portz alleges that the government through its officials, primarily Lomeland, misrepresented the financial status of Agriborealis and its viability as an ongoing business. Further, he alleges that these misrepresentations induced him to leave his secure employment with the Toronto-Dominion Bank to become the manager of Agriborealis. Portz therefore suffered damage, he claims, due to the fact that he has not been employed since the company's receivership.

43 Portz also advanced claims of breach of fiduciary duty and breach of warranty but there was no evidence in support of these claims and no argument was advanced with respect to them.

44 The counterclaim is based on the principle of liability for negligent statements promulgated by the House of Lords in Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465. That case held that, in appropriate circumstances, liability can be imposed on an individual for economic losses suffered by someone who relied on advice or representations negligently given by that individual. The principle has also been

recognized in Canada and its five requirements definitively summarized by Iacobucci J. in The Queen v. Cognos Inc., [1993] 1 S.C.R. 87 (at page 110):

> (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said representation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

45 In this particular case I have already concluded that there was a special relationship between the government and Agriborealis. This was not the typical creditor and debtor relationship. Similarly the relationship between the government and Portz was not the typical creditor and surety relationship. It too was "special" in that Portz looked to the government for information while the government had the final say on whether Portz would be accepted as manager. Therefore I have no hesitation in saying that there was a duty of care based on this special relationship.

46 There was no evidence, however, of representations being negligently made inducing Portz to leave his employment. There is no evidence of statements that could lead Portz to believe that the government would guarantee the financial viability of Agriborealis. Portz acknowledged that there was no explicit representation from any government official that additional money would be readily forthcoming for the company. There is no evidence that Portz was led to believe that the government contribution money would solve all problems. He was aware of the reviews and investigations conducted on behalf of the government. He would have been also aware of the most obvious conclusion of those reviews, that being that the venture was a very high risk proposition. He knew about the precarious financial situation from the meeting in late

March or early April. Portz testified that, at that point, he would not commit additional bank financing. I therefore find that, with all this information, Portz could not have relied on any representations from government officials in making his decision to change careers. He knew the risks and he decided to take them.

47 When I say that Portz knew the risks, I am referring to the risks involved in the business generally. This is different from the specific risks associated with signing the guarantee. Those risks — the fact that the BLF loan was in arrears and that the other guarantees were not secured — were material to the specific risk assumed with the guarantee, risks that should have been disclosed. The general risks associated with the business as a going concern would have been obvious to everyone including Portz.

48 I have given much thought to the question of whether the issue of misrepresentation due to non-disclosure can be separated from the issue of negligent misrepresentation leading to damages for economic loss. In other words, can the two types of misrepresentation be separated or does a finding of one automatically determine the finding of the other? I have concluded that they are distinct issues and one does not predetermine the other.

49 The use of the term "misrepresentation" in the context of the disclosure rule is really a misnomer. The requirement to disclose any unusual material fact is one of the special rules entitling a surety to a discharge. It is non-disclosure, pure and simple, whether innocently done or fraudulently. But, as many authors point out, the jurisprudence, in order to categorize this type of non-disclosure, employs the general term

of misrepresentation. It is considered as misrepresentation to be implied from silence on the notion that silence amounts to a representation that there are no unusual material facts. But, since it is irrelevant whether this happens innocently or not, it is very much a notional misrepresentation only. It does not require deliberation or even negligence on the part of the person who should make disclosure. It can be the mere lack of action that triggers the relief.

50 In the context of negligent misrepresentation as identified by the Hedley Byrne case, misrepresentation connotes an act, some positive conduct, albeit negligently performed. The very essence of this type of liability is actual communication that is relied on by the recipient. That is what distinguishes this type of misrepresentation from mere non-disclosure.

51 I have concluded that there is no evidence of representations negligently made that would have induced Portz to leave his employment with the bank. He dealt directly with Kronstal and the government. He would have been aware that he was becoming part of a risky venture. For assuming that general risk he is alone responsible.

52 For these reasons, the counterclaim is also dismissed.

Conclusions:

53 The claim and counterclaim are each dismissed. The parties will bear their own costs of these proceedings.

J. Z. Vertes

J.S.C.

Dated at Yellowknife, Northwest Territories
this 22nd day of January, 1996

Counsel for the Plaintiff: Douglas G. McNiven

The Defendant represented himself.

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Reasons for Judgment of the Honourable Mr. Justice J. Z. Vertes

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