



SUPREME COURT OF CANADA

CITATION: Ponce v. Société
d'investissements Rhéaume ltée,
2023 SCC 25

APPEAL HEARD: January 12, 2023
JUDGMENT RENDERED: October
27, 2023
DOCKET: 39931

BETWEEN:

Antoine Ponce and Daniel Riopel
Appellants

and

**Société d'investissements Rhéaume ltée, Michel Rhéaume investissement ltée,
Agence André Beaulne ltée and 9098-3289 Québec inc.**
Respondents

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Karakatsanis, Brown,* Rowe, Kasirer, Jamal and
O'Bonsawin JJ.

REASONS FOR Kasirer J. (Wagner C.J. and Karakatsanis, Rowe, Jamal and
JUDGMENT: O'Bonsawin JJ. concurring)
(paras. 1 to 119)

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* Brown J. did not participate in the final disposition of the judgment.

**Antoine Ponce and
Daniel Riopel**

Appellants

v.

**Société d'investissements Rhéaume ltée,
Michel Rhéaume investissement ltée,
Agence André Beaulne ltée and
9098-3289 Québec inc.**

Respondents

Indexed as: Ponce v. Société d'investissements Rhéaume ltée

2023 SCC 25

File No.: 39931.

2023: January 12; 2023: October 27.

Present: Wagner C.J. and Karakatsanis, Brown,* Rowe, Kasirer, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Civil liability — Obligation of loyalty — Implied contractual obligations
— Duty to inform — Obligation to act in good faith — Remedy — Company informing
presidents of group of companies that it was interested in acquiring group —*

* Brown J. did not participate in the final disposition of the judgment.

Presidents not disclosing information to group's majority shareholders — Presidents purchasing shareholders' interests in group and reselling them to company for profit — Whether presidents' non-disclosure of interest expressed by company in acquiring group constitutes civil fault — Appropriate remedy if fault established — Civil Code of Québec, arts. 1375, 1434.

Two presidents of a group of three companies in the insurance industry learned that a major company was interested in acquiring the group. Rather than revealing this to the group's majority shareholders, the presidents decided to buy the whole of the shareholders' interests themselves in order to resell them to the company for a substantial profit. Before the resale, the presidents and the purchaser company entered into an undertaking of confidentiality, which prevented the company from dealing directly with the group's majority shareholders.

Upon learning of the resale, the shareholders filed a motion to institute proceedings for damages in the Superior Court, claiming approximately \$24 million as compensation for the gain they would have made through that transaction of which they were deprived. They alleged that the presidents had breached their contractual and legal obligations and their fiduciary obligations, and in particular their obligations to act in good faith, with loyalty and transparency, by failing to inform them of the interest expressed by the purchaser company in acquiring the group. The shareholders argued that, because of the presidents' unlawful actions, they were entitled to claim the equivalent of the excess profits made by the presidents.

The Superior Court ruled in the shareholders' favour and ordered the presidents solidarily to pay them \$11,884,743, an amount equal to the profits earned by the presidents on the resale. The court found that, under both the *Civil Code of Québec* and the *Canada Business Corporations Act*, the presidents, in their capacity as directors, owed duties of honesty, loyalty, prudence and diligence to the group. The trial judge found that these same duties could be extended to the shareholders because of an incentive pay agreement entered into by the shareholders and the presidents ("Presidents' Agreement") that governed the parties' relationship and entailed implied obligations for the presidents. The Court of Appeal affirmed the trial judgment and upheld the remedy awarded by the trial judge. However, it was of the view that the trial judge erred in finding that the duties of honesty and loyalty provided for in the *Civil Code of Québec* and the *Canada Business Corporations Act* could be extended to the shareholders. The court held that the presidents' conduct fell within the three criteria set out in *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554, and that the presidents breached the obligation of contractual good faith and the obligation to inform they owed to the shareholders.

Held: The appeal should be dismissed.

The presidents' failure to inform the majority shareholders of the purchaser company's interest in acquiring the group was a breach of the requirements of good faith. They breached the obligation of contractual loyalty linked to good faith, which was an implied obligation under the contract through the combined effect of arts. 1434

and 1375 *C.C.Q.* The Presidents' Agreement involved an implied obligation to inform that required the presidents to provide the shareholders with all information relevant to making an informed decision about the sale of their shares. This implied obligation flowed from the nature of that agreement, which reflected the presumed intention of the parties, in accordance with art. 1434 *C.C.Q.* The presidents were also required to perform the Agreement in accordance with the requirements of good faith, which was included in the contract through imperative law under art. 1375 *C.C.Q.* With regard to the remedy, the purpose of damages is to compensate for the gain lost as a result of fault, and the quantum must be assessed so as to place the shareholders in the position they would have been in but for the presidents' fault. Disgorgement of profits is not available where there has simply been a breach of the obligation of good faith; in principle, it is available only where a person is charged with exercising powers in the interest of another. However, where a breach of the requirements of good faith prevents the aggrieved party from proving the injury sustained, it should be presumed that the injury is equivalent to the profits made by the party at fault. The presidents have shown no palpable and overriding error in the trial judge's conclusion that the shareholders' lost gain is equivalent to the profits made by the presidents. There is therefore no reason to interfere with the assessment of the quantum of damages.

With regard to the possible legal bases for the presidents' obligation to inform the shareholders of the interest expressed by the purchaser company in acquiring the group, the obligation of maximalist loyalty arising from the exercise of powers in the interest of another, like the one resting on an administrator of the property

of others or a mandatary, is not at issue in this case. The presidents are neither the shareholders' mandataries nor administrators of the property of others, which means that they cannot be held to an obligation of loyalty like the one provided for in arts. 1309 para. 2 and 2138 para. 2 *C.C.Q.* In addition, the extracontractual obligation to inform related to good faith in the formation of contracts is of only theoretical importance in this case given the contractual relationship that the parties chose to establish with one another. The shareholders do not allege that there was a breach of the requirements of good faith at the pre-contractual stage, nor do they ask that the contracts for the sale of their interests in the group to the presidents be annulled. Rather, their focus is on the good faith performance of the Presidents' Agreement, which was fully applicable at the relevant time.

The first legal basis for the duty to inform incumbent on the presidents is therefore the implied contractual obligation to inform the shareholders under the Presidents' Agreement. Pursuant to art. 1434 *C.C.Q.*, a contract binds the parties not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law. In this case, the nature of the Presidents' Agreement leads to the conclusion that an implied obligation to inform was incident to it. The Presidents' Agreement was the cornerstone of the business relationship between the presidents and the shareholders. The role of each party in this relationship was clear. The Presidents' Agreement was a long-term agreement formalizing a mutually beneficial business relationship between the presidents and the shareholders, and it required reciprocal contractual loyalty. It reinforced the high level

of trust that the shareholders placed in the presidents, and it expressly set out incentive pay terms and conditions for the presidents' benefit without spelling out reciprocal obligations for them. In light of the very nature of the Presidents' Agreement, the presidents had an implied obligation to inform the shareholders of any fact that might enable them to assess the companies' profits and value and decide whether to sell their shares and, if so, at what price. The non-disclosure of the purchaser company's interest was a direct breach of this implied obligation.

The second legal basis is the obligation to perform the Presidents' Agreement in accordance with the requirements of good faith under art. 1375 *C.C.Q.* Good faith in Quebec civil law is now an enacted standard of public order. Unlike maximalist loyalty arising from the exercise of legal powers, contractual loyalty is reciprocal because of the mutual nature of good faith. It requires a contracting party to act with loyalty by taking into account, within the limits of reasonable conduct, the interests of the other contracting party. Nevertheless, the obligation of loyalty rooted in contractual good faith in the performance of a contract does not require a contracting party to subordinate their interests to those of the other party. In this case, contractual loyalty tied to good faith did not prevent the presidents from performing the contract to further their self-interest, but it did require them to consider the interests of the other contracting parties. For this reason, it could impose on them a duty to inform. While they did not have to subordinate their interests to those of the shareholders, the presidents could not conceal the purchaser company's interest in the group without

incurring contractual liability to the shareholders. By concealing that interest, they breached their obligation of good faith.

The interest expressed by the purchaser company satisfies, in the context of the Presidents' Agreement, each of the three criteria set out in *Bail*, which serve to determine whether particular information falls within the duty to inform: (1) knowledge of the information, whether actual or presumed, by the party owing the obligation to inform; (2) the fact that the information in question is of decisive importance; (3) the fact that it is impossible for the party to whom the duty to inform is owed to inform itself, or that the creditor is legitimately relying on the debtor of the obligation. With regard to the first criterion, the presidents knew of the purchaser company's interest and were fully aware of the financial value of that information. The second criterion is also satisfied because the purchaser company's interest would have had a major impact on the decision and on the determination of the value of the shareholder's shares and the sale price. The last criterion is doubly satisfied given the atmosphere of trust that existed between the parties and the fact that it was impossible for the shareholders to inform themselves of the purchaser company's interest. As a result, the requirements of good faith in the performance of the Presidents' Agreement imposed a duty on the presidents to inform the shareholders of the interest expressed by the purchaser company.

Determining the appropriate remedy in this case helps to clarify the boundary between restitution and compensation in the civil law. Compensation for the

injury caused by a breach of contractual loyalty is distinct from disgorgement of profits arising from non-performance of the obligation of maximalist loyalty in the exercise of powers. Disgorgement of profits without regard to injury is not an appropriate remedy in this case, because it is not in keeping with the compensatory function of civil liability. It is available only where a person is charged with exercising powers in the interest of another, and it is meant to ensure compliance with the obligation of maximalist loyalty owed by a person on whom a power is conferred. An award of damages, on the other hand, serves to compensate the victim of a fault for the injury sustained, reflecting a compensatory logic related to contractual loyalty under art. 1375 *C.C.Q.*, and its purpose is to compensate for the gain lost as a result of fault. To justify an award of damages, the party wronged by a breach of contractual loyalty bears the burden of establishing compensable injury, in accordance with the fundamental principle of *restitutio in integrum* (or full reparation) that is central to the law of civil liability in Quebec.

In this case, the gain lost by the shareholders is compensable under the rule for assessing damages set out in art. 1611 *C.C.Q.* Although the law of civil liability does not, as a general rule, excuse a plaintiff from proving the injury sustained, it is the presidents' disloyal conduct that prevents the shareholders from making such proof. The presidents' non-disclosure of information to the shareholders was accompanied by efforts to conceal the purchaser company's interest in the group. The presidents cannot be allowed to profit from their breach of the requirements of good faith by arguing that the shareholders failed to prove their injury. In accordance with *Biotech Electronics*

Ltd. v. Baxter, [1998] R.J.Q. 430 (C.A.), the presidents' wrongdoing gives rise to a rebuttable presumption that the shareholders' lost advantage is equivalent to the profits unjustly realized by the presidents. The presumption established in *Baxter* serves as the basis for a method of calculating damages to compensate the aggrieved party for the injury sustained. It is based on a compensatory objective that is distinct from disgorgement of profits where disgorgement is awarded for a restitutionary purpose in the absence of any injury. The presidents have not rebutted this presumption, and the damages owed to the shareholders are equivalent to the difference between the sale price received by the presidents on their resale of the shares to the company and the price received by the shareholders on the initial sale of the shares to the presidents.

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33, [2002] 2 S.C.R. 235; *National Bank of Canada v. Soucisse*, [1981] 2 S.C.R. 339; *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122; *Tardif v. Succession de Dubé*, 2018 QCCA 1639, 51 C.C.L.T. (4th) 54; *Dunkin' Brands Canada Ltd. v. Bertico Inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45; *Desjardins Financial Services Firm Inc. v. Asselin*, 2020 SCC 30, [2020] 3 S.C.R. 298; *Abbas-Turqui v. Labelle Marquis Inc.*, 2004 CanLII 26082; *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; *National Bank of Canada v. Corbeil*, [1991] 1 S.C.R. 117; *Provincial Bank of Canada v. Gagnon*, [1981] 2 S.C.R. 98; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Grenier v. Grenier*, 2011 QCCA 964; *M.H. v. Axa Assurances inc.*, 2009 QCCA 2358, [2010] R.R.A. 15.

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APPEAL from a judgment of the Quebec Court of Appeal (Mainville, Rancourt and Fournier JJ.A.), 2021 QCCA 1363, [2021] AZ-51794090, [2021] J.Q. n° 10987 (QL), 2021 CarswellQue 14386 (WL), affirming a decision of Déziel J., 2018 QCCS 3538, [2018] AZ-51519694, [2018] J.Q. n° 7285 (QL), 2018 CarswellQue 7079 (WL). Appeal dismissed.

Audrey Boctor, Étienne Morin-Lévesque and Laurence Boudreau, for the appellants.

Jean-Rémi Thibault, Louis P. Bélanger and Samuel Nadeau, for the respondents.

English version of the judgment of the Court delivered by

KASIRER J. —

I. Overview

[1] Antoine Ponce and Daniel Riopel, presidents of a group of three thriving companies in the insurance industry, learned that a major company was interested in acquiring the group of companies that they ran. Rather than revealing this to the group's majority shareholders, Michel Rhéaume and André Beaulne and their investment companies ("the shareholders"), the two presidents decided to buy the companies themselves and then resell them at a substantial profit. The shareholders felt betrayed; not only had they trusted the presidents, but they had entered into an incentive pay agreement that gave the presidents significant benefits, including a right of first refusal in the event that the shareholders decided to divest themselves of their interests in the group.

[2] Considering this conduct to be disloyal, the majority shareholders blamed the presidents for not disclosing to them the interest expressed by a prospective purchaser in acquiring the companies, arguing that this was a breach of the presidents' duty to inform that justified disgorgement of the profits they had made by unlawfully appropriating that business opportunity. The presidents answered that, during the negotiations leading to their purchase of the companies, they had been under no legal obligation to subordinate their interests to those of the shareholders in such a manner.

[3] The Superior Court ruled in the shareholders' favour and ordered the presidents solidarily to pay them an amount equal to the profits earned on the resale of the shares. The Court of Appeal confirmed the trial judge's conclusions, while

specifying the nature of the obligations breached by the presidents in relation to the shareholders, and upheld the remedy awarded at trial.

[4] This appeal requires the Court to consider the basis for and parameters of the obligation of loyalty in order to determine whether a duty to inform was incumbent on the presidents. The Court must also clarify the conditions under which a court may award disgorgement of profits as a remedy, in particular for a contracting party's disloyal conduct. Specifically, it must trace the boundaries of the moral precept that "no one should profit from their own wrongdoing", on which the shareholders rely, as a justification for the remedy of disgorgement of profits made in bad faith.

[5] A first observation flows from the debate between the parties: the obligation of loyalty arising from the exercise of powers in the interest of another — like the one resting on an administrator of the property of others or a mandatary — is not at issue here. An obligation of that kind would have required the presidents to subordinate their interests to those of the shareholders by requiring them to disclose the prospective purchaser's interest in acquiring the group. But as Professor Madeleine Cantin Cumyn has written, the [TRANSLATION] "basis for this loyalty . . . differs substantially from the one dictating contractual loyalty, which applies to a person who performs a prestation or exercises a right under a contract and who is bound to act in good faith" ("L'obligation de loyauté dans les services de placement" (2012), 3:1 *B.D.E.* 19, at p. 21). Unlike loyalty tied to legal powers that must be exercised in the interest of another or to achieve a particular purpose, the obligation of contractual

loyalty rooted in good faith in the performance of a contract under art. 1375 of the *Civil Code of Québec* (“*C.C.Q.*”) does not require a contracting party to subordinate their interests to those of the other party. In this case, the presidents are neither the shareholders’ mandataries nor administrators of the property of others, which means that they cannot be held to an obligation of loyalty like the one provided for in arts. 1309 para. 2 and 2138 para. 2 *C.C.Q.*

[6] A second observation is in order: despite the absence of an obligation of loyalty arising from the exercise of powers in the interest of another, the presidents’ conduct is nonetheless wrongful. Although contractual loyalty tied to good faith did not prevent the presidents from performing the contract to further their self-interest, it did require them to consider the interests of the other contracting parties and, for this reason, it could impose on them a duty to inform. Accordingly, while the presidents did not have to subordinate their interests to those of the shareholders, the fact remains that, in pursuing their own interests, they could not conceal the prospective purchaser’s interest in the companies without incurring contractual liability to the shareholders. By doing so, they breached contractual loyalty linked to good faith, which was an implied obligation under the contract through the combined effect of arts. 1434 and 1375 *C.C.Q.* Moreover, the trial judge was correct to conclude that the incentive pay agreement involved an implied obligation to inform that required the presidents to provide the shareholders with all information relevant to making an informed decision about the sale of their shares. This implied obligation flowed from the nature of the

contract, reflecting the presumed intention of the parties, in accordance with art. 1434 C.C.Q.

[7] The wrongful nature of the presidents' conduct raises a second issue: Could the non-disclosure of the prospective purchaser's interest justify, as a remedy, disgorgement of profits to the shareholders, who lost a business opportunity as a result of that wrongful conduct? An obligation of loyalty like the one resting on an administrator of the property of others or a mandatary in the exercise of their powers may justify disgorgement of profits for a restitutionary purpose, but generally not for a compensatory one. However, the presidents are correct to say that they had no such obligation of loyalty.

[8] Determining the appropriate remedy in this case therefore presents an opportunity for the Court to clarify what Professor Pascal Fréchette calls [TRANSLATION] "the boundary between restitution and compensation" in the civil law (*La restitution des prestations* (2018), at p. 9). Compensation for the injury caused by a breach of contractual loyalty is distinct from disgorgement of profits arising from non-performance of the obligation of loyalty in the exercise of powers. To justify an award of damages, the party wronged by a breach of contractual loyalty bears the burden of establishing compensable injury, in accordance with the fundamental principle of *restitutio in integrum* (or full reparation) that is central to the law of civil liability.

[9] Relying on decisions of this Court in which good faith was in issue, particularly *Bank of Montreal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429, the shareholders seek disgorgement of profits as a remedy for the presidents' breach of the requirements of good faith. In my respectful view, the shareholders are misreading *Kuet*, which relates to the exercise of a power similar to that of a mandatary. Absent proof of injury, *Kuet* cannot justify disgorgement of profits based solely on the breach of the presidents' obligation of contractual loyalty. That said, this misreading of *Kuet* does not preclude an award of damages to the shareholders for an amount equivalent to what would have been disgorged to them to compensate for the advantage they lost due to the presidents' fault.

[10] In this case, the harm resulting from the presidents' contractual fault must therefore be proved in accordance with the typical rules of civil liability. The shareholders seek compensation for lost profits under the rule for assessing damages set out in art. 1611 *C.C.Q.* Although the law of civil liability does not, as a general rule, excuse a plaintiff from proving the injury sustained, it is the defendant's disloyal conduct that prevents the plaintiff from making such proof here. This is because, in this case, the presidents' non-disclosure of information to the shareholders was accompanied by efforts to conceal the prospective purchaser's interest in the companies and, according to a determination that is ultimately left to the trier of fact, by lies told to the shareholders to shut them out of the proposed deal.

[11] The presidents cannot be allowed to profit from their breach of the requirements of good faith by arguing that the shareholders failed to prove their injury. In a case such as this one, the presidents' wrongdoing gives rise to a rebuttable presumption that the shareholders' lost advantage is equivalent to the profits unjustly realized by the presidents (see *Biotech Electronics Ltd. v. Baxter*, [1998] R.J.Q. 430 (C.A.)). The presidents could rebut this presumption by establishing the actual quantum of the lost gain on a balance of probabilities. They did not do so. Since the presidents have shown no palpable and overriding error in the trial judge's conclusion that the shareholders' lost gain is equivalent to the profits made by the presidents, I am of the view that there is no reason to interfere with the assessment of the quantum of damages.

[12] I would dismiss the appeal with costs.

II. Background

[13] Groupe Excellence was comprised of three companies operating in the insurance industry: two brokerage firms, Michel Rhéaume & Associés inc. and Beaulne & Rhéaume Assurance ltée, as well as The Excellence Life Insurance Company. At the time of the events in dispute, Michel Rhéaume and André Beaulne, through the respondent investment companies, owned all the shares of the two brokerage firms and 93.1 percent of the shares of The Excellence. Mr. Rhéaume and Mr. Beaulne, who were in their late sixties at the relevant time, describe themselves as having little formal education. However, they were very successful in the insurance field over the years, having founded the companies making up Groupe Excellence in the late 1970s.

[14] In February 2002, the appellants, Antoine Ponce and Daniel Riopel, were appointed presidents of the Groupe Excellence companies. An actuary since 1978, Mr. Ponce became the president of The Excellence Life Insurance Company, a position that Mr. Rhéaume had offered him several times before. Mr. Riopel, who became a lawyer in 1986, is Mr. Beaulne's nephew. He worked with both of the brokerage firms for more than 20 years before becoming their president.

[15] On March 15, 2002, Mr. Ponce and Mr. Riopel, designated in their capacity as [TRANSLATION] "presidents" of the Groupe Excellence companies, and the investment companies of Mr. Rhéaume and Mr. Beaulne, as "majority shareholders", entered into a contract described in its preamble as an "incentive pay agreement" ("Presidents' Agreement" or "Agreement") (A.R., vol. X, at p. 3652). The Agreement governed the parties' relationship during the entire period relevant to this litigation, including during the negotiations and then the sale by Mr. Rhéaume's and Mr. Beaulne's investment companies of their shares in Groupe Excellence to Mr. Ponce and Mr. Riopel. The Agreement, which had an initial term of five years, was to be renewed automatically for additional two-year periods unless written notice to the contrary was given.

[16] The Presidents' Agreement formalized a business relationship between the parties that was based on their commitment to work toward the common goal of ensuring the success of Groupe Excellence as an ongoing business, even with a view to a potential sale. To this end, the Agreement provided for various forms of incentive

pay for the presidents in addition to what they received as directors of the companies. The Agreement had only eight clauses and, aside from requiring the subsequent negotiation of a non-competition clause in favour of the shareholders, imposed no express obligation on the presidents.

[17] It was in this context, and while the Agreement was still applicable, that the actions alleged took place.

[18] In April 2005, Industrial Alliance Insurance and Financial Services Inc. (“IA”) informed the presidents, Mr. Ponce and Mr. Riopel, of its interest in acquiring Groupe Excellence. A series of discussions and exchanges of documents between the presidents and IA took place over several months. In July 2005, during that process, the presidents and IA entered into an [TRANSLATION] “Undertaking of Confidentiality” concerning “a potential partnership agreement and/or any other form of transaction that may be entered into by the [p]arties” (A.R., vol. IV, at p. 1110, cl. 2). In the Undertaking, the presidents and IA agreed to the mutual disclosure of confidential information relative to their circumstances. At the presidents’ request, an exclusivity clause in their favour was also included with respect to any transaction involving IA and Groupe Excellence. The purpose of that clause — according to the presidents themselves — was to prevent IA from dealing directly with Mr. Rhéaume and Mr. Beaulne as well as with their holding companies.

[19] The presidents never informed the shareholders of these exchanges with IA or of IA's interest in acquiring Groupe Excellence, nor were the shareholders told of the existence of the Undertaking of Confidentiality.

[20] In 2006, when the shareholders had been contemplating the possibility of selling their interests in Groupe Excellence for some time, Mr. Beaulne asked Mr. Ponce whether IA would be interested in buying the shares. Despite the prior exchanges between IA and the presidents, Mr. Ponce answered that he had already checked and that IA was not interested. The parties disagree as to the exact date of that interaction. The appellants say that the conversation took place before IA's interest led to a preliminary valuation in May 2006 and an acquisition proposal in August 2006. The respondents say instead that the conversation took place following these events. Thus, according to the respondents, Mr. Ponce deliberately lied to Mr. Beaulne.

[21] In any event, the respondents did not know about the interest expressed by IA in acquiring Groupe Excellence at the time they agreed to sell the whole of their interests to the presidents. Mr. Rhéaume did so in the fall of 2006, and Mr. Beaulne followed suit in the spring of 2007. As consideration for that sale, Mr. Rhéaume received approximately \$23,500,000 together with a full release for his debts under the Agreement. Mr. Beaulne received \$10,371,210 together with a release similar to Mr. Rhéaume's. In the months following those transactions, the presidents in turn resold to IA, for a total of \$74,280,000, the interests they had acquired from the shareholders.

[22] In December 2007, IA issued a press release announcing its acquisition of Groupe Excellence from the presidents. The respondents learned of the sale at that time. In response, they filed a motion to institute proceedings for damages in the Superior Court, claiming approximately \$24 million as compensation for the gain they would have made through that transaction of which they were deprived.

[23] In their motion, the respondents alleged that the presidents' failure to inform them of IA's interest had caused them a [TRANSLATION] "serious loss" (motion to institute proceedings, at para. 57, reproduced in A.R., vol. II, at p. 674). They stated that they had been deprived of the difference between the price they received when they sold their shares to the presidents and the higher price the presidents obtained on the resale to IA. They alleged that the presidents had breached [TRANSLATION] "their contractual and legal obligations, their fiduciary obligations and their obligations to act in good faith, with loyalty and transparency" by "intentionally" failing to inform the shareholders of the interest expressed by IA in acquiring Groupe Excellence (para. 41). The respondents stated that, because of the [TRANSLATION] "unlawful actions" of Mr. Ponce and Mr. Riopel, they were entitled to claim "the equivalent" of the excess profits made by them (paras. 57-57.1).

[24] In defence, the appellants argued that the respondents were conflating the obligations the appellants owed to the companies and the obligations they owed to the shareholders. Here, they said, the appellants [TRANSLATION] "are under no obligation whatsoever to the former shareholders, Beaulne and Rhéaume" (A.R., vol. II, at p. 689,

para. 93). The appellants also argued that they had complied with their obligations under the Presidents' Agreement and, more broadly, that they had committed [TRANSLATION] "no fault" against the respondents (para. 240). In addition, according to the appellants, Mr. Rhéaume and Mr. Beaulne had been aware of the prospective purchaser's interest in acquiring Groupe Excellence, so the appellants could not be accused of hiding or concealing relevant information about the transactions that led to the resale of the shares to IA. Finally, the appellants disputed the calculation of the damages arising from the harm allegedly suffered by the respondents, saying that they were in no way [TRANSLATION] "indebted" to the respondents (para. 241).

III. Judicial History

A. *Quebec Superior Court, 2018 QCCS 3538 (Déziel J.)*

[25] The trial judge granted the respondents' motion in part. He stated that, under both the *Civil Code of Québec* and the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, the appellants, in their capacity as directors, owed duties of honesty, loyalty, prudence and diligence to Groupe Excellence. The trial judge found that these same duties can be extended to shareholders [TRANSLATION] "where there is an independent relationship between the directors . . . and the shareholders" (para. 427 (CanLII)). In his view, this kind of independent relationship existed here, particularly because of the Presidents' Agreement, which [TRANSLATION] "is key in illustrating the obligations assumed by the [appellants]" (para. 430).

[26] In the trial judge's opinion, the Agreement entailed three implied obligations for the appellants: (1) to maximize, in the performance of their mandate and for the shareholders' benefit, the profits and value of Groupe Excellence; (2) to report to the shareholders, in a full and transparent manner, all information that might enable them to assess the value of Groupe Excellence or make a decision to sell their shares and, in such a case, to determine a sale price; and (3) not to use information for their personal benefit without obtaining the shareholders' consent.

[27] The judge then found that the appellants had secretly negotiated the resale of Groupe Excellence with IA. He noted that the appellants had signed an Undertaking of Confidentiality with IA to ensure that IA did not deal directly with the shareholders. By doing so, the appellants had intentionally concealed from the shareholders the interest expressed by IA in acquiring Groupe Excellence, knowing that if the shareholders had been told of it, they [TRANSLATION] "would have sought to maximize the sale price for their shares and it would then have been more costly for the [appellants] to exercise their right of first refusal under the Presidents' Agreement" (para. 487; see also paras. 436-37, 445-46 and 486). Considering the appellants' conduct in light of the obligational content of the Agreement, the trial judge held that they had breached their duties of good faith and loyalty as well as their duty to inform owed to shareholders Rhéaume and Beaulne.

[28] The trial judge then assessed the injury resulting from the appellants' fault, applying the principle of full reparation (*restitutio in integrum*). For that purpose, he

essentially used the method of assessing injury proposed by the respondents' expert, which was based on the following key assumption: [TRANSLATION] “. . . had it not been for the acts alleged against the [appellants], the [respondents] would have received consideration equivalent to what IA paid to acquire the [appellants'] interests in Groupe Excellence rather than the amount they obtained from the [appellants] . . .” (A.R., vol. VII, at p. 2295, quoted with approval by the trial judge at para. 598; see also paras. 615 and 638-39).

[29] Accepting the hypothesis put forward by the respondents' expert, the trial judge held that the injury corresponded to the gains lost on the business opportunity unlawfully appropriated by the appellants. The gains lost were therefore equivalent to the profits made by the appellants when they resold the shares to IA, which the judge assessed at \$11,884,743. He ordered the appellants solidarily to pay that amount and, taking note of the agreement reached by Mr. Rhéaume and Mr. Beaulne concerning the distribution of their respective interests in Groupe Excellence, he allocated \$7,368,540.60 to Mr. Rhéaume's investment companies and \$4,516,202.40 to Mr. Beaulne's investment companies.

B. *Quebec Court of Appeal, 2021 QCCA 1363 (Rancourt J.A., Mainville and Fournier J.J.A. concurring)*

[30] The Court of Appeal, per Rancourt J.A., unanimously dismissed the appeal and affirmed the trial judgment. However, the court noted that the trial judge erred in finding that the duties of honesty and loyalty provided for in art. 322 C.C.Q. and

s. 122(1)(a) of the *Canada Business Corporations Act*, which the appellants had owed to Groupe Excellence in their capacity as directors, could be extended to the shareholders. But the court found that this error was not an overriding one given the other bases for the appellants' liability, which were correctly identified by the trial judge. His analysis of the obligational content of the Presidents' Agreement supported his conclusions regarding the appellants' fault, namely that they had breached their contractual obligation of good faith and duty to inform (see paras. 84, 94 and 110-11 (CanLII)).

[31] Discussing the duty to inform in greater detail, the Court of Appeal held that the appellants' conduct fell within the three criteria set out in *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554. The Court of Appeal focused specifically on the fact that it had been impossible for the shareholders to inform themselves of the interest expressed by IA in acquiring Groupe Excellence as well as on the atmosphere of trust that had existed between the appellants and the shareholders (see paras. 90-91). The court therefore concluded that the appellants breached the obligation of contractual good faith and the obligation to inform they owed to the shareholders, including by keeping them out of the negotiations with IA and secretly signing the Undertaking of Confidentiality with IA (see paras. 93-94; see also paras. 110-11).

[32] With respect to the remedy, the Court of Appeal noted that it was not the role of an appellate court to substitute itself for the trial judge in assessing contradictory

expert evidence or in fixing the quantum of damages (para. 119). The total award of \$11,884,743 in damages was upheld.

IV. Parties' Arguments and Issues

[33] Broadly speaking, two lines of argument are made by the parties before this Court. First, the debate turns on whether the appellants' failure to inform the shareholders of the interest expressed by IA in acquiring Groupe Excellence was a breach of an obligation, be it contractual or legal. In this regard, the appellants argue that their failure cannot constitute a civil fault because there was no legal basis requiring them to share that information in this case. As for the respondents, they take the view that the appellants are minimizing the scope and impact of the Presidents' Agreement, which was applicable during the entire period in issue. In their opinion, the requirements of good faith in the performance of that agreement made it obligatory for the appellants to disclose to the respondents the interest expressed by IA in acquiring Groupe Excellence.

[34] Second, the parties disagree as to the appropriate remedy in the event that fault is established. The appellants submit that there were no grounds upon which the trial judge could award disgorgement of profits or even compensatory damages to the respondents by way of remedy. There are two possibilities: either the trial judge ordered disgorgement of profits without having any legal basis for doing so, or he awarded damages without having sufficient evidence of harm (A.F., at para. 92). Noting that the profits flowed from the appellants' wrongdoing, the respondents counter that the

appellants must hand over to them the profits made on the resale of Groupe Excellence to IA, in accordance with the general principle of full compensation that is at the heart of the law of civil liability.

[35] In light of the parties' arguments, two main questions shape the debate before this Court:

- A. Did the appellants' non-disclosure of the interest expressed by IA in acquiring Groupe Excellence constitute a breach of a contractual or legal obligation to inform owed to the respondents and therefore a civil fault?

- B) If this fault is established, did the courts below err in awarding the respondents a sum representing the profits made by the appellants, either through the disgorgement of profits mechanism or as damages to compensate for the gain of which the respondents were deprived?

[36] These questions will be analyzed in turn.

V. Analysis

- A. *Did the Appellants' Non-Disclosure of the Interest Expressed by IA Constitute a Civil Fault?*

[37] The trial judge found that the appellants had failed to disclose to the respondents the interest expressed by IA in acquiring Groupe Excellence (paras. 485-90). He also found that, in 2005, the appellants had entered into an Undertaking of Confidentiality with IA that was intended to prevent IA from dealing directly with the shareholders (para. 441). These events occurred while the appellants were the presidents of the Groupe Excellence companies and while the Presidents' Agreement signed in 2002 was fully applicable.

[38] The issue in this case is therefore whether the appellants did have a duty to inform the shareholders of the interest expressed by IA in acquiring Groupe Excellence that was breached. In this Court, the parties discussed four possible legal bases for such an obligation: (1) an obligation of loyalty arising from a legal power conferred on the presidents that they had to exercise in the shareholders' interest, like the obligation resting on a mandatary or an administrator of the property of others; (2) an extracontractual obligation to inform related to good faith in the formation of the contracts for the sale of the respondents' interests to the appellants in 2006 and 2007; (3) an implied contractual obligation to inform the shareholders under the Presidents' Agreement; or (4) an obligation to perform the Agreement in accordance with the requirements of good faith. The appellants take the view that none of these four bases imposed an obligation on them to inform the respondents of IA's interest in acquiring Groupe Excellence. This being the case, I propose to consider each of these four possibilities in order to determine whether the appellants were required to inform the shareholders of the interest expressed by IA.

(1) First Possible Basis: Obligation of Loyalty Arising From the Exercise of Powers in the Interest of Another

[39] The appellants correctly argue that their duty to inform cannot be based on a “fiduciary-type” obligation of loyalty that would be “similar to the fiduciary duties of the common law . . . requir[ing] the debtor to put the interests of the beneficiary first” (A.F., at para. 53). In this regard, the Court of Appeal properly stated that, as directors of the Groupe Excellence companies, the presidents did not have such an obligation to act with loyalty toward the majority shareholders, although they did owe such an obligation to the legal persons of the group (see, e.g., art. 322 para. 2 *C.C.Q.*). The appellants had no duty to inform anchored in this type of loyalty, which would have imposed on them “a duty to act selflessly” (A.F., at para. 54). The respondents themselves recognize that [TRANSLATION] “[t]here was never any question of requiring the [a]ppellants to subordinate their interests to [theirs]” (R.F., at para. 76).

[40] In my view, the parties are correct on this point: the appellants did not have, as Professor Lionel Smith puts it, an obligation of “maximalist” loyalty grounded in the loyal use of power by a fiduciary, that is, “not just power *over* another person, but power held *for* that other person” (“Loyalty” (2020), 66 *McGill L.J.* 121, at p. 122 (emphasis in original)). In Quebec civil law, the obligation of maximalist loyalty referred to by the appellants exists mainly where a person exercises a [TRANSLATION] “power” *in the interest of another* or for the fulfilment of a purpose (such as where a trustee exercises a prerogative over a patrimony by appropriation in favour of the beneficiary), not where the holder of a “legal right” exercises it *in their own interest*

(such as a borrower's prerogative under a contract for the simple loan of property) (see M. Cantin Cumyn and M. Cumyn, *L'administration du bien d'autrui* (2nd ed. 2014), at para. 91). This is because, [TRANSLATION] “[u]nlike the holder of a right, a person on whom powers are conferred is legally bound to act in the interest of another or for the achievement of the purpose for which the powers were granted” (M. Cantin Cumyn, “Le pouvoir juridique” (2007), 52 *McGill L.J.* 215, at p. 223; see *Resolute FP Canada Inc. v. Hydro-Québec*, 2020 SCC 43, at para. 69).

[41] Two types of loyalty must be carefully distinguished. On the one hand, contractual loyalty arising from good faith requires a contracting party to [TRANSLATION] “take the other party's interests into account”. On the other hand, loyalty in the exercise of a power, because of the purpose of that power, must be exercised [TRANSLATION] “only in the beneficiary's interest or to achieve the goal that led [it] to be conferred” (Cantin Cumyn (2012), at p. 22).

[42] A comparison can be drawn between the obligation of maximalist loyalty in the civil law and the obligation of loyalty in the English legal tradition that is anchored in the exercise of a fiduciary obligation. In both legal traditions, the person subject to an obligation of maximalist loyalty must subordinate their own interests to those of another (see, e.g., *Resolute*, at para. 63; *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, at para. 110). However, the prerogatives of a trustee in English law are based on the legal title held by the trustee. In contrast, in Quebec law, an administrator of the property of others has no legal right

in the property being administered but only powers that must be exercised over a patrimony by appropriation in the interests of another (see *Cantin Cumyn and Cumyn*, at para. 4; *Smith*, at p. 122).

[43] The obligation of loyalty of an administrator or mandatary in the civil law tradition therefore relates to the exercise of powers defined on the basis of a purpose — the interest of another or the achievement of a goal — rather than on the basis of the exercise of legal title, as in English law. As Professor Michele Graziadei notes, “many fiduciary relationships in civilian countries are framed so to leave title to property subject to fiduciary administration in the name of the beneficiary. Hence, if the property produces profits, those profits automatically belong to the owner” (“Virtue and Utility: Fiduciary Law in Civil Law and Common Law Jurisdictions”, in A. S. Gold and P. B. Miller, eds., *Philosophical Foundations of Fiduciary Law* (2014), 287, at p. 297). Since the mechanics of the civil law differ from those of English law, the expression “fiduciary-type loyalty” may seem inaccurate in the civil law tradition (see *Gravino v. Enerchem Transport inc.*, 2008 QCCA 1820, [2008] R.J.Q. 2178, at para. 39). Finally, I note that, in both traditions, the duties associated with the general principle of good faith in the performance of contracts “ha[ve] strong conceptual differences from the much higher obligations of a fiduciary” (*Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 65; see also *Resolute*, at para. 63).

[44] In this case, the appellants were not required, by the Presidents’ Agreement or otherwise, to exercise powers for the benefit of the shareholders. They were therefore

not bound, on that basis, by an obligation of maximalist loyalty. In particular, the Presidents' Agreement did not impose on the appellants an obligation of loyalty similar to that of a mandatary, with the attendant obligation to inform (arts. 2138 para. 2 and 2139 *C.C.Q.*), because they did not have the power to represent the respondents in the sale of Groupe Excellence's shares to IA. Moreover, given that they were also not administrators of the shareholders' property, the appellants are correct to say that they did not have a duty of loyalty under art. 1309 para. 2 *C.C.Q.* that required them to subordinate their own interests to those of the shareholders or their holding companies (A.F., at para. 53). Accordingly, the duty to inform owed by the appellants to the shareholders could not originate in any obligation of loyalty in the exercise of powers. This means that the non-disclosure of IA's interest did not breach an obligation of maximalist loyalty.

[45] I note, however, that in Quebec civil law, the concept of loyalty does not refer solely to the maximalist loyalty contemplated by the appellants. The respondents point out that good faith imposes on the parties a duty of loyalty with a nature and basis that are entirely different, both at the stage of formation of the contract and at the stage of its performance and extinction. While contractual loyalty arising from good faith does not require a party to put the interests of another first, it does affect the way in which the holder of a legal right may exercise it (Cantin Cumyn (2012), at p. 21).

[46] Given the absence in this case of an obligation of loyalty arising from the exercise of powers in the interest of another, the appellants' alleged obligation to

inform, if it exists, must have a different legal basis. I turn now to the other three bases raised by the parties, starting with the appellants' possible extracontractual liability for breaching the obligation of good faith in the formation of the contracts for the sale of the respondents' interests in 2006 and 2007.

(2) Second Possible Basis: Extracontractual Obligation to Inform in the Negotiation and Formation of a Contract

[47] The appellants ask this Court to examine their conduct from the standpoint of extracontractual liability. They say that the allegations made against them by the respondents relate to the stage of formation of the contracts by which the respondents sold their interests in 2006 and 2007 (A.F., at para. 46). They submit that the Agreement did not apply in this case because it “does not govern the buy-out negotiations” (outline of argument, at para. 2.5, in condensed book, at p. 2). As a result, they say, any fault alleged at the stage of the negotiations that led to the making of those contracts of sale can only be extracontractual.

[48] The appellants acknowledge that, at the stage of contract formation, the requirements of good faith give rise to a duty to inform (A.F., at para. 48). That said, they submit that the scope of this duty did not extend so far as to require them to disclose IA's interest to the respondents. At the pre-contractual stage, nothing prevented them from acting in their own interests by not disclosing that information.

[49] The appellants are correct that the requirements of good faith must be met during the formation of a contract (art. 1375 *C.C.Q.*; see also B. Lefebvre, “La négociation d’un contrat: source potentielle de responsabilité extracontractuelle”, in P.-C. Lafond, ed., *Mélanges Claude Masse: En quête de justice et d’équité* (2003), 571, at pp. 573 and 586-87). Some authors properly connect the legal obligation to act in good faith during negotiations with an obligation to act [TRANSLATION] “with loyalty and fair play” (J. Pineau et al., *Théorie des obligations* (5th ed. 2023), by C. Valcke, at No. 87). While it is not necessarily disloyal to pursue parallel negotiations at the pre-contractual stage, good faith entails a duty to inform, which varies with the context and is intended in part to [TRANSLATION] “make up for a lack of information that might lead to a form of exploitation” (B. Lefebvre, “La bonne foi”, in B. Moore, ed., *Les grandes notions* (2015), 75, at p. 108). Baudouin, Jobin and Vézina suggest that the criteria from *Bail* determine the scope of this duty to inform, even at the pre-contractual stage (J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 313).

[50] Good faith during the pre-contractual phase — and, by extension, the duty to inform arising from it — must be assessed in light of the parties’ relationship, which in this case includes the atmosphere of trust that existed between them as well as the Presidents’ Agreement they had entered into (see J.-L. Baudouin, “Justice et équilibre: la nouvelle moralité contractuelle du droit civil québécois”, in G. Goubeaux et al., eds., *Études offertes à Jacques Ghestin: Le contrat au début du XXI^e siècle* (2001), 29, at p. 33). In Quebec, this pre-contractual duty to inform does not require a party to

disregard their own interests or subordinate them to those of another. I would note that in France, a recent reform to the law of obligations appears to be consistent, to a large degree, with this understanding of the state of Quebec law (see arts. 1112 and 1112-1 of the French *Code civil*). As Malaurie, Aynès and Stoffel-Munck explain, the duty of good faith in the formation of a contract in French law now formally recognizes that each party must refrain from any conduct that is likely to mislead the other about their true intentions, a duty that [TRANSLATION] “essentially involves obligations to say and not to say” (P. Malaurie, L. Aynès and P. Stoffel-Munck, *Droit des obligations* (12th ed. 2022), at No. 277).

[51] There would have been a meaningful debate in this case about the scope of the extracontractual duty to inform owed to the respondents on the basis of good faith, but it is not a debate that needs to be settled here. The respondents do not allege either in their motion to institute proceedings or before this Court that there was a breach of the requirements of good faith at the pre-contractual stage, nor do they ask that the contracts of sale they entered into with the appellants in 2006 and 2007 be annulled. Rather, their focus in this Court is on the good faith performance of the Presidents’ Agreement, which was fully applicable at the relevant time. I note that the Agreement anticipated the possibility of the sale of shares by Mr. Rhéaume and Mr. Beaulne in various ways, including by granting the appellants a right of first refusal. In this context, both the respondents and the courts below are right to have approached the issue of the appellants’ liability from a contractual standpoint. In short, the cause of action defended

against by the appellants relates not to the *formation* of the 2006 and 2007 contracts but rather to the *performance* of the Presidents' Agreement entered into in 2002.

[52] In sum, arguments based on extracontractual liability are of only theoretical import here given the contractual relationship that the parties chose to establish with one another. That being so, I will now examine the obligational content of the Presidents' Agreement to determine whether the appellants were contractually bound to inform the respondents of the interest expressed by IA in acquiring Groupe Excellence.

(3) Third Possible Basis: Implied Contractual Obligation to Inform

[53] The appellants submit that the trial judge erred in finding that the Presidents' Agreement contained an implied obligation to inform, making their non-disclosure of IA's interest a contractual fault. Characterizing the Agreement instead as simply a "remuneration agreement", they argue that it could not include such an obligation (outline of argument, at para. 2.5).

[54] The appellants are mistaken. Before the scope of an obligation of contractual good faith is even considered, the nature of the Presidents' Agreement leads to the conclusion that an implied obligation to inform was incident to it. The Presidents' Agreement was the cornerstone of the business relationship between the appellants and the shareholders. The role of each party in this relationship was clear. The shareholders provided the capital needed for the common enterprise while retaining ownership of

the shares and the right to dispose of them, while the appellants agreed to contribute their expertise. This was how the parties chose to join forces contractually to pursue a common goal, the success of Groupe Excellence. As noted above, the wording of the Presidents' Agreement created obligations only for the appellants' benefit, as the parties did not expressly provide for any correlative obligation for the shareholders' benefit (aside from requiring the subsequent negotiation of a non-competition clause). In this regard, art. 1434 *C.C.Q.* provides that a contract binds the parties not only as to what they have expressed in it but also "as to what is incident to it according to its nature and in conformity with usage, equity or law". Implied obligations result in what Professor Crépeau, in an article discussing art. 1024 of the *Civil Code of Lower Canada*, called the [TRANSLATION] "widening of the contractual circle" (P.-A. Crépeau, "Le contenu obligationnel d'un contrat" (1965), 43 *Can. Bar Rev.* 1, at p. 7).

[55] In this case, the appellants' implied obligations arose primarily from the very nature of the Presidents' Agreement. As this Court has noted, the nature of a contract will be the source of an implied duty if "the contract's coherency seems to require such a duty and if the duty is consistent with the general scheme of the contract" (*Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101, at para. 74). In other words, an implied obligation arising from the nature of a contract must not have the effect of adding new obligations to the contract but must instead fill the gaps in its express content (D. Lluelles and B. Moore, *Droit des obligations* (3rd ed. 2018), at No. 1542). According to Professor Crépeau, the

justification for the inclusion of implied obligations arising from the nature of a contract rests first and foremost on the presumed intention of the parties (pp. 7-8). In this sense, implied obligations have the same basis as express obligations, thereby linking autonomy of the will to the “[b]inding force and content of contracts”, as the subheading preceding art. 1434 *C.C.Q.* now states (see *Churchill Falls*, at para. 74, per Gascon J., and para. 170, per Rowe J., dissenting, but not on this point).

[56] Here, by its very nature, the Presidents’ Agreement was a long-term agreement that formalized a business relationship between the appellants and the majority shareholders, parties who each had different roles to play to maximize the value of Groupe Excellence. Regardless of whether the Agreement is characterized as a relational contract, it required reciprocal contractual loyalty (*Churchill Falls*, at paras. 122-23, quoting *Provigo Distribution Inc. v. Supermarché A.R.G. Inc.*, 1997 CanLII 10209 (Que. C.A.), at p. 25). The Agreement was certainly not a contract of employment — the element of subordination was absent — under which an obligation of contractual loyalty specific to that nominate contract would have arisen pursuant to art. 2088 *C.C.Q.* (*Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55, [2004] 3 S.C.R. 195, at paras. 27-28). As mentioned above, the Agreement was also not analogous to a contract of mandate that involves an obligation of maximalist loyalty. However, the Agreement was similar in some respects to a contract for services (art. 2098 *C.C.Q.*), since the appellants undertook, in exchange for compensation and with no relationship of subordination, to perform physical and intellectual acts for the respondents’ benefit. From this standpoint, and by analogy with art. 2100 para. 1

C.C.Q., the appellants were bound to act “in the best interests” of Mr. Rhéaume and Mr. Beaulne, but without subordinating their interests to those of the shareholders (Cantin Cumyn (2012), at pp. 20-21; see also Smith, at p. 121).

[57] According to clause 1 of the Agreement, [TRANSLATION] “[t]he SHAREHOLDERS agree to share with the PRESIDENTS part of the excess profits and part of the increase in corporate value of [Groupe Excellence]” (A.R., vol. X, at p. 3652). In addition, clauses 2 and 3 of the Agreement suggested the possibility of a future sale by the shareholders of their interests in Groupe Excellence and stipulated the benefits that the appellants could derive from such a sale. Specifically, clause 2 gave the appellants an option to purchase 40 percent of the majority shareholders’ capital stock in the event of a full or partial transaction, and clause 3 gave the appellants a right of first refusal in such a scenario. Clauses 4 to 8 were miscellaneous clauses that, among other things, provided for special compensation owed to the appellants in certain circumstances if there was a sale or merger of Groupe Excellence (clause 4) and stipulated the term of the Agreement — five years, renewable automatically for two-year periods (clause 6).

[58] An analysis of the general scheme of the Presidents’ Agreement shows that it was intended to formalize a mutually beneficial business relationship between the appellants and the shareholders. In this sense, the Agreement reflected and reinforced the high level of trust on which a common enterprise of this kind rests, including, above all, the trust that the shareholders placed in the appellants, as the trial judge found based

on the evidence (see, in particular, Sup. Ct. reasons, at para. 36). The sharing of Groupe Excellence's profits and increase in value was the centrepiece of the Agreement, because this mechanism encouraged the appellants to step up their efforts to ensure its success, which would ultimately benefit each of the parties. Furthermore, the Agreement was such that it provided the appellants with significant benefits, even if the shareholders sold their shares. It expressly set out these incentive pay terms and conditions for the appellants' benefit without spelling out any reciprocal obligations for them.

[59] Having regard to the very nature of the Presidents' Agreement, the trial judge found that the appellants had an implied obligation to maximize the value of Groupe Excellence, including with a view to a sale. That interpretation of the contract — based on the evidence — is consistent with the way the parties' relationship was structured: the appellants took care of the management of the companies and left it to the shareholders to decide Groupe Excellence's ultimate destiny. Moreover, I agree with the trial judge that the appellants also had an implied obligation to inform the shareholders of any fact [TRANSLATION] “that might enable the Shareholders to assess the companies' profits and value and decide whether to sell their shares and, if so, at what price” (para. 432). These implied obligations served to ensure the Agreement's internal coherence. Grounded in the presumed intention of the parties, they could have been configured differently, through an express clause. They were the logical counterpart of the significant benefits conferred on the appellants and of the high level of trust existing in such a business relationship. This is all the more reason why the trial

judge's interpretation of the contract is entitled to deference, as the Court of Appeal noted, and the appellants have failed to raise any reviewable error in this regard (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 32).

[60] According to the appellants, the scope of this implied obligation to inform was not so wide as to impose on them a duty to tell the shareholders of the interest expressed by IA in acquiring Groupe Excellence (A.F., at para. 78). They submit that IA's interest in Groupe Excellence was no more than an indication of its market value, which is information that a buyer cannot be obligated to provide to a prospective seller (A.F., at para. 73).

[61] This argument advanced by the appellants is without merit. In my view, the scope of the implied obligation to inform recognized by the trial judge supports his conclusion regarding the wrongful nature of the appellants' omission. I reiterate that, in keeping with that obligation, the appellants had to provide the shareholders with [TRANSLATION] "all information they have that might enable the Shareholders to assess the companies' profits and value and decide whether to sell their shares and, if so, at what price" (Sup. Ct. reasons, at para. 432). According to the trial judge's findings of fact, which are not directly contested in this Court, knowledge of the interest expressed by IA in acquiring Groupe Excellence would have had a major impact on the shareholders' decision to sell to the appellants and on the price of that sale (paras. 446, 487, 492 and 499). IA's interest in acquiring Groupe Excellence was therefore information that might have helped the shareholders make a decision to sell their

interests and determine a price. Accordingly, the non-disclosure of IA's interest was a direct breach of the implied obligation found by the trial judge.

[62] But there is more.

[63] Not only did the appellants breach their implied obligation to inform arising from the nature of the Presidents' Agreement, but they may also have breached their duty to perform the Agreement in a manner consistent with the requirements of good faith (art. 1375 *C.C.Q.*). Indeed, it is from this latter perspective that the respondents invite us to assess the appellants' fault, alleging that they failed to meet these requirements in performing the Presidents' Agreement (R.F., at paras. 46-48). As we will see, regardless of the existence of an implied obligation to inform under the Presidents' Agreement, it can be concluded that in this case the requirements of good faith, on their own, imposed a duty on the appellants to inform the shareholders of IA's interest, as an obligation of public order (see S. Grammond, A.-F. Debruche and Y. Campagnolo, *Quebec Contract Law* (3rd ed. 2020), at para. 327).

[64] Although they sometimes overlap, there is a fundamental difference between non-performance of a contractual obligation and performance of the obligation in a manner contrary to the requirements of good faith. The former relates to implementation of the *content* of the contractual obligation, whereas the latter relates instead to the *manner* in which the obligation is performed. For example, if the appellants worked to maximize the value of Groupe Excellence but secretly took action to prevent the shareholders from reaping the resulting benefits in the event of a sale,

the appellants would indeed have performed their contractual obligation to maximize Groupe Excellence's value, but they would have done so in a manner contrary to the requirements of good faith. Of course, the content of an implied contractual obligation to inform — arising from the presumed intention of the parties — may differ from the content of the duty to inform arising from good faith, which is imposed on the parties by imperative law.

[65] I note that it is not always easy, helpful or necessary to draw a distinction between non-performance of a contractual obligation, on the one hand, and performance of such an obligation in a manner contrary to the requirements of good faith, on the other. That said, it may be relevant in certain respects to recognize that a party has not only failed to perform a contractual obligation but has also breached the requirements of good faith. As I note below, even once non-performance of a contract is established, evidence of an additional breach of the requirements of good faith can have a significant impact at the remedy stage. In this context, and in light of the respondents' arguments, it is therefore appropriate to continue our analysis in order to determine whether the appellants performed the obligational content of the Presidents' Agreement in a manner consistent with the requirements of good faith.

(4) Fourth Possible Basis: Obligation to Perform the Presidents' Agreement in Accordance With the Requirements of Good Faith

[66] The appellants submit that their non-disclosure of the interest expressed by IA in acquiring Groupe Excellence was not contrary to the requirements of good faith.

In their opinion, the trial judge erred in concluding that they [TRANSLATION] “clearly breached their duties of good faith and loyalty and their duty to inform” (para. 544). They say that the Court of Appeal also erred in upholding that conclusion (para. 110).

[67] Specifically, according to the appellants, the trial judge erred at para. 546 of his reasons when he faulted them for breaching their duty to [TRANSLATION] “put the interests of [the respondents] ahead of their own”. In so doing, they argue, he misapprehended the scope of the obligation to perform a contract in good faith. They argue that unlike the “fiduciary-type” obligation of loyalty, contractual loyalty flowing from art. 1375 *C.C.Q.* does not require a contracting party to subordinate their interests to those of the other party.

[68] In keeping with what they consider to be the proper scope of the obligation of good faith under art. 1375 *C.C.Q.*, the appellants submit that they were not bound to disclose IA’s interest to the respondents because that information does not meet the criteria laid down in *Bail* relating to the duty to inform arising from good faith. The appellants thus argue that, in reality, IA’s interest was simply an indication of market value, or “information that Rhéaume and Beaulne could, and should, [have] obtain[ed] for themselves” (outline of argument, at para. 2.8).

[69] The appellants are mistaken. It is true that the trial judge misspoke in stating that the appellants had to put the respondents’ interests “ahead” of their own (para. 546). Nonetheless, in finding that the appellants had breached the obligation to perform the Presidents’ Agreement in good faith, the trial judge correctly assessed the

scope of contractual loyalty and did not require the appellants to subordinate their interests to those of the respondents. His findings concerning the appellants' concealment of IA's interest in acquiring Groupe Excellence — as the Court of Appeal affirmed (at para. 93) — are not tainted by a reviewable error. In short, the Superior Court and the Court of Appeal were right in finding two breaches — which were also interrelated — of contractual loyalty, which attached to the Presidents' Agreement through art. 1375 *C.C.Q.*: failing to properly inform the shareholders at the time their interests in Groupe Excellence were purchased and thereby lacking the elementary probity required by contractual public order.

[70] Good faith in Quebec civil law, which has been fully recognized since *National Bank of Canada v. Soucisse*, [1981] 2 S.C.R. 339, *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122, and *Bail*, is now an enacted standard of public order; it infuses every contract as if a clause provided for it (Lluelles and Moore, at No. 1977). Through the combined effect of arts. 1375 and 1434 *C.C.Q.*, good faith performance is an implied obligation that by law must be included in a contract (*Tardif v. Succession de Dubé*, 2018 QCCA 1639, 51 C.C.L.T. (4th) 54, at para. 75; *Provigo*, at pp. 20-22; Baudouin, Jobin and Vézina, at No. 307; Lluelles and Moore, at No. 2017). To this end, art. 1434 *C.C.Q.* [TRANSLATION] “sets out a mechanism of implied *prestations*” and art. 1375 establishes one of those *prestations* by requiring reciprocally from the contracting parties “a *general attitude* — even ‘a state of being’ — in the course of their contractual relationship” (Lluelles and Moore, at No. 1977 (emphasis in original; footnote omitted)).

[71] Even before art. 1375 *C.C.Q.* was enacted, Professor Crépeau explained that an implied obligation may arise from legislation, under either a suppletive or an imperative provision (pp. 27-29). The inclusion of an implied obligation through a legislative provision supplementing contractual intention is, of course, justified by the statutory presumption that this was what the parties intended; the parties may exclude the obligation through an express clause (see, e.g., with respect to marriage contracts, arts. 431 and 432 *C.C.Q.*). The justification for the inclusion of an implied obligation based on an imperative statutory provision rests upon another conception of contractual fairness grounded not in autonomy of the will but in public order. This is the foundation of the duty to perform the Presidents' Agreement in good faith, an imperative obligation under art. 1375 *C.C.Q.* In this sense, good faith differs from the implied prestations that arise, in part, from the nature of the contract. The imperative standard of good faith applies to all contracts; its implementation varies with the circumstances. Discussing French law, Professor Bénabent explains that good faith, which is [TRANSLATION] "flexible in its content", involves a range of requirements tailored to the specific circumstances of each case (A. Bénabent, *Droit des obligations* (19th ed. 2021), at No. 303 (emphasis deleted)). Here, the Presidents' Agreement — a long-term contract formalizing a business relationship — was entered into in the context of the atmosphere of trust found by the trial judge and had to be performed accordingly. The Agreement did not, however, require the appellants to exercise powers for the respondents' benefit.

[72] The appellants are therefore right to say that, in this case, they did not have an *obligation of loyalty in the exercise of powers* in the interest of another. But like any contracting party in Quebec, they had to comply with an obligation of *contractual loyalty* toward the respondents, which arose from the duty of good faith set out in art. 1375 *C.C.Q.* Through its so-called completive function, good faith requires a contracting party [TRANSLATION] “to act with loyalty, that is, taking into account, within the limits of reasonable conduct, the interests of [the] other [contracting] party” (M. A. Grégoire, *Liberté, responsabilité et utilité: la bonne foi comme instrument de justice* (2010), at p. 209; see also *Dunkin’ Brands Canada Ltd. v. Bertico Inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1, at paras. 66-70). This obligation of loyalty [TRANSLATION] “applies to a person who performs a prestation or exercises a right under a contract and who is bound to act in good faith” (Cantin Cumyn (2012), at p. 21). Unlike maximalist loyalty, contractual loyalty is reciprocal because of the mutual nature of good faith. It does not require contracting parties to act in the sole interest of their counterparty, but it does require them to consider the other party’s interests when performing the contract (Lluelles and Moore, at No. 1987).

[73] I pause here to note that the French term “*loyauté*” is sometimes used to describe different concepts, which no doubt reflects the [TRANSLATION] “great terminological variety” characteristic of this field: “. . . reference is made both to good faith and to an obligation of loyalty, of cooperation or, more vaguely, to an obligation of prudence or consistency” (Bénabent, at No. 303; see, in Quebec law, Smith, at p. 121). For example, some Quebec authors have used this term to refer to the generally

prohibitive dimension of good faith (see, e.g., Lluellas and Moore, at No. 1978). On the other hand, Professor Picod distinguishes [TRANSLATION] “loyalty as absence of bad faith” from “loyalty as a diligent and conscientious attitude”, regarding loyalty as reflecting both the prohibitive and proactive dimensions of good faith in French law (Y. Picod, *Le devoir de loyauté dans l’exécution du contrat* (1989), at p. 26). For his part, Professor Cornu explains that the term “*loyauté*” may, among other things, refer more generally to “contractual good faith (in the performance of a contract)” (G. Cornu, ed., *Dictionary of the Civil Code* (2014), definition of “*loyauté*”). This latter approach was echoed in Quebec jurisprudence based on the *Civil Code of Lower Canada*, including the landmark case of *Houle*, in which this Court wrote that the “implicit obligation of good faith . . . mandates that rights be exercised in a spirit of fair play” (p. 158; see also, under the *Civil Code of Québec*, *Provigo*, at pp. 23-26).

[74] In these reasons, I use the expression “contractual loyalty” to refer to the general attitude of a contracting party in good faith, who must take the other party’s interests into account (see Cantin Cumyn (2012), at p. 21). In this sense, contractual loyalty is “minimalist”. It stands in contrast to “maximalist” loyalty, which is the general attitude that must be adopted by a person on whom a power is conferred and which requires the person to subordinate their interests to those of another (see Smith, at p. 122). I note that the legislature uses the term “*loyauté*” in French to describe both maximalist loyalty (see arts. 322, 1309 para. 2 and 2138 para. 2 *C.C.Q.*) and contractual loyalty (see art. 2088 *C.C.Q.*). The term “loyalty” is used as the English equivalent of

“loyauté” in art. 322 *C.C.Q.*, but the legislature sometimes uses the adverb “faithfully” in analogous contexts (see arts. 1309 para. 2, 2088 and 2138 para. 2 *C.C.Q.*).

[75] Authors have properly recognized that, depending on the context, good faith may have both a prohibitive dimension and a proactive dimension (see Lluelles and Moore, at No. 1978; M. A. Grégoire, *Le rôle de la bonne foi dans la formation et l'élaboration du contrat* (2003), at pp. 11-12; Baudouin, Jobin and Vézina, at No. 161). In this case, I am of the view that the appellants, through their conduct, breached the obligations flowing from both of these dimensions of good faith.

[76] First, the prohibitive dimension of good faith requires, among other things, that parties to a contract not act dishonestly in performing it (Lefebvre (2015), at p. 93). In this case, contractual loyalty did not require the appellants to forsake their own interests to benefit the respondents, let alone to refrain from exercising the legal rights they had under the Agreement. But in the pursuit of their interests and the exercise of their rights, parties to a contract must conduct themselves loyally by not unduly increasing the burden on the other party or behaving in an excessive or unreasonable manner (see *Churchill Falls*, at paras. 112-13, per Gascon J., and para. 177, per Rowe J., dissenting, but not on this point). The prohibitive dimension of good faith also requires each contracting party not to jeopardize the existence or equilibrium of the contractual relationship (Lluelles and Moore, at No. 1979).

[77] However, I agree with the trial judge that in this case the appellants conducted themselves in a disloyal manner and lacked probity when they failed to

disclose the interest expressed by IA to the shareholders and when they signed the Undertaking of Confidentiality with IA (paras. 544-47). They were, of course, not obliged to subordinate their interests to those of the respondents in performing the Presidents' Agreement, but they did have to *look out for the interests* of the respondents in the legitimate pursuit of their own interests (see *Dunkin' Brands*, at paras. 74-75; *Provigo*, at pp. 24-25; see also *Bhasin*, at para. 70). The respondents could therefore legitimately expect the appellants to refrain from scheming in any way to enrich themselves at their expense. In the context of the business relationship in question, the appellants thus engaged in dishonest conduct that thwarted the respondents' legitimate expectations in pursuing the goal they all had, which was to maximize the profits and value of the Groupe Excellence companies for the benefit of both the appellants and the respondents.

[78] Furthermore, I make note once again of the trial judge's factual determination that when Mr. Beaulne asked Mr. Ponce whether IA was interested in acquiring Groupe Excellence, Mr. Ponce lied to Mr. Beaulne by telling him that he had checked and that IA was not interested (paras. 67-68 and 449). The appellants urge us to review that finding of fact. According to them, IA's offer to purchase the group had not yet been made at the relevant time. Even if it had been, they say, IA never wanted to do business directly with the shareholders (A.F., at para. 85), so Mr. Ponce did not act dishonestly by telling Mr. Beaulne that IA was not interested in acquiring his shares in the group.

[79] I disagree with the appellants on this point. Although the interplay of dates makes the chronology of events sometimes difficult to reconstruct on appeal, I am of the view that the appellants have not discharged the onerous burden of showing that the trial judge's finding in this regard — which was based in part on his assessment of the credibility of those involved — is tainted by a palpable and overriding error. Regardless of whether Mr. Ponce's answer was a lie in the strict sense, his failure to convey to Mr. Beaulne the information he had at the time concerning the definite interest expressed by IA amounted, at the very least, to dishonest concealment that was meant to mislead the shareholders (see *Private Law Dictionary and Bilingual Lexicons: Obligations* (2003), definition of "concealment"; P. Stoffel-Munck, *L'abus dans le contrat: Essai d'une théorie* (2000), at Nos. 92-98; see also *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, at para. 89). That choice not to reveal IA's interest was in keeping with the silence required by the Undertaking of Confidentiality, through which Mr. Ponce and Mr. Riopel sought to prevent IA from dealing directly with the shareholders (Sup. Ct. reasons, at para. 441). In this context, the trial judge had sufficient grounds for finding that such disloyal conduct was contrary to the requirement of honesty arising from art. 1375 *C.C.Q.*

[80] Second, in addition to these breaches of the prohibitive dimension of good faith, the appellants also contravened its proactive dimension. In this regard, good faith requires, from each contracting party, active behaviour that is intended to assist their contracting partner but that still remains compatible with the party's own interests. Based on the circumstances, each party must, in particular, [TRANSLATION] "inform

[their partner], in the course of the contract, of events they had better know about for the performance of the contract” (Lluelles and Moore, at No. 1997 (footnote omitted)). Good faith thus imposes on each contracting party a duty to inform that [TRANSLATION] “encompass[es] their partner’s legitimate expectations” (D. Mazeaud, “Chronique de jurisprudence civile générale: Obligations et protection des consommateurs”, in *Répertoire du notariat Deffrénois* (1996), at p. 1010, quoted in Lluelles and Moore, at No. 2001; see also *Desjardins Financial Services Firm Inc. v. Asselin*, 2020 SCC 30, [2020] 3 S.C.R. 298, at para. 61). In keeping with this proactive dimension, as Professor Cantin Cumyn helpfully notes, [TRANSLATION] “the duty of [contractual] loyalty requires [a contracting party] to provide the other party with the information that is relevant to the performance of their prestation, in order to facilitate it or avoid making it more onerous than originally intended” (Cantin Cumyn (2012), at p. 20). Like its prohibitive counterpart, the proactive dimension of contractual good faith does not require a contracting party to act selflessly. However, it does always require a contracting party to consider the other party’s perspective when exercising the legal rights conferred by the contract (p. 21; see, e.g., *Dunkin’ Brands*, at para. 74).

[81] In the context of this case, which involves a long-term business relationship, contractual good faith imposed a proactive duty to inform on the parties through art. 1375 C.C.Q. Disclosure by the appellants of the interest expressed by IA would not have amounted, in this case, to the subordination of their interests to those of the respondents. Conversely, remaining silent about IA’s interest constituted disloyal conduct. Again, we are dealing with a contractual undertaking through which the

parties joined forces to achieve a common goal. This is what French authors Malaurie, Aynès and Stoffel-Munck describe as an [TRANSLATION] “alliance contract” or “cooperation contract”, under which the parties unite to some degree to pursue a common goal over time (No. 276). Such contracts are better able to accommodate the duties of initiative and cooperation based on good faith than [TRANSLATION] “exchange contracts”, which are not meant to be long-lasting (No. 276; see also Grammond, Debruche and Campagnolo, at paras. 49 and 326).

[82] All that remains to be determined is the extent of this duty to inform in the specific context of the business relationship that existed here. For this purpose, I will refer to the landmark decision in *Bail*. In that case, the Court outlined a general theory regarding the duty to inform arising from the obligation of good faith in contractual matters, which served to determine whether particular information fell within this duty. As the Court of Appeal properly noted, this Court laid down the following three criteria in *Bail* (at pp. 586-87): (1) knowledge of the information, whether actual or presumed, by the party owing the obligation to inform; (2) the fact that the information in question is of decisive importance; (3) the fact that it is impossible for the party to whom the duty to inform is owed to inform itself, or that the creditor is legitimately relying on the debtor of the obligation.

[83] In this case, Rancourt J.A. carefully verified whether these criteria were met in light of the facts found by the trial judge, and I adopt his conclusion that the three criteria are satisfied (paras. 86-91). With regard to the first criterion, the

appellants do not dispute that they knew of the interest expressed by IA in acquiring Groupe Excellence (para. 87, referring to the examination after defence of Daniel Riopel, reproduced in A.R., vol. XVIII, at p. 6699). I also note that they were fully aware of the financial value of that information and of the fact that it was of interest to the shareholders from the standpoint of a possible sale (Sup. Ct. reasons, at para. 492). The second criterion is also satisfied in this case, as the trial judge found that the interest expressed by IA in acquiring Groupe Excellence would have [TRANSLATION] “had a major impact on the decision of Rhéaume and Beaulne to sell their interests to the [appellants] and, beyond a shadow of a doubt, on the determination of the value of the shares and the price” (para. 446). The trial judge also found that if the shareholders had known of IA’s interest, they [TRANSLATION] “would have sought to maximize the sale price for their shares”, and Mr. Rhéaume “would not have signed the act of sale of September 1, 2006” (paras. 487 and 494). Indeed, Mr. Ponce himself acknowledged that, in such circumstances, the presidents and the shareholders could have presented a united front and, as a group of four, obtained a better sale price (paras. 492-93).

[84] Finally, I am of the view that the last criterion from *Bail* is doubly satisfied in this case. First, with regard to the atmosphere of trust between the parties, I repeat that they had, for several years, been cultivating a business relationship that involved the pursuit of a common goal, the success of Groupe Excellence. In this sense, the respondents were perfectly entitled to expect to be duly informed of the interest expressed by IA in acquiring Groupe Excellence. However, the appellants acted disloyally in this regard, betraying the trust that their counterparties, the respondents,

had legitimately placed in them. Second, irrespective of the atmosphere of trust that existed between the parties, I am of the view that it was impossible for the shareholders to inform themselves of IA's interest. As noted above, the appellants entered into an Undertaking of Confidentiality with IA a few months after being approached by it, and clause 5 of that undertaking was specifically intended to prevent any transaction between IA and the shareholders (Sup. Ct. reasons, at para. 445). According to the trial judge, clause 5 [TRANSLATION] "no doubt explains why IA's president . . . never returned Beaulne's call in April 2006 to verify IA's interest" (para. 447). In addition, when Mr. Beaulne asked Mr. Ponce whether IA would be interested in purchasing his shares in Groupe Excellence, Mr. Ponce answered that he had checked and that IA was not interested (paras. 448-49). As I said above, regardless of whether it was a lie, that interaction — coupled with the signing of the Undertaking of Confidentiality — illustrates the shareholders' unsuccessful efforts to inform themselves.

[85] In sum, I agree with the Court of Appeal that the interest expressed by IA in acquiring Groupe Excellence satisfies, in the context of the Presidents' Agreement, each of the three criteria set out in *Bail* (paras. 87-91). As a result, the requirements of good faith in the performance of the Agreement imposed a duty on the appellants to inform the shareholders of IA's interest.

[86] Since the appellants' failure to inform the shareholders of IA's interest in acquiring Groupe Excellence was therefore a breach of the requirements of good faith, I turn now to the question of the appropriate remedy.

B. *Basis for the Remedy and Amount Owed to the Respondents*

[87] The parties disagree on the legal basis for the appropriate remedy in this case and on the amount, if any, owed to the respondents. As noted above, the trial judge ordered the appellants solidarily to pay the respondents \$11,884,743, an amount equivalent to the profits that he found had been made by the appellants in reselling the shares of Groupe Excellence to IA. The Court of Appeal upheld that amount, as it was of the view that the appellants had not established any reviewable error.

[88] The appellants submit that the courts below erred in ordering disgorgement to the respondents of the profits made on the resale of Groupe Excellence to IA. In their opinion, there was no legal basis for awarding that remedy in this case. They stress that disgorgement of profits must remain an exceptional remedy, since it is a departure from the cardinal principle of corrective justice. They maintain that ordering disgorgement of profits can be justified only where there is a breach of an obligation of loyalty similar to that of a common law fiduciary, that is, the maximalist loyalty required of a person authorized to exercise powers in the interest of another. According to the appellants in this case, the Court of Appeal correctly found, unlike the trial judge, that the parties' legal relationship was not characterized by such a relationship of loyalty. However, they argue that the Court of Appeal erred in upholding disgorgement of profits anyway based on the breach of an obligation of good faith. They submit that a breach of that contractual obligation must be compensated for only where injury is duly proved by the plaintiff.

[89] As disgorgement of profits was not, in their view, an available remedy in this case, the appellants maintain that the onus was on the respondents to prove their injury. However, the respondents adduced no evidence to this effect, they say, which means that no damages should be awarded against them. In their opinion, awarding damages without proof of injury, even for a possible breach of the obligation of good faith, would be tantamount to awarding punitive damages, which cannot be justified in the circumstances.

[90] The respondents answer that the remedy awarded by the courts below is fully justified in light of the wrong committed (R.F., at para. 89). First, they state that disgorgement of profits is simply an application of the moral precept that no one should profit from their own wrongdoing or bad faith (R.F., at paras. 84-85, citing on this point *Kuet*, at pp. 439 and 441). Second, and in the alternative, the respondents allege that the remedy awarded by the Superior Court and upheld on appeal can be seen as equivalent to an award of damages. The respondents say that these damages, which are directly related to the appellants' fault, compensate here for the injury flowing from lost profits, as permitted by art. 1611 *C.C.Q.* They argue that this "serious loss", raised in the motion to institute proceedings in the Superior Court, materialized when the appellants resold Groupe Excellence to IA at a price higher than the one they had paid to purchase it from the respondents. This price difference [TRANSLATION] "would therefore be the value most representative" of the profits of which the respondents were allegedly deprived as a result of the appellants' wrongful omission (R.F., at para. 118). In support of their position, the respondents rely in part on the testimony of Mr. Ponce,

who stated the following regarding the sale price for Groupe Excellence:
[TRANSLATION] “. . . of course, we could have gotten more, but as a group of four”
(examination in chief, reproduced in A.R., vol. XXVII, at p. 9465).

[91] To determine the appropriate remedy in this case before considering the issue of assessment of damages, I must begin by identifying the legal basis for awarding disgorgement of profits.

(1) Availability of Disgorgement of Profits as a Remedy

(a) *Disgorgement of Profits Where There Is an Obligation of Loyalty in the Exercise of a Power*

[92] The appellants are certainly right on one point: as a general rule, disgorgement of profits does not have the same compensatory function as an award of damages as a remedy for breach of a contractual obligation. “Reparation” in civil liability is intended to compensate for loss sustained or profit lost (art. 1611 C.C.Q.). In contrast, other remedies are aimed at “restitution” and involve returning what has been received. As such, they do not have this compensatory aspect that reparation does in the law of liability (on this distinction, see the comments of Professor Pascal Fréchette, particularly at pp. 14 and 135). As for disgorgement of profits — which straddles restitution and compensation in the law of liability, and which was recognized by this Court in *Kuet* under the *Civil Code of Lower Canada* — the conditions for its

application, which are somewhat uncertain in positive law, are disagreed upon by the parties in this case.

[93] To begin, the appellants are correct in stating that disgorgement of profits is, in principle, available only where a person is charged with exercising powers in the interest of another: a mandatary and an administrator must hand over the property when the administration ends, and this [TRANSLATION] “normal restitution” would encompass the profits accrued during the administration (Fréchette, at p. 154; see also Cantin Cumyn (2012), at p. 22). For example, because an administrator of the property of others exercises the powers attached to their office for the benefit of others, any profit resulting from the exercise of those powers, along with the administered property, returns to the administered patrimony when the administration ends (arts. 1365 and 1366 para. 1 *C.C.Q.*). In this regard, the first part of art. 1366 para. 1 *C.C.Q.* provides that an administrator of the property of others must hand over to the beneficiary all that the administrator has received in performing the obligation of loyalty attached to their duties, even if the beneficiary has not sustained any injury (see 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* (2015), 281). Moreover, under the second part of art. 1366 para. 1 *C.C.Q.*, an administrator “is also accountable for any personal profit or benefit he has realized by using, without authorization, information he had obtained by reason of his administration”. In this exceptional case, disgorgement of profits sanctions the breach of the administrator’s obligation of maximalist loyalty, from a perspective farther

removed from restitution (Cantin Cumyn and Cumyn, at para. 376). Even in such a case, disgorgement of profits differs, as I will endeavour to explain, from the traditional sanction of damages, which depends on proof of injury.

[94] These two remedies are indeed conceptually distinct. Disgorgement of profits, which is more restitutionary in its focus, is in principle meant to ensure compliance with the obligation of maximalist loyalty owed by a person on whom a power is conferred. An award of damages, on the other hand, serves to compensate the victim of a fault for the injury sustained and thus reflects a compensatory logic related in part to contractual loyalty under art. 1375 *C.C.Q.* As some authors explain, disgorgement of profits is therefore different from damages, as it is [TRANSLATION] “not in keeping with the compensatory function of civil liability” (Fréchette, at p. 161; see also Grégoire (2010), at pp. 50-51).

[95] The respondents assert that in *Kuet*, this Court extended the scope of the remedy of disgorgement of profits beyond just cases in which a party exercises a power (R.F., at paras. 84-85). More particularly, they argue that *Kuet* made disgorgement of profits a remedy to sanction a person who has committed a fault for financial gain and breached the requirements of good faith in contractual matters (paras. 84 and 88). The appellants, on the other hand, give *Kuet* a much narrower scope. Noting that the bank in that case had sustained no injury due to the conduct of its foreign currency trader, who had made personal profits in the performance of his duties, the appellants say that *Kuet* does not permit the scope of the exceptional remedy of disgorgement of profits to

be extended beyond cases in which the debtor at fault was required to subordinate their own interests to those of their creditor (A.F., at para. 101). This interpretation of *Kuet* leads the appellants to conclude that disgorgement of profits is not available as a remedy in this case because, as we know, the appellants did not breach an obligation of “maximalist” loyalty given that they were not charged with exercising powers in the respondents’ interest. Accordingly, the appellants say, the breach of the obligation of contractual loyalty they were found to have committed can give rise only to damages as compensation for proven injury, not to disgorgement of profits. However, the respondents have not proved such injury.

[96] I agree with the appellants that *Kuet* should not be given an interpretation that departs from the foundations of the law of civil liability. That judgment, when properly read, indicates that the remedy of disgorgement of profits is not available to a court where there has simply been a breach of the obligation of good faith by a person who is not subject to an obligation of loyalty in the exercise of a power. *Kuet* therefore provides no basis to support disgorgement of profits to the respondents as a remedy.

[97] It is true, as the respondents note, that Gonthier J. relied on the precept that “no one should profit from his own wrongdoing” in deciding to award disgorgement of profits (*Kuet*, at p. 439). That said, Gonthier J. did not base his reasoning solely on that adage, which might have suggested that he tied disgorgement of profits simply to a breach of good faith. He took care to ground his decision to award disgorgement of profits in an analogy with the obligation of a mandatary to turn over profits to the

mandator, since the specific relationship between the bank and its currency trader in that case was similar to mandate.

[98] A brief overview of the facts of the case is necessary to fully appreciate this reality. In *Kuet*, a bank's chief foreign currency trader had taken advantage of his position to make secret arrangements with his clients. Under those arrangements, he was to conduct foreign exchange transactions for their benefit and, in return, keep a percentage of the profits made. When the bank was made aware of those unauthorized activities, it brought a civil action against the currency trader, who by that point had made more than \$600,000 in profits. Because the plaintiff bank had not suffered any loss, it did not seek damages but rather disgorgement of the profits made by the trader.

[99] Upon concluding his analysis, Gonthier J. allowed the bank's claim and ordered the trader to turn over the profits he had made. That conclusion did not rest solely on the trader's misconduct but thus related "rather to the underlying function and relationship between the parties to the contract" (p. 436). The strong resemblance between that relationship and the one arising under a contract of mandate, due to the control exercised by the trader over the bank's affairs, was what led Gonthier J. to require the trader to account for all that he had received in the context of his administration (see the analysis proposed by Professor Fréchette, at pp. 10 and 155-56). Gonthier J. based that disgorgement of profits, by analogy, on art. 1713 of the *Civil Code of Lower Canada* (see today art. 2184 C.C.Q.), a provision applicable first and

foremost to mandataries that required them to deliver all that they had received under the authority of their mandate to the mandator, even if it was not due (p. 436).

[100] Professor Fréchette, commenting on the case, is therefore right to emphasize the parallel between the role of mandatary and the representative position held by the currency trader and in noting that this Court required the trader [TRANSLATION] “to account for all that he had received in the context of his administration, in keeping with the general logic of the rules of mandate” (p. 155). Similarly, Professors Cantin Cumyn and Cumyn, at para. 376, take the view that Gonthier J. required specific performance of an obligation to hand over profits, an obligation analogous to that of a mandatary or administrator of the property of others (arts. 1366 para. 1, 2146 para. 2 and 2184 *C.C.Q.*). It was thus the existence of an obligation of maximalist loyalty in the context of exercising a power that justified disgorgement of profits in *Kuet* even though the bank had sustained no injury. I note that in *Abbas-Turqui v. Labelle Marquis Inc.*, 2004 CanLII 26082 (Que.), which concerned a fault committed by a contracting party for financial gain in the context of a sale, the Court of Appeal took care to distinguish *Kuet* based on this same logic (see para. 13).

[101] I conclude that the principles spoken to in *Kuet* cannot be usefully transposed to this case. Of course, it might be said that by concealing the interest expressed by IA, the appellants, like the currency trader in *Kuet*, breached the obligation of good faith imposed on them through the combined effect of arts. 1434

and 1375 C.C.Q. But unlike the defendant in *Kuet*, the appellants were not required to turn over profits, as a mandatary or administrator would be, because they were not charged with exercising powers in the respondents' interest.

[102] Accordingly, I am of the view that unlike the relationship that existed in *Kuet* but like the one in *Abbas-Turqui*, the specific relationship between the appellants and the respondents cannot ground disgorgement of the profits made by the appellants as a remedy.

(b) *Disgorgement of Profits Where There Is No Exercise of Power*

[103] In addition to *Kuet*, the respondents rely on *Uni-Sélect inc. v. Acktion Corp.*, [2002] R.J.Q. 3005, arguing that in that case the Quebec Court of Appeal ordered disgorgement of profits where a fault was committed for financial gain but there was no exercise of power in the interest of another. In *Uni-Sélect*, the contracting party at fault had purchased a company in violation of a non-competition clause. Faced with the trial judge's finding that injury had not been proved, the Court of Appeal held that the injury was equivalent to the profits made by the contracting party at fault (paras. 58-63). The Court of Appeal thus reversed the trial judge's factual determination, stating that the [TRANSLATION] "benefit in the marketplace" derived by the contracting party at fault, that is, the profits it made, "inevitably caused, in [this] context, a loss for the [aggrieved contracting party]" (para. 59). For this reason, it declared that the beneficiary of the non-competition clause [TRANSLATION] "must be compensated for this loss" pursuant to art. 1611 C.C.Q. (para. 59; see also para. 36).

The respondents are therefore incorrect in arguing that the Court of Appeal in *Uni-Sélect* ordered the contracting party at fault to disgorge profits for a purpose other than compensation and without any proof of injury. Accordingly, insofar as it was established that the profits realized were equivalent to the injury caused by the contracting party's wrongful conduct, disgorgement of profits in *Uni-Sélect* was justified as compensation for fault. The respondents certainly cannot rely on that case to obtain disgorgement of profits directly, in the absence of an obligation of maximalist loyalty.

[104] Independently of the foregoing, the respondents argue that disgorgement of profits can be a non-compensatory remedy that is available in the case of conduct [TRANSLATION] “that truly deviates from that of an honest, prudent contracting party” (R.F., at para. 100). But as I have said, it must be recognized that they are above all seeking disgorgement of profits based on the compensatory function of this remedy, since they are claiming the profits made by the appellants as the “equivalent” of the gain of which they were allegedly deprived because the appellants unlawfully appropriated the business opportunity. As the motion to institute proceedings clearly indicates, the disgorgement of profits sought by the respondents is more akin to damages, which are in keeping with the general principles of civil liability (motion to institute proceedings, at para. 57.1). Unlike the bank in *Kuet*, the respondents say that they have sustained “serious loss”. They are therefore seeking disgorgement of profits as compensation for that injury caused by the breach of the appellants’ obligation of “contractual” loyalty. It follows that there is no need, in the context of the facts of this

case, to decide whether disgorgement of profits is available to a court as a confiscatory and [TRANSLATION] “rather novel” sanction in the absence of such injury (see Lluellas and Moore, at No. 2037; 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* (2012), 949).

[105] In sum, I am of the view that disgorgement of profits without regard to injury is not an appropriate remedy in this case. The sanction requested is to compensate for a wrong. The demand is not simply for restitution of profits, much less for disgorgement of profits for a confiscatory or punitive purpose, a remedy that would potentially deviate from the general law of civil liability. It is thus appropriate to assess, on the basis of the respondents’ alternative argument, the quantum of the damages to be awarded to them to compensate for the loss they claim to have suffered.

(2) Award of Damages Pursuant to the Presumption in *Baxter*

[106] In Quebec, the law of civil liability is based on the principle of full compensation for injury sustained, often expressed through the phrase *restitutio in integrum*. Pursuant to this principle, the purpose of damages is to compensate for loss sustained or gain lost as a result of fault. The quantum of such damages must be assessed so as to place the respondents in the position they would have been in but for the appellants’ fault (see arts. 1611 et seq. *C.C.Q.*).

[107] Here, the trial judge found that the appellants' failure to tell the shareholders of the interest expressed by IA in acquiring Groupe Excellence had a major impact on the respondents' decision to sell their shares and on the sale price (para. 446). In the Superior Court, Mr. Ponce acknowledged that if the shareholders had been duly informed, they and the presidents could have presented a united front in negotiating with IA and thus obtained a better price (paras. 492-93). That said, despite that concession, the appellants argue that the outcome of such negotiations is speculative and that it is therefore impossible to accurately determine the position the respondents would have been in but for the appellants' fault. Since the existence of lost profits has not been established, they say, what the respondents are claiming is compensation for loss of chance, which is not compensable in Quebec law.

[108] The respondents answer that, since the start of the proceedings, they have been seeking compensation for the gain lost due to the bad faith of the appellants, who unlawfully appropriated the proceeds from the resale of Groupe Excellence to IA. The trial judge accepted the existence of this lost gain, they say, and any difficulty proving it with precision is directly attributable to the appellants' wrongdoing.

[109] This situation is not unlike the one in *Baxter*, to which the trial judge referred (paras. 590-93). In that case, the Quebec Court of Appeal held that the majority shareholders had breached the requirements of good faith by failing to disclose to the minority shareholders the possibility of a public offering of their shares. Not having been informed of such a possibility, the minority shareholders agreed to sell their

interests to the majority shareholders for \$25 per share. A few months later, the majority shareholders resold those shares in the public offering for \$150 each, thus earning a profit of \$125 per share.

[110] Writing for the majority, Rothman J.A. found that if the minority shareholders had been told of the possibility of a public offering, they would not have sold their interests for \$25 per share. However, determining the price at which they would have sold their interests — if they had indeed decided to sell them — involved speculation (*Baxter*, at p. 443), because the dishonest concealment of information prevented the minority shareholders from precisely establishing the position they would have been in but for the fault committed against them.

[111] In that context, Rothman J.A. stated that the loss sustained by the minority shareholders should be presumed to be equivalent to the profit made by the majority shareholders (p. 443). He explained that this presumption is compatible with the principles governing the awarding of damages in the civil law (pp. 443-44, quoting *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3, at pp. 14-16). First, the presumption is consistent with the principle of *restitutio in integrum*, which requires that the aggrieved party be restored to their former position. Second, it is consistent, from an evidentiary standpoint, with the principle that “the perpetrator of a wrongful act should not be permitted to profit from his own bad faith or wrongdoing” (*Baxter*, at p. 443).

[112] I note that Deschamps J.A., dissenting on the issue of the quantum of damages, found instead that the evidence had established that, if they had been duly informed, the minority shareholders would still have sold their interests prior to the public offering, at a price of \$91 per share (p. 447). That being said, there is nothing to suggest that, in reaching that conclusion, she rejected the soundness of the presumption endorsed by the majority. She agreed that the minority shareholders had provided sufficient proof of their injury; the disagreement concerned only the assessment of the quantum of damages.

[113] In accordance with the presumption helpfully identified by Rothman J.A., where a breach of the requirements of good faith prevents the aggrieved party from proving the injury sustained, it should be presumed that the injury is equivalent to the profits made by the party at fault. However, this presumption is rebuttable, as it can be displaced by evidence to the contrary showing that the quantum of damages differs from the amount of the profits (pp. 443-44, quoting *Rainbow Industrial Caterers*, at pp. 14-16).

[114] The presumption relied upon in *Baxter* draws from the common law, which has long recognized that where a fact cannot be proved because of a party's dishonesty, that fact will be assumed to be true in the absence of evidence to the contrary (see *Rainbow Industrial Caterers*, at pp. 14-16; *Lamb v. Kincaid* (1907), 38 S.C.R. 516, at pp. 539-40; see also *Callow*, at para. 116). In both legal traditions, this presumption is consistent with the principle of *restitutio in integrum* (see *Rainbow Industrial Caterers*,

at p. 16, where Sopinka J. relied on *National Bank of Canada v. Corbeil*, [1991] 1 S.C.R. 117, and *Provincial Bank of Canada v. Gagnon*, [1981] 2 S.C.R. 98; see also *Baxter*, at p. 444, citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229).

[115] The presumption established in *Baxter* therefore serves as the basis for a method of calculating damages to compensate the aggrieved party for the injury sustained. In this way, it is based on a compensatory objective that is distinct from disgorgement of profits where disgorgement is awarded for a restitutionary purpose in the absence of any injury. It should be noted that this presumption is not a departure from corrective justice, which is the foundation of the general rules of civil liability in Quebec: the sanction dependent on it is not punitive or confiscatory, but compensatory. Applying the presumption set out in *Baxter* therefore does not amount to awarding punitive damages, since the damages awarded on this basis have reparatory purposes.

[116] In this case, the respondents are seeking disgorgement of profits as the “equivalent” of the “serious loss” they claim to have sustained as a result of the appellants’ breach of the requirements of good faith in the performance of the Agreement (motion to institute proceedings, at paras. 1, 47, 57, 57.1 and 58). That injury is equivalent here to the gain lost by the respondents, which is compensable under art. 1611 *C.C.Q.* Based on the presumption set out in *Baxter*, it can be assumed that, had it not been for the appellants’ wrongful omission, the respondents would have sold their interests to IA at the same price the appellants did. This was in fact the premise underlying the analysis by the respondents’ experts, which was accepted by

the trial judge, as can be seen from his explanations about calculating the value of the lost advantage (see paras. 598 and 615). Consequently, what the appellants describe as “loss of chance” to negotiate ceases to be hypothetical and becomes simply a “loss” for which the respondents must be compensated in the absence of evidence to the contrary (A.F., at paras. 119-29; R.F., at para. 117). The onus was therefore on the appellants to establish on a balance of probabilities that the respondents would have sold their interests to IA for a price lower than the one obtained by the appellants.

[117] The appellants did not discharge this burden. The trial judge accepted the assumption put forward by the respondents’ firm of experts, namely that, “had it not been for the acts alleged against the [appellants], the [respondents] would have received consideration equivalent to what IA paid to acquire the [appellants’] interests in Groupe Excellence rather than the amount they obtained from the [appellants]”. At the hearing in this Court, the appellants did not show that this finding of fact, which is entitled to deference, was tainted by a palpable and overriding error (*Housen*, at para. 10; *Grenier v. Grenier*, 2011 QCCA 964, at para. 45 (CanLII); *M.H. v. Axa Assurances inc.*, 2009 QCCA 2358, [2010] R.R.A. 15, at para. 19). Therefore, because the presumption in *Baxter* has not been rebutted, the damages owed to the respondents are equivalent to the difference between the sale price received by the appellants on the resale to IA and the price received by the respondents on the initial sale to the appellants.

[118] The injury sustained by the respondents in the form of a lost gain thus amounts to \$11,884,743, and the trial judge’s award, upheld on appeal, is solidary. I

take note of the agreement reached by the respondents that the amount awarded would be divided in proportion to their shares in Groupe Excellence, that is, 62 percent for Mr. Rhéaume's companies and 38 percent for Mr. Beaulne's companies. Accordingly, the damages are allocated as follows: \$7,368,540.60 to Mr. Rhéaume's companies and \$4,516,202.40 to Mr. Beaulne's companies.

[119] For these reasons, I would dismiss the appeal, with costs.

Appeal dismissed with costs.

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