
Court of Appeal for Saskatchewan
Docket: CACV4283

Citation: *Tomcala v SSC Security Services Corp.*, 2026 SKCA 38

Date: 2026-03-10

Between:

Frank Tomcala, Ryan Tomcala and Laurie Tomcala

*Appellants/Respondents by Cross-Appeal
(Plaintiffs/Defendants by Counterclaim)*

And

**SSC Security Services Corp., Input Capital Limited Partnership,
Assiniboia Capital Corp., and Gord Nystuen**

*Respondents/Appellants by Cross-Appeal
(Defendants/Plaintiffs by Counterclaim)*

Before: Caldwell, Schwann and Kilback JJ.A.

Disposition: Appeal dismissed; cross-appeal dismissed

Written reasons by: The Honourable Justice Neal W. Caldwell
In concurrence: The Honourable Justice Lian M. Schwann
The Honourable Justice Keith D. Kilback

On appeal from: QBG-RG-01793-2017 (SKKB), Regina
Appeal heard: October 16, 2025

Counsel: Casey Churko for the Appellants
Graham Quick and Brian Lunde for the Respondents

Caldwell J.A.**I. OVERVIEW**

[1] Frank, Laurie and Ryan Tomcala appeal against a Court of King's Bench judge's judgment after trial dismissing their counterclaims against SSC Security Services Corp. [SSC Security] and Input Capital Limited Partnership [ICLP] (*Tomcala v SSC Security Services Corp.* (15 June 2023), Regina QBG-RG-01793-2017 (SKKB) [*Merits Decision*]) and awarding \$4,494,385 in damages to SSC Security after allowing its claims against the Tomcalas (*Tomcala v SSC Security Services Corp.* (19 October 2023), Regina QBG-RG-01793-2017 (SKKB) [*Damages Award*])). The respondents cross-appeal against the *Merits Decision* and the *Damages Award* [together, the *Judgment*].

[2] SSC Security was known formerly both as Assiniboia Capital Corp. [ACC] and as Input Capital Corp. [ICC]. Gord Nystuen, who was a principal of ACC and ICC and is a principal of SSC Security, is not a party to the Tomcalas' appeal because the Tomcalas abandoned their claims against him and against the former corporate names of SSC Security at the conclusion of the trial.

[3] The Tomcalas are farmers. In 2010, they entered two contracts with ACC or ICLP regarding the provision of input capital for the production and delivery of canola. Frank and Laurie Tomcala signed one contract, and Ryan Tomcala executed another, both with ACC/ICLP as the party opposite [Initial Contracts]. For the 2011 crop-year, those relationships were merged under a single contract between the Tomcalas and ICLP [2011 Agreement], and that arrangement continued for the 2012 crop-year [2012 Agreement]. The parties restructured their relationship in 2013 [2013 Restructuring Agreement], following which the Tomcalas annually entered streaming contracts with ICC (under which ICC provided input capital to the Tomcalas in exchange for future deliveries of canola over a series of years [Streaming Contracts]) and ad hoc agreements [Side Deals] for the delivery of canola. In 2015, the parties again restructured their relationship to address the Tomcalas' outstanding obligations and their requests for ongoing input capital [2015 Restructuring Agreement]. The Tomcalas did not initially fully perform under any of these agreements and, as their obligations matured, their cumulative liability grew (beginning with \$270,341 under the Initial Contracts and ending at \$4,494,385 under the *Damages Award*).

[4] In 2016, despite having a bumper crop, the Tomcalas failed to deliver the contracted-for amount of canola to ICC because much of their crop had been stolen. The parties' relationship deteriorated, and, early in 2017, the Tomcalas sued the respondents, seeking compensation for alleged misrepresentations in the marketing of the input-capital arrangements. SSC Security counter-sued, claiming damages for the non-delivery of canola, and, in a separate action, sued to enforce mortgages and collateral security it held over the Tomcalas' land and equipment.

[5] Among their multiple claims, the Tomcalas asserted that the parties' relationship was a partnership, that all contracts between them and the various parties-opposite were unenforceable because ICC was not licensed as a lender or registered as a financing corporation pursuant to *The Trust and Loan Corporations Act, 1997*, SS 1997, c T-22.2, and, alternatively, because the transactions under those contracts were unconscionable, relying latterly on *The Unconscionable Transactions Relief Act*, RSS 1978, c U-1.

[6] In the *Merits Decision*, the judge dismissed all of the Tomcalas' claims but concluded that the 2015 Restructuring Agreement and all contracts entered after that agreement were unconscionable. In the *Damages Award*, he found the Tomcalas liable to repay money to SSC Security that it had advanced to them under and after the 2015 Restructuring Agreement. He reached that result after reviewing *The Sale of Goods Act*, RSS 1978, c S-1 [*SGA*], and saying he was applying the doctrine of unjust enrichment.

[7] The Tomcalas' appeal against the *Judgment* by asking a central question: did the judge err by finding that they and ACC/ICLP had entered joint ventures, as opposed to partnerships, under the Initial Contracts? If the parties' relationship began as a partnership, then the Tomcalas submit that, while its terms could have been varied, the partnership itself could only have been dissolved by the parties pursuant to *The Partnership Act*, RSS 1978, c P-3, a legal fact which, if established, they say would undermine the soundness of the judge's liability analysis and his damages calculations.

[8] The respondents cross-appeal against the judge's conclusion that the 2015 Restructuring Agreement and the 2015-and-later Streaming Contracts and ad hoc Side-Deals were unconscionable. They also cross-appeal against the *Damages Award*, arguing that the judge erred in his approach to quantifying damages and that, when properly calculated under the *SGA*, their

damages were \$10,273,935.42 (if the post-2014 agreements were not unconscionable) or \$8,607,820.61 (if they were).

[9] Having reviewed the *Judgment* and having considered the record in the context of the issues raised in the hearing of the appeal and the cross-appeal, and having received written and oral submissions from counsel, I conclude that the appeal and the cross-appeal must be dismissed.

II. ANALYSIS

[10] Although the Tomcalas' notice of appeal contains 52 separate grounds, in their factum and in oral argument, they focused on the question of whether the judge had erred "in finding that there was a joint venture but not a partnership" or "in his approach to remedies", including arguments under the *SGA, The Trust and Loan Corporations Act, 1997* and *The Unconscionable Transactions Relief Act*. In the cross-appeal, SSC Security alleged that the judge erred when he concluded that agreements between the parties were unconscionable and when assessing the damages owing to it.

[11] Taken together, two global questions are raised by the appeal and cross-appeal. The first, which overlaps the second, relates to liability. It is whether the judge misapprehended the nature of the legal relationship as between the Tomcalas and ACC/ICLP in 2010 or as between the Tomcalas and ICC after 2015. The second is about damages. It is whether the judge properly approached the quantification of damages, which largely depends on how the first question is answered.

A. A Joint Venture Relationship

[12] The Tomcalas' arguments about the judge erroneously finding them liable to pay damages to SSC Security are premised on an assertion that they had entered into a partnership with ACC/ICLP in 2010 that continued under the annual Streaming Contracts after 2013.

1. 2010-2012: Joint Venture Agreements

[13] While their terms differ in some material respects, the judge found in the *Merits Decision* that the Initial Contracts as well as the subsequent 2011 and 2012 Agreements were contracts between the Tomcalas and ACC/ICLP to enter a joint venture with respect to the crops grown in

each of 2010, 2011 and 2012 [JV Agreements]. He rejected the Tomcalas' proposition that the parties had formed a partnership.

[14] As a side note, the judge observed that the respondent contracting party in the JV Agreements was styled as ACC but that the contracts had been executed on behalf of ICLP by Input Capital GP Corp., its general partner. After making that observation, he referred to that party as "ACC/ICLP". Like the judge, I will refer to the party contracting opposite the Tomcalas in these agreements as ACC/ICLP.

[15] As I understand the arguments the Tomcalas made at trial, they asserted that they had never read the Initial Contracts, did not know what they meant and had relied on representations by Mr. Nystuen that the relationship between the parties was a partnership. Essentially, they sought to marginalise the probative value of the text of the written agreements in determining the nature of the relationships between the parties, preferring their own parol evidence to the contrary.

[16] In the *Merits Decision*, the judge identified and followed the approach laid down in *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 [*Sattva*], when he interpreted the JV Agreements and the parties' rights and obligations thereunder. Employing that approach, the text of those contracts did not leave the judge with any uncertainty as to the parties' mutual intentions regarding the nature of their relationship. They were, in his assessment, joint venture agreements. He rejected the Tomcalas' testimony to the contrary.

[17] Under the Initial Contracts, the judge found that ACC/ICLP had agreed to provide a total upfront payment to the Tomcalas of \$457,000, and the Tomcalas had covenanted to deliver canola grown on specific acres of farmland to ACC/ICLP, with crop insurance proceeds (if any became payable) to be shared equally. Although the Initial Contracts referred to a "Partnership's interest" in the yield, the judge held that this was a reference to ICLP (*Merits Decision* at para 161), which was itself a limited partnership. He interpreted the overall meaning of the Initial Contracts in this way:

[159] The two agreements executed in March of 2010 [i.e., the Initial Contracts] were essentially the same other than acreages in each for Frank and for Ryan and provided that the farmers (Frank and Ryan) would each allocate acreage to canola. ACC/ICLP would provide an up-front payment to the farmer (Frank or Ryan) of \$100 per acre which was designated for canola growing i.e. toward the production of canola in the first year. In return the farmer would keep 50% of the production on the first 26 bushels per acre and

ACC/ICLP would receive 50% of the production on the first 26 bushels per acre. If the crop produced exceeded 26 bushels per acre the farmer would keep 83% of the additional production and ACC/ICLP would receive 17% of the additional canola produced (the bonus production). Finally, any proceeds of crop insurance would be shared 50/50.

[163] Frank undertook to allocate 2,570 acres to the joint venture and Ryan undertook to allocate 2,000. On these acres, funding in the amount of \$257,000 and \$200,000 respectively was agreed to be advanced to the Tomcalas. It is notable that there is no minimum number of tonnes required by the 2010 contract.

[164] The correct understanding of the agreement the Tomcalas entered into with ACC/ICLP was a joint venture, where both parties, producer (the Tomcalas) and funder (ACC), were taking a risk on the producers seeding and harvesting canola on a specified number of acres, aided in part by the infusion of \$100 per acre of input capital for such enterprise by the funder. This initial agreement allocated some risk or success and failure to each of the participants in the joint venture.

[165] Specifically, ACC/ICLP's entitlement in the event of a bad crop was to 50% of the canola actually grown and 50% of the crop insurance payments received by the farmer. Of note is the fact that there was no guarantee that ACC and ICLP would receive 13 bushels per acre of canola, or a corresponding debt would be created for the Tomcalas.

[18] In the *Merits Decision*, when setting out his key findings, the judge summarised the JV Agreements in these terms:

[390] The relationship between ACC/ICC and the Tomcalas was not a partnership, nor carried with it the stated expectations the Tomcalas testified to and submitted in argument. In the first three years (2010–2012) it was a joint venture, the risks of which were spelled out in the initial agreements or through the discussion and conduct of the parties as interpreted through the surrounding circumstances. These did not include the notion that ACC/ICC would advance funds and whatever happened happened, including that a failure to seed canola acres with the input funds meant the Tomcalas simply kept the money with no obligation in return.

[391] ACC/ICC did not undertake to fund the Tomcalas in 2010–2012 regardless of the circumstances and in the event the input funds advanced were not used to seed canola on the targeted number of acres. Rather, it is clear that the funds were being advanced to give the opportunity of a canola crop to be seeded, grown, and harvested. The funds being advanced were an investment in the seeding, growth and harvest of a crop or alternately the payment of crop insurance. All parties understood or ought to have understood these basic terms.

[19] Interpreting the parties' rights and obligations under the JV Agreements through the text of those agreements, the judge rejected the Tomcalas' proposition that the parties had mutually intended to enter into a partnership, finding that each Initial Contract had established a joint venture, that Mr. Nystuen had not represented that ACC/ICLP had intended to partner with the Tomcalas and, moreover, that each JV Agreement contained a "no partnership" clause (Initial Contracts):

10.07 No partnership is created by this Agreement. Nothing contained in this Agreement shall be or shall be [*sic*] deemed to constitute the parties hereto as partners nor as agents for the other, nor any other relationship whereby either could be held liable for any act or omission of the other. Neither party shall have any authority to act for the other or incur any obligations on behalf of the other save and except as is specifically provided for in this Agreement.

[20] In their appeal, the Tomcalas submit that the judge erred because he should have ignored the no-partnership clauses in the parties' contracts. They point to jurisprudence in which courts have not given effect to express no-partnership clauses in agreements to find that a partnership exists, citing: *Adam v Newbigging* (1888), 13 AC 308 (UKHL); *Weiner v Harris*, [1910] 1 KB 285 (UKCA), per Cozens-Hardy M.R.; *Lansing Building Supply (Ontario) Ltd. v Ierullo*, 1989 CanLII 4202, 71 OR (2d) 173 (ONDC); *Hayes v Continental Distributors Ltd.*, 1991 CanLII 1065 (BCSC), aff'd 1992 CanLII 5982, [1993] 2 WWR 749 (BCCA), leave to appeal to SCC refused [1993] 2 SCR viii; *CCLC Technologies Inc. v Canada (National Revenue)*, 1995 CanLII 19064, 103 FTR 292, leave to appeal to SCC refused 223 NR 158 (note) (FCTD); *Rezek v Hays*, 2005 FCA 227, leave to appeal to SCC refused 349 NR 396 (note); as well as referring to the Alberta Law Reform Institute, *Joint Ventures*, Final Report 99 (May 2012).

[21] I do not reject the premise of the Tomcalas' argument. Where ambiguity arises from the text of a contract as to the mutual intention of the parties, an interpreting court could, with an appropriately supporting factual matrix, resolve the ambiguity in a way that contradicts an express term of that contract. The validity of that proposition does not, however, establish error in the judge's interpretation of the JV Agreements.

[22] The Tomcalas argue that the judge erred in the interpretation exercise because he did not ask whether the factual matrix showed that it was the mutual intention of the parties to establish a partnership – i.e., the “carrying on [of] a business in common with a view of profit” (s. 3(1) of *The Partnership Act*; see also *Backman v Canada*, 2001 SCC 10). However, to compel appellate intervention under this line of reasoning, the Tomcalas would have first had to establish two palpable errors on the judge's part. The first being that he erred when interpreting the text of the JV Agreements by determining that there was no ambiguity about the parties' mutual intention to enter into joint ventures. Given the Tomcalas' position on this point and the reasoning in the *Judgment*, I fail to see how the judge could be said to have ignored their assertion that an aspect of the interpretive exercise involved asking whether the parties intended to carry on a business in

common with a view of profit. The second being that the judge erred by rejecting the Tomcalas' parol evidence that contradicted the express language of the JV Agreements. Even if those errors were established, which in my view they were not, there are limits to the reach of the Tomcalas' arguments because, as Rothstein J. wrote in *Sattva*, "[w]hile the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement" (at para 57).

[23] Respectfully, I am unable to see how it was an error for the judge to reach an interpretation that accorded with the unambiguous and express language of the contracts in question. Clause 10.07, quoted above, could hardly be clearer: "No partnership is created by this Agreement". Furthermore, in my assessment, the judge properly relied upon the surrounding circumstances *to deepen* his "understanding of the mutual and objective intentions of the parties as expressed in the words of the contract" (*Sattva* at para 57), which he understood to be to enter into a joint venture.

[24] Under a related argument involving the indicia of partnership identified in *Blackman*, the Tomcalas assert that the judge erred because he failed to consider that the terms of the JV Agreements supported "*at least 7 traditional common law factors*" indicating that the parties' relationship was a partnership (emphasis in the Tomcalas' factum). It is difficult, however, to discern from their argument what terms or surrounding circumstances relevant to the parties' mutual intention regarding their relationship were overlooked by the judge. The judge provided lengthy analyses of the JV Agreements and the circumstances surrounding their execution in which he, directly or indirectly, considered evidence relevant to the indicia of partnership identified in *Blackman* and by the Tomcalas in this appeal. The judge, however, did not draw from that evidence the inferences that the Tomcalas had sought.

[25] For example, with respect to joint decision-making expected in a partnership, the judge concluded that "the Tomcalas maintained their autonomy and decision-making capacity on what to do with their farm year to year up until September of 2016" (at para 403). As another example, when addressing the claim that Mr. Nystuen had negligently misrepresented the nature of the relationship being formed, the judge soundly rejected the Tomcalas' assertion that Mr. Nystuen had said that the parties would be sharing profits and losses as would partners:

[373] In this instance the first problem [with the claim of negligent misrepresentation] is that an untrue, inaccurate or misleading representation is absent. I do not find that Mr. Nystuen represented that there would be a partnership whereby ACC/ICC would advance funds and have no expectation that they would be repaid. This defies logic and I find was not what he stated to the Tomcalas. I accept his evidence on this point as I find it consistent and credible. He was in a business, not a non-profit or charitable organization.

...

[375] The Tomcalas argue that Mr. Nystuen was not fully familiar with the contracts and such terms as “joint venture” and “without prejudice” were not terms he could explain extemporaneously, and therefore it had to be a partnership Mr. Nystuen had told the Tomcalas they were in together. However, one does not need to fully explain all details of the agreement for there to be no misrepresentation. Mr. Nystuen continued to tell the Tomcalas that they were not responsible for each other’s debts, thus stating in lay terms this was not a partnership. The agreement itself had a specific provision which stated this was not a partnership.

...

[379] The fourth criteria [necessary to establish negligent misrepresentation] is also not met in this instance. Even if the Tomcalas fully believe they heard Mr. Nystuen say something equivalent to “if you don’t make money, we don’t make money”, that is both somewhat self evident by the terms of the agreement and clearly has limits. To believe that something said of this sort meant ACC/ICC was content to never see a profit from their relationship with the Tomcalas is not reasonable. This is, however, in essence, what the Tomcalas say was their arrangement with ICC - that regardless of any factors, if they did not make a profit, ICC would be content to lose money on an indefinite basis with them. This does not meet the reasonableness threshold required.

[26] The Tomcalas on appeal attempted to isolate the judge’s findings of fact that negated an indication of partnership as only applying to the cause of action in respect of which they were made – like the forgoing facts, which were made under the claim of negligent misrepresentation. That is an untenable proposition. If a finding made in respect of one claim or cause of action is relevant and probative of an issue under a different claim or cause of action based on the same factual circumstances, it would be an error for a judge to fail to take it into account or to make an inconsistent or contrary finding when evaluating the merit of that other claim or cause of action. Which is to say that the Tomcalas’ assertion that the judge overlooked “*at least 7*” indicia of partnership is not supported by his findings of fact or his legal analyses in the *Judgment*.

[27] On the bottom line of my assessment, the Tomcalas’ argument that the judge’s analysis erroneously failed to conclude that the parties had intended to form a partnership under the JV Agreements must be rejected. They have not established that the judge palpably erred when, based on the text of the JV Agreements and the circumstances surrounding their execution, he determined that the parties had entered joint ventures.

2. 2013: A Restructured Relationship

[28] Even if the judge had erred in his interpretation of the JV Agreements, the legal relationship between the parties to this litigation was fundamentally altered in 2013 – not least by the fact that the contracting parties changed.

[29] The impetus for the 2013 reorganisation (and ultimately for this litigation) has its origins in the 2010 crop year. That was an unusually wet year. Many farmers were unable to grow a crop. In the Tomcalas’ case, it was too wet to seed much of their land and, therefore, they did not produce much canola. This resulted in unfulfilled obligations on both sides of the Initial Contracts.

[30] As the judge observed, the Tomcalas would have satisfied their contractual obligations under the Initial Contracts by delivering to ACC/ICLP 50% of the canola they had grown in 2010 (a value of \$203,869¹) along with 50% of the crop insurance payments they had received (a value of \$130,525). That, however, did not completely occur. ACC/ICLP only received \$64,053 from the Tomcalas from the crop produced in 2010 and no share of the crop-insurance payments. To address the shortfall of \$270,341, the parties proceeded under a verbal agreement that the Tomcalas’ outstanding obligations under the Initial Contracts would be “rolled forward” (at para 196).

[31] The judge found the parties had verbally agreed that \$240,710 of the \$368,670 (\$100 per acre) ACC/ICLP had advanced, but which the Tomcalas had not used for seeding, was “amounts owing” by the Tomcalas as a debt (*Merits Decision* at paras 167 and 168). He later described this collateral agreement in these terms:

[206] The agreement struck after the 2010 crop year was that the Tomcalas’ Crop Insurance would be kept by the Tomcalas and the capital overinvestment from ACC/ICLP for unseeded acres would be considered an advance for 2011 and added to what should ultimately come back to ACC/ICLP in 2011.

[207] Thus the perceived over payment of \$240,710 by ACC/ICLP and received by the Tomcalas for the investment in the seeding of canola acreage (or in lieu thereof the provision of Crop Insurance) was considered appropriately to be credited by ACC/ICLP to itself. ACC/ICLP submits it never intended that the Tomcalas would be paid per acre for acres which could not be seeded and for which no Crop Insurance was available. It was, however, also ACC/ICLP’s underlying assumption that seeding would occur to garner the

¹ There are minor inconsistencies in the dollar amounts set out in the *Judgment*, which seem to result at times from rounding or because a tonnage rate was slightly higher than the per-bushel rate. I have ignored these discrepancies as none were material to the issues in the appeal or cross-appeal.

\$100 per acre and if something went poorly with the 2010 seeded acres that Crop Insurance paid would be available as the backfill.

[32] The judge calculated the Tomcalas' obligation by taking into account the fact that ACC/ICLP had failed to advance \$88,330 of the covenanted \$457,000 of input capital in 2010. In the judge's assessment, this unadvanced amount had to be offset against the Tomcalas' debt, leaving a shortfall of \$182,011 owing to ACC/ICLP. Later in the *Merits Decision*, the judge set out his analysis in this regard:

[209] I find that the calculation that is compliant with the agreement is that \$334,384 ought to have been paid by Frank and Ryan to ACC/ICLP in 2010 based on actual canola harvested and Crop Insurance received. Actually paid to ACC/ICLP instead of the \$334,384 was \$64,053. Thus, not considering the total payment ACC/ICLP agreed to make, the amount owing by the Tomcalas to ICC at the end of the 2010 crop year would, on this view, be \$270,331.

[210] ACC calculated the amount still owed differently - based on the percentage of unseeded acres perspective - and derived a total of \$240,771 that was outstanding. This was based on inputs not utilized through seeded acres after the amount paid by ACC/ICLP and repaid by the Tomcalas was considered.

[211] However, before leaving 2010, what of the unpaid \$100 per acre total from ACC/ICLP in 2010? ACC/ICLP paid the Tomcalas \$368,670 of the \$457,000 agreed to in the first joint venture agreement. This left \$88,330 in funds not allocated to the Tomcalas in the first place. ACC/ICLP was to provide \$457,000 in input capital so that the Tomcalas could lived up to their end of the bargain by trying to seed all the acres targeted.

[212] The unpaid \$88,330 which was required in order to arrive at the full \$457,000 for 2010 must be factored into the equation. The \$270,331 ought therefore to be reduced by \$88,330, leaving \$182,001 unpaid in 2010. I find that application of the contract would have resulted in the Tomcalas owing \$182,001 and that is the amount that ought to have been "rolled forward".

[33] As mentioned, the poor crop in 2010 resulted in some changes to the relationship, which were put into effect under the 2011 Agreement. That ensuing agreement contained more specific terms regarding the parties' rights and obligations if there were to be a shortfall in yield in 2011.

[34] Under the 2011 Agreement, ACC/ICLP covenanted to provide the Tomcalas with input capital of \$925,000 for 4,000 acres (\$231.25 per acre) in exchange for 100% of the first 20 bushels of canola that they produced per acre with excess bushels up to 2,600 tonnes (114,640 bushels) split evenly, and, in the event of a poor crop, 100% of crop insurance received, if any. The judge held that this meant that "in essence the Tomcalas were pre-selling canola to ICC at the rate of \$355.77 per tonne" under the 2011 Agreement (*Merits Decision* at para 171). However, the judge

observed that “[n]othing in the [2011 Agreement] specifically addresses the ‘shortfall’ from 2010” (at para 172).

[35] In 2011, the Tomcalas seeded only 3,163 acres to canola. The judge found that they had no explanation for why they had not complied with their covenant to seed 4,000 acres, noting that they had seeded “many other crops on land they had access to including barley and wheat” (at para 216). ACC/ICLP took the position at trial that the Tomcalas’ failure had added \$295,896 to their debt, given the yield that they had obtained from canola-seeded acreage. The judge, however, found that the amount was larger: “The Tomcalas’ obligation to ICC, having grown by a further \$363,209 in 2011, when combined with 2010’s obligation of \$182,001 meant their total debt to ICC at the end of the 2011 joint venture agreement stood at \$545,210” (at para 226).

[36] The parties continued their relationship into 2012 on “essentially unaltered” terms or “essentially the same terms as 2011” but reduced the seeded acreage to 3,500 acres (*Merits Decision* at paras 177, 227). Under the 2012 Agreement, the total input capital provided by ACC/ICLP was maintained at \$925,000, which converted equals an increase to \$264.29 per acre. The division of crop production and crop insurance among the parties remained the same as in 2011.

[37] In 2012, another wet year, the Tomcalas seeded only 1,084 acres to canola. They grew 14,840 bushels of canola, which the judge calculated called for a \$178,382.10 payment to ACC/ICLP. The Tomcalas also received \$311,200 in crop insurance, none of which was shared with ACC/ICLP. Summing up, the judge wrote:

[234] Thus, to apply the interpretation which saw the funding flow to the Tomcalas and in return they provide all production less than 3,000 tonnes, there could well have been \$178,382.10 in actual canola production marketed. There was a total of \$311,200 in Crop Insurance proceeds. Deducting the \$112,443 paid in January of 2013 by the Tomcalas to ACC/ICLP, this left, on this perspective, \$377,139.10 owing for 2012.

[38] The judge later adjusted the amount of crop insurance to account for the fact that a percentage of it had been paid in respect of unseeded acreage not covered by the 2012 Agreement. He wrote:

[238] If the percentage approach is utilized (Crop Insurance as a portion of the whole), the \$178,381 would be added to the 72.3% of \$311,200, (equalling \$224,997), thus the payment would at minimum need to be \$403,378. Having paid only \$112,443, this left \$290,935 outstanding for 2012.

[39] After considering SSC Security's arguments regarding the debt owed by the Tomcalas to ACC/ICLP under the JV Agreements, the judge wrote:

[243] The total outstanding obligation according to the joint venture agreements by the end of the 2012 crop season on the ACC/ICLP model was \$1,018,707.22, being the obligation from 2010, 2011 and 2012 cumulatively calculated.

[244] However, on the calculation that is the correct approach it totals \$627,612. I conclude that the 2010 through 2012 Joint Venture agreements correctly applied resulted in \$627,612 owing from the Tomcalas to ACC/ICLP. ACC/ICLP noted it was in a different amount, as can be seen in R-21 (\$1,386,102.39), but I conclude the number using their approach based on the actual production records ought to have been \$1,018,707.22.

[40] Subsequent to 2012 and outside the JV Agreements, ACC/ICLP advanced to the Tomcalas, or paid third parties on their behalf, a total of \$421,272.38. SSC Security submitted that this brought the total debt owing to ACC/ICLP to \$1,439,979.60. The judge found that these collateral payments had increased the amount owing to \$1,048,884. However, the judge held that the parties, acting on their own understanding of the situation, had agreed in February of 2013 [2013 Restructuring Agreement] to deal with the debt as follows:

[247] Ultimately, though, whatever the parties themselves may have honestly believed, they agreed on February 4, 2013 that of the \$2,528,200 that was to be credited to the Tomcalas by virtue of the 2013 streaming contract, that \$831,689 was to be used to retire the debt incurred in the 2010-2012 (inclusive) joint venture agreements and that \$421,272.38 provided in advance of the 2013 streaming contract would be withheld and credited to the Tomcalas, not a further cash payment. They executed a receipt and payment direction which directed \$1,275,239 to go to Frank, Laurie and Ryan and \$1,252,961 to be credited to ICLP making up the \$2,528,200.

[248] Therefore, \$1,252,961 was the amount which was agreed by all would retire the Tomcalas outstanding obligations to ICC for 2010–2012 including for the advances of \$421,272 linked to the 2013 streaming contract.

[41] Given the judge's conclusions with respect to the Tomcalas' outstanding obligations, there is no merit to their submissions about how his failure to recognise the existence and continuation of a partnership through to 2017 adversely affected his handling of the subsequent contracts between the parties and his calculation of the damages owing to SSC Security, which they submit would be calculated differently upon dissolution of a partnership.

B. The Unconscionable Agreements

[42] The judge's interpretations and findings with respect to the various contracts between the parties are also relevant in the Tomcalas' cross-appeal. As noted, SSC Security alleges that the

judge erred by determining that a restructuring in 2015 had rendered the ongoing relationship unconscionable. In legal effect, the judge found that the 2015 Restructuring Agreement and all subsequent agreements were unconscionable. Those findings are predicated on the evolution of the Tomcalas' outstanding obligations to ICC following the 2013 Restructuring Agreement, which led to the Streaming Contracts in 2013.

1. 2013-2015: Streaming Contracts and Security Agreements

[43] In 2013, a “new financing vehicle was introduced to the Tomcalas – the streaming agreement” (*Merits Decision* at para 255), which the judge described as changing the relationship between the parties as follows:

[256] The streaming agreement provided for funds to be advanced and a certain amount of canola to be delivered each year for six years. Laurie and Frank signed the first streaming contract. A signature appears for Ryan, but he does not confirm it was him who signed it. Laurie denies the signature is hers.

[257] The issue of application of payment for a crop and/or crop insurance in a bad year being satisfaction was altered in the streaming contracts by virtue of the structure of the agreement and paras. 9.01(b), 9.02 and 9.03 which obligated the farm operator to deliver the full amount of ICC's crop interest, but also to provide another commodity having a value equal to the then current canola crop promised if the full amount of base tonnes could not be delivered for reasons beyond the control of the farm operator. Thus while crop insurance was mandated by para. 6.05, it was not what would stand in lieu of crop not delivered.

[258] Going forward then from 2013 onward, there was therefore no longer an agreement that crop or insurance would satisfy ICC's infusion of cash interest.

...

[267] On February 4, 2013 ICC (as ICLP was wound down) and the Tomcalas executed the first streaming contract. Funding of \$2,528,000 was negotiated in exchange for 1,500 tonnes of canola being provided to ICC each year for six years (2013-2018 inclusive). As noted, the \$2,528,000 would cover the existing obligation from the joint venture agreements 2010-2012 inclusive and inject a further \$1,275,239 to go to Frank, Laurie and Ryan. Security was given for the first time along with the streaming contract. A collateral security agreement dated February 4, 2013 and accompanying mortgages were provided.

[44] Although the judge made individual findings about the JV Agreements and the 2013 Streaming Contract, he made no specific findings about the other pre-2015 contracts. In short, however, the judge found “there was no unconscionable transaction in any of the agreements whether the joint venture, streaming, amendments, or security arrangements including the mortgages executed prior to the restructuring agreement of September 2015” (at para 335).

a. 2013: A Streaming Contract and a Side Deal

[45] As to the specific terms of the 2013 Streaming Contract, the judge found that ICC (now the respondent-party to the relationship) had covenanted to provide the Tomcalas with \$2,528,200 in exchange for 1,500 tonnes of canola each year for six years (2013 to 2018). That sum was composed of \$1,252,961 to retire the Tomcalas' then-existing debt owing to ACC/ICLP (which became an obligation owing to ICC), and \$1,275,239 paid to the Tomcalas for future delivery of canola. As noted, the Tomcalas also entered into security agreements with ICC collateral to the 2013 Streaming Contract, granting it mortgages as well as security interests over their personal property to secure their performance under the 2013 Streaming Contract.

[46] In terms of fulfillment, the Tomcalas delivered 1,265.69 tonnes of canola to ICC but, on top of the 1,500 that were supposed to be delivered under the 2013 Streaming Contract, in January of 2014 the Tomcalas had negotiated an ad hoc deal to deliver another 975 tonnes of canola from the 2013 crop to ICC for which it paid \$430,000 (\$441 per tonne). The judge calculated that this left an aggregate shortfall of "1,209.31 tonnes of canola outstanding for the 2013 obligations" (*Merits Decision* at para 274). The Tomcalas satisfied this outstanding delivery obligation from 2013 through the allocation of 1,221.04 tonnes of canola they delivered to ICC in 2014, which, the judge noted, "exceeded the outstanding obligation by 11.73 tonnes likely due to the bonus tonne arrangement" (at para 275).

[47] In reference to the Tomcalas' allegation that the 2013 Streaming Contract was unconscionable, the judge wrote:

[268] There is nothing unusual about this agreement and I find nothing in the evidence which suggests the terms were not fully understood and accepted by the parties. There was no situation of pressure being applied by Mr. Nystuen on the Tomcalas. There is no evidence of any capacity concerns in the Tomcalas in any respect. It was a straightforward agreement for the Tomcalas to obtain funding for their use in farming canola which was being purchased in advance by ICC at an identifiable rate. It was not an improvident bargain nor was anyone's free and independent autonomy compromised by the circumstances then at play.

b. 2014: A Streaming Contract and Two Side Deals

[48] The Tomcalas agreed to deliver 1,500 tonnes of canola under the 2014 Streaming Contract in exchange for the \$2,528,000 they had received in 2013. They also negotiated two Side Deals. Under the first, they agreed to sell 800 tonnes of canola per year for the four years beginning in

2014 in exchange for \$1,000,000 (\$250 per tonne). In the second 2014 Side Deal, the Tomcalas verbally agreed to sell an additional 600 tonnes in 2014 for \$250,000 (\$416.67 per tonne). The judge found that, in total, the Tomcalas had agreed to deliver 2,900 tonnes of canola to ICC in 2014. After accounting for actual deliveries, the judge wrote:

[279] This left 1,948.98 tonnes of canola outstanding for the 2014 obligations. As the outstanding 2013 amounts were retired with 2014 canola sales, 1,948.98 tonnes was the total obligation still outstanding at the end of 2014.

[49] Under the terms of the Streaming Contracts, the Tomcalas' outstanding obligations from 2014 were satisfied through the allocation of 2,064.87 tonnes of the canola they delivered to ICC in 2015, again "exceeding the outstanding obligation by 115.89 tonnes, likely being the bonus tonnes" (at para 280).

c. 2015: A Streaming Contract and Two Side Deals

[50] On March 31, 2015, ICC advanced \$2,200,000 to the Tomcalas and they covenanted to deliver 5,500 tonnes of canola from their 2015 crop (\$400 per tonne) in addition to a streaming contract for 2015. On July 28, 2015, ICC advanced a further \$300,000 and the Tomcalas agreed to deliver an additional 700 tonnes of canola (\$428.57 per tonne).

[51] In 2015, the Tomcalas delivered a total of 4,960.83 tonnes of canola and 1,025.40 "equivalent tonnes" of wheat, faba beans and barley to ICC of which 3,921.36 tonnes or equivalent tonnes were allocated to their 2015 delivery obligations (*Merits Decision* at paras 282-283). However, under the 2015 Streaming Contract and Side Deals, ICC had paid for the delivery of 8,500 tonnes of canola in 2015. The judge described the Tomcalas' outstanding obligations at the end of 2015 in these terms:

[286] On a straight by-the-year analysis, the shortfall for 2015 was therefore 2,513.77 tonnes, however as the previous year's deficit was being retired through 2,064.89 tonnes from the 2015 harvest going to the 2014 outstanding amount, it left 3,921 tonnes to be applied to the 8,500 tonne obligation. The shortfall for 2015 (total shortfall) was therefore 4,578.64 tonnes.

[287] This left 4,578.64 tonnes of canola outstanding for the 2015 obligations. As the outstanding 2014 amounts were retired with 2015 canola sales, 4,578.64 tonnes was the total obligation still outstanding at the end of 2015.

1. 2015-2017: Unconscionable Agreements

a. 2015: A Restructuring Agreement

[52] On September 21, 2015, ICC and the Tomcalas entered into the 2015 Restructuring Agreement whereby they agreed to sell and deliver their entire 2016 crop to ICC in exchange for an upfront payment of \$3,000,000, which worked out to 7,692 tonnes of canola at \$390 per tonne. Notably, the judge found that this agreement was unconscionable. The following excerpt from the *Merits Decision* contains the judge's conclusion in this regard:

[335] I therefore conclude that there was no unconscionable transaction in any of the agreements whether the joint venture, streaming, amendments, or security arrangements including the mortgages executed prior to the restructuring agreement of September 2015. At that point the fundamental inequality of bargaining power, the Tomcalas' vulnerability given their financial situation, and the improvidence of the deal made that agreement unconscionable.

[53] In the later-written *Damages Award*, the judge summarised his conclusions with respect to the 2015 Restructuring Agreement and the Tomcalas' obligations to ICC in this way:

[19] I conclude that the obligations preceding the 2015 restructuring agreement, being earlier agreements within the series of transactions culminating in the 2015 restructuring agreement, were subsumed in and eclipsed by the 2015 restructuring agreement which was unconscionable. Given the nature of that agreement and the ongoing interactions of the parties here, the result at law of this is that the relationship itself became unconscionable (as underscored and perpetuated in the 2016 restructuring and subsequent agreements), and thereafter the obligation of the Tomcalas became repayment of that which ICC had advanced to them and they had not repaid, along with the appropriate rate of interest.

(Emphasis added)

[54] In stating that "the relationship itself became unconscionable", I understand the judge to be saying that an inequality of bargaining power existed after the 2015 Restructuring Agreement and that the subsequent agreements were improvident, but only due to the financial circumstances of the Tomcalas, such that they were all unconscionable agreements.

b. 2016: A Streaming Contract and a Side Deal

[55] On May 12, 2016, the parties entered another ad hoc deal under which ICC advanced \$500,000 to the Tomcalas in exchange for the future delivery of a further 1,282 tonnes of canola (\$390 per tonne). They also amended the mortgages the Tomcalas had granted to ICC to increase the principal amounts secured thereby.

[56] The judge found that 2016 was a “very good year for the Tomcalas’ canola crop” (*Merits Decision* at para 289). They produced 6,256 tonnes of canola, averaging 62.5 bushels per acre. However, as mentioned, 2,964.45 tonnes of canola from the 2016 crop had been stolen. As a result, the canola the Tomcalas were able to physically deliver to ICC in 2016 left a significant cumulative shortfall. The judge explained:

[296] In the 2016 crop year the Tomcalas were supposed to provide to ICC the initial amount of 1,500 tonnes (February 4, 2013 agreement for payment of \$2,528,000) plus the 800 tonnes agreed to on March 31, 2014 (each year from 2014 - 2018 inclusive for the additional \$1,000,000). A Further 7,692.31 tonnes was added to the 2016 obligation on September 21, 2015 for the advance of \$3,000,000.

[297] The total tonnage was therefore 9,992.31 that was to be delivered by agreement as modified when additional advances were made for 2016. As indicated, ICC took the entire crop of all types to try to catch up the Tomcalas on their outstanding obligation.

[298] On a straight by-the-year analysis, the shortfall for 2016 was therefore 4,537.66 tonnes, however the previous year’s deficit was being retired so 4,629.55 tonnes were applied to 2015 obligations from the 2016 harvest. With just 825.13 tonnes being applied to the 2016 requirement the shortfall for 2016 (total shortfall) after 2015 was eliminated the shortfall was therefore a total of 9,167.18 tonnes.

[299] As of the end of the 2016 harvest cycle (March 31, 2017), the Tomcalas were behind in their obligation to that point by a total of 9,167.18 tonnes as all previous years’ shortfalls had effectively been eliminated.

[57] The judge remarked that, by the end of 2016, ICC had over seven years “advanced a total of \$10,007,148” to the Tomcalas but had only received deliveries of canola having a market value of \$6,675,180 (at para 302). As noted, the parties’ relationship deteriorated after 2016.

c. 2017: A Streaming Contract and the End of the Relationship

[58] On January 13, 2017, the Tomcalas and ICC entered a streaming contract whereby, in exchange for an up-front payment of \$1,449,242.49 by ICC (\$177.50 per tonne), the Tomcalas agreed to deliver 1,361 tonnes of canola in 2017 and each year thereafter up to and including 2022. ICC agreed to pay the Tomcalas a further \$177.50 per tonne upon delivery (for a total of \$355 per tonne). The judge found that this arrangement was unconscionable because an inequality of bargaining power remained after the 2015 Restructuring Agreement making the streaming contract an improvident bargain:

[355] I have found that upon the September 2015 restructuring agreement being executed it was an unconscionable transaction. This conclusion carries forward through to the 2017 streaming contract. The Tomcalas did not get their heads above water any further by the time of the 2017 streaming contract. The price was quite low even though it did provide for additional payments on delivery. They had no options and continued executing

whatever would get them another season. Here to they were excessively weakly position visa vi [*sic*] ICC, had no bargaining power, and continued on with what had now become an improvident bargain.

[59] While ICC advanced \$1,382,216.99 of the \$1,449,242.49 it had agreed to provide to the Tomcalas in 2017, the Tomcalas did not deliver any further canola to ICC after 2016. They commenced their action against ICC on July 14, 2017.

d. 2015-2017: Unconscionable Transactions

[60] In its cross-appeal, SSC Security conceded that the judge correctly identified the relevant principles of the doctrine of unconscionability as set forth in *Uber Technologies Inc. v Heller*, 2020 SCC 16 [*Heller*], and *Input Capital Corp. v Gustafson*, 2021 SKCA 56, leave to appeal to SCC appeal refused 2021 CanLII 129763 (SCC) [*Gustafson 2021*]. In *Heller*, the Supreme Court of Canada affirmed that the doctrine of unconscionability requires both an inequality of bargaining power and a resulting improvident bargain. SSC Security submitted that the judge erred in his application of the *Heller* test principally because there was nothing about the circumstances surrounding any of the Streaming Contracts that made them unconscionable. However, for the reasons that follow, I find that the judge did not palpably err when he concluded that the contracts were unconscionable.

[61] As to the first factor, *Heller* stands for the proposition that the courts must take a contextual approach when determining whether an inequality of bargaining power existed such that one party could not adequately protect their interests in the contracting process. Here, SSC Security argued that the Tomcalas were well-positioned to protect their own interests because they had been farming for over 40 years, Frank had attended university, they had experience with financial advisors and agrologists, they marketed their own grain, they farmed over 4,000 acres, they negotiated the purchase and lease of equipment, they only used lawyers when purchasing land, and they had experience with mortgage financing. SSC Security pointed out that Frank had acknowledged in his testimony that he understood the security he was granting to ICC in connection with the Streaming Contracts. Ryan testified that he had concerns with the mortgage security but nonetheless signed on. However, these observations are merely restatements of evidence that the judge took into account in his analysis. They do not disclose error in the judge's treatment of that evidence when considering the doctrine of unconscionability.

[62] SSC Security correctly acknowledged that *Heller* recognises that inequality of bargaining power can arise in various scenarios including “where a party is vulnerable due to financial desperation” (at para 70). It submitted that financial desperation is a relevant factor in the analysis, but that *Heller* does not support the proposition that inequality of bargaining power can be established on the basis of financial desperation alone. That may be fair, but the judge did not find that the inequality of bargaining power arose in late 2015 simply because the Tomcalas were desperate financially. There was considerable texture to that finding, as is evident from the judge’s reasons:

[329] However, by the end of 2015 growing season their obligation was higher than ever and they had no options other than to go to ICC and seek a large amount of cash to even hope to have a 2016 crop. They agreed to provide a total of 9,992.31 tonnes of canola or equivalent grain in 2016. This was neither realistic nor reasonable. I find they believed it was their only option and they did it in desperation to try something to turn the tide that was against them. They saw their farms slipping away and had few if any alternatives by this point in time. Lenders were not interested in providing them the kind of cash they would need to plant a large crop so as to dig out of the hole. They were not like Mr. Gustafson [in *Gustafson 2021*] in that they were unaware of the crisis they were in with their farms; they knew it all too well and felt it acutely every day. They also did not have significant other business interests which might balance off their financial troubles on the farm.

[330] Their position at that point was therefore excessively weak. They kept building a larger debt to ICC. The margins on sale of their product that might make a difference were not there as the canola was being sold at \$390 a tonne when the market was paying \$468.81. In this instance, there was very little “time value of money” at play as the additional 7,692.31 tonnes was to be provided in 2016, not several years down the road.

[63] SSC Security argued before us that it is not necessary for a court to make a finding of inequality of bargaining power if the bargain is not itself improvident. On the other hand, it is clear that the judge factored the nature of the bargain in this case into his analysis and conclusion about an inequality of bargaining power. Respectfully, I do not see an error in the judge’s handling of the bargaining power issue – the bargain itself is part of the context.

[64] Moreover, in *Heller* the Supreme Court said that judges should also take a contextual approach to the second indication of unconscionability, which is an improvident bargain. A bargain may be improvident if, at the time of contract formation, it unduly advantages the stronger party or unduly disadvantages the vulnerable party (at para 74). In this regard, SSC Security pointed out in its cross-appeal that the judge did not find that the Streaming Contracts were detailed or complex. They simply required the Tomcalas to deliver a quantity of canola each year at a specific

purchase price and set the terms for payment. In its factum, SSC Security posited that “there is nothing to suggest an experienced farmer would not understand or not knowingly assent to these transactional terms” but “it is these transactional terms which grounded the finding that the Streaming Contracts were unconscionable”. However, as I read the *Merits Decision*, the judge fully rejected the notion that the Tomcalas did not understand what they were signing and that they had done so knowingly, not least when he rejected their claims of *non est factum* at trial.

[65] In assessing the question of improvident bargain, I accept that SSC Security bore more risk from falling canola prices and (as was established at trial) from non-delivery and still find no palpable error in the judge’s conclusion that the post-2015 Streaming Contracts were improvident bargains for the Tomcalas. One of the factors mentioned by the judge is recognised in *Heller*, where the Court said that an indicator of an improvident bargain is “where the price of goods or services departs significantly from the usual market price” (at para 76). As noted, in the *Merits Decision*, the judge wrote, “[t]he margins on sale of their product that might make a difference were not there as the canola was being sold at \$390 a tonne when the market was paying \$468.81” (at para 330). The judge also understood that the Tomcalas were receiving large sums of money upfront and on more favourable terms than they could obtain elsewhere. In this regard, the heightened risk borne by SSC Security directly reflected the dire straits in which the Tomcalas had placed themselves. Even so, the judge recognised that, notwithstanding indicia of an improvident bargain, ICC was not acting unreasonably or taking advantage of the Tomcalas:

[331] I level no criticism of ICC here. From their perspective starting to get a return on their significant outlay was important and reasonable. The relative financial positions of each party here is of some significance contextually though as well. ICC had a sizable amount of capital available to it through its shareholders funding the start up. The Tomcalas on the other hand had themselves and whoever else might provide them funding, which was growing much smaller each year, resulting in no one who would provide the kind of resources they would need for a 2016 crop. This financial juxtaposition adds to the milieu such that in all the circumstances at that time this was both a severe inequality of bargaining power and became an improvident bargain for the Tomcalas.

[332] I make no finding that ICC acted improperly, falsely or deceptively. The basis that the transaction becomes unconscionable includes the context and circumstances which must consider the lead up to this event, the significant power differential, the fact that prices which earlier had been fair in those circumstances including that they were for a number of years and the size of the obligation for a single year became much too one-sided.

[333] I also do not find that ICC was responsible for the Tomcalas’ crisis – the Tomcalas had opportunities in several of the years leading up to the signing of the 2015 restructuring agreement to meet their obligations and substantially lessen them as a total debt and for whatever reasons did not do so. However, I also do not find that parsing fault or sorting out

contribution to the reason for the crisis is essential in all cases in order to ascertain if such an agreement was unconscionable. The time in which to evaluate the bargain and the context it is set in is at the time the contract is entered.

[66] SSC Security argued in its cross-appeal that the Tomcalas had received better prices per tonne of canola as the Streaming Contracts progressed, as well as upfront payments. It also pointed out that at least one contract called for price-splitting if canola sold for more than \$550 per tonne. It said that, overall, the prices ICC had paid did not represent a significant departure from the market price. Regardless of these assertions, the judge found, in one instance, that the contracted price of \$390 a tonne was below the market price of \$468.81. Moreover, the fact that contract prices were better here and there does not establish palpable error in the judge's conclusion that they were low throughout the post-2015 relationship regardless of the time value of money. It is no answer to point out that ICC paid a total of \$11,490,417 to the Tomcalas — the judge knew that. While it is true that the Tomcalas had the use of the considerable amount of funds ICC had advanced to them, the law does not say that an improvident bargain is one entirely without advantage or benefit to the vulnerable party.

[67] In *Heller*, the Supreme Court recognised that “[f]or a person who is in desperate circumstances, for example, almost *any* agreement will be an improvement over the status quo” (at para 76). The point being expressed in the preceding paragraph that “[i]mprovidence must be assessed contextually” to determine whether “the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized”, the Court giving the example of an undue advantage becoming “evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties” (at para 75).

[68] In short, as with the Tomcalas' assertions regarding the nature of the initial relationship, the judge declined to draw the inferences that SSC Security asked him to draw from the evidence about the providence (or lack of improvidence) of the bargains struck under the 2015 Restructuring Agreement and the agreements that followed. It has also failed to establish palpable error in the judge's findings or conclusions on the issue of unconscionability.

C. Damages

1. The *Merits Decision* and the *Damages Award*

[69] Overall, the judge found that, due to “a series of successive requests from the Tomcalas” – i.e., the Streaming Contracts and ad hoc Side-Deals – ICC and the Tomcalas had renegotiated their contractual arrangements to provide “the additional revenue the Tomcalas sought”, which ICC advanced to them “in exchange for additional canola deliveries” (*Merits Decision* at para 269).

[70] In the aggregate, the judge calculated that the Side Deals and amendments to the Streaming Contracts between 2014 and 2017 had resulted in ICC ultimately advancing approximately \$11,590,000 to the Tomcalas, or to third parties on their behalf, in exchange for the delivery of canola. However, approaching the issue of SSC Security’s damages from the perspective of the Tomcalas having been unjustly enriched, the judge observed that they had “received \$3,000,000 in September of 2015, \$500,000 in May of 2016 and \$1,449,242.49 (less \$67,025.50) in January of 2017, totaling \$4,882,217. While the contracts starting with the September 2015 restructuring agreement themselves are not binding, the money the Tomcalas received must be repaid with interest. They have had the use of it and must now return it with interest from the time it was advanced to them” (*Merits Decision* at para 414).

[71] The judge then considered how to quantify any damages related to contracted-for but undelivered canola under the *SGA* in the face of his finding on unconscionability. In this regard, he decided to calculate the value of any undelivered canola by following the model Currie J. had used in *Input Capital v Gustafson*, 2021 SKQB 250, aff’d 2022 SKCA 22 [*Gustafson Damages*], where he wrote:

[28] The principle underlying s. 50 [of the *SGA*] is that a buyer should be made whole for a seller’s non-delivery of goods. As s. 50(2) provides, the measure of damages is “the estimated loss directly and naturally resulting in the ordinary course of events from the seller’s breach of contract.”

[29] In this case, where the buyer has paid the contract price, the fair and reasonable approach to calculating Input Capital’s damages is to (a) award damages in the amount of the contract price that Input Capital in fact paid, but for which it received no canola, and (b) award damages calculated under s. 50(3). This approach will achieve the goal, set out in s. 50(2), of awarding “the estimated loss directly and naturally resulting in the ordinary course of events from the seller’s breach of contract.” In effect, the s. 50(3) presumption is rebutted to the extent that the measure of damages in this case also includes the amount of the contract price that Input Capital paid to Mr. Gustafson.

[30] Since the s. 50(3) determination (the difference between the market price and the contract price) is based on the contract price, the determination of Input Capital's total principal damages will be achieved by simply determining "the market or current price of the goods at the time or times when they ought to have been delivered". In this way Input Capital's damages for Mr. Gustafson's non-delivery will be determined under s. 50 of *The Sale of Goods Act*.

[72] However, because the judge found that "all canola contracted for and expected from 2013 through 2015 was delivered and that 916 tonnes was delivered pursuant to the 2016 contract" (at para 417), he gave the following instructions to the parties in the *Merits Decision*:

[418] Therefore it appears that an adjustment of the value of 916 tonnes should be given to the Tomcalas in their repayment of the money they are to pay back. At \$468.81 this comes to \$387,382.39 as a credit to their repayment of \$4,882,217. This is therefore \$4,494,835 plus 5% interest from the time the funds were advanced.

[419] Therefore, with application of the approach as set out in *Gustafson Damages*, ICC will prepare a further calculation of damages with this determination now in hand, and provide a copy to the court and to [counsel for the Tomcalas]. [Counsel for the Tomcalas] will have two weeks to provide any responding comments. In addition, he can provide comment on whether the mortgage interest rate is applicable to the unjust enrichment amount.

[420] From there I will finalize the damages portion of this judgment. As noted, the principles have been set out and applied in *Gustafson Damages* and if applicable, are to be applied here as well. This includes utilizing Statistics Canada data on the average sale price of canola and the interest component as determined in *Gustafson Damages*.

[73] As is evident, the *Damages Award* is the judge's calculation of damages following his receipt of the supplemental submissions from the parties. He began his reasons in the *Damages Award* by confirming the unenforceability of the parties' agreements on the basis of unconscionability:

[13] The upshot of this line of authorities is that the context of the series of transactions must be considered in light of a finding of unconscionability placed as it is amongst them at a point in time when the obligations, compounded as they were, must be considered together. Here, while the transactions initially were not unconscionable, the transaction and thereby the relationship turned into one that was unconscionable with the advent of the 2015 restructuring agreement. It converted the as yet unfulfilled obligations pursuant to the previous agreements, within the context of the now total control of the farming operation by ICC, into an unconscionable relationship. Thus, even the agreements which initially were not themselves unconscionable are caught by the net of unconscionability upon the execution of the 2015 restructuring agreement within the context of this relationship going forward.

[14] It would be a perverse outcome in this context for the pre-existing streaming contract to somehow survive the restructuring agreement. That conclusion may not be the case in all scenarios, but here it is so. The calculation of damages submitted by ICC demonstrates this. To find that the Tomcalas were literally on the ropes to the extent that they lost their freedom of choice within the relationship with ICC but they should still,

subsequently remain obligated for portions of transactions which in totality contributed to bringing them to that point is unfair, unreasonable and contrary to equity and law within the context of an unconscionable transaction such as this.

(Emphasis added)

[74] Then, speaking to the policy objectives that underpin the doctrine of unconscionability, the judge implicitly rejected the *SGA* approach to the quantification of SSC Security's damages by stating:

[16] The purpose of the law's treatment of unconscionable transactions is to ensure that the prejudice suffered by the party who had insufficient capacity to strike a fair and reasonable bargain and instead was compelled into an improvident one is not in essence forced to live with the consequences the highly unfair agreement created. In this context that means the Tomcalas are not on the one hand to be relieved from obligations imposed via an unconscionable transaction being set aside while at the same time being treated as if their obligations continue beyond the sort of transaction at issue here notwithstanding. This would not be how equity interacts or reacts.

[17] Pure detached logic may bring one to the conclusion that the previous agreement or agreements, themselves in isolation not being unconscionable, should be separated from the unconscionable transaction and thereby survive the setting aside going forward. However, that approach does not take into account the purpose of the law regarding unconscionable transactions and the remedies associated therein within this specific factual milieu.

[75] Next, drawing a parallel with the facts of *Eusanio v Janolino*, 1997 CanLII 1911, 10 RPR (3d) 56 (BCSC), the judge wrote:

[18] This situation is in some ways similar to *Eusanio*. In that case the underlying agreement for mortgage funds and a reasonable rate of interest was the fair and equitable agreement and the vastly increased payments forced upon the homeowners by the mortgage financier, described as being much more powerful, were set aside. So too, in this situation, what started as a fair and reasonable arrangement was entirely eclipsed by the subsequent transactions. Imposing what is fair, equitable and reasonable is ultimately what the law requires. Here that means that the amount forwarded to the Tomcalas by ICC and unrepaid must be repaid with an appropriate rate of interest.

[19] I conclude that the obligations preceding the 2015 restructuring agreement, being earlier agreements within the series of transactions culminating in the 2015 restructuring agreement, were subsumed in and eclipsed by the 2015 restructuring agreement which was unconscionable. Given the nature of that agreement and the ongoing interactions of the parties here, the result at law of this is that the relationship itself became unconscionable (as underscored and perpetuated in the 2016 restructuring and subsequent agreements), and thereafter the obligation of the Tomcalas became repayment of that which ICC had advanced to them and they had not repaid, along with the appropriate rate of interest.

(Emphasis added)

[76] Which is all to say that, because the judge found all contracted-for canola under pre-2016 agreements had been delivered and the 2015 Restructuring Agreement and all subsequent agreements were unconscionable, he approached the question of the Tomcalas' liability to ICC in the *Damages Award* not under the *SGA* but in terms of what he determined was "fair, equitable and reasonable" in the circumstances (at para 18). However, he had explained his approach in the *Merits Decision*, there writing:

[387] In *Gustafson SKQB* it [i.e., the doctrine of unjust enrichment] was easily applied. Mr. Gustafson received \$4,500,000 and applied it to his farm as is common, paying off creditors, purchasing farm inputs, and similar uses.

[388] And so is the conclusion here. Funds were advanced by ICC to the Tomcalas in the amount of \$4,882,217 from the signing of the September 2015 restructuring agreement. The Tomcalas utilized that funding just as Mr. Gustafson did. It has not been repaid. In the language of *Pettkus v Becker*, [1980] 2 SCR 834, *Garland v Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 SCR 629 and *Moreira v Ontario Lottery and Gaming Corporation*, 2013 ONCA 121, 296 CCC (3d) 245, there has been an enrichment of the Tomcalas, there has been a corresponding deprivation of ICC and I find no juristic reason for the enrichment. This is application of the economic approach to the first two parts of the test and the final consideration, on what basis ought the Tomcalas keep the funds advanced to them for farming purposes, is lacking. I find no juristic reason it ought not be repaid.

[77] As noted, the judge also summarised this conclusion at the end of his reasons in the *Merits Decision* by writing "[w]hile the contracts starting with the September 2015 restructuring agreement themselves are not binding, the money the Tomcalas received must be repaid with interest. They have had the use of it and must now return it with interest from the time it was advanced to them" (at para 414).

[78] In short, in the *Damages Award* the judge deducted \$387,382 from the \$4,882,217 that he had found was owing to ICC in the *Merits Decision*. He did so because the Tomcalas had delivered 916 tonnes of the canola that they were obligated to deliver in 2016, which he valued at the market price of \$468.81 per tonne.

[79] Therefore, at the end of the day, the judge held that, when the Tomcalas terminated their relationship with ICC in 2017, they owed it "\$4,494,385 plus interest at 5% from the time the funds were advanced" (at para 418), and he issued a judgment in favour of SSC Security in that amount.

2. Appeal and Cross-appeal Against the Decision on Damages

a. The damages awarded and the doctrine of unjust enrichment

[80] I would not give effect to the Tomcalas' challenge to the judge's application of the doctrine of unjust enrichment on the basis that SSC Security did not specifically plead or rely on that doctrine in its statements of defence and counterclaim. In my view, that did not bar the judge from ordering the Tomcalas to repay the windfall benefit they received under the agreements when he determined they were unconscionable.

[81] That being said, I agree that the judge erred by applying the doctrine of unjust enrichment to determine that the Tomcalas were liable to SSC Security. Nonetheless, the damages determination he ultimately made was open to him under the doctrine of unconscionability based on the findings he had made, meaning the error was without consequence in the result.

[82] I say that because the judge's application of the doctrine of unconscionability relieved the Tomcalas from the disadvantageous effects of the improvident contracts and thereby also negated any juristic reason for them to retain the \$4,494,385 ICC had advanced for canola they had failed to deliver under those contracts. As I interpret his decision, as part of the application of the doctrine of unconscionability under the principles of equity, the judge decided to remedy the overall inequity of this unusual situation by relieving the Tomcalas of their disadvantageous obligations under the unconscionable agreements — i.e., to deliver the canola that ICC had already paid for — while at the same time requiring them to return the consideration ICC had paid for their performance of those relieved obligations — i.e., the amount ICC had paid for canola that the Tomcalas were no longer obliged to deliver.

[83] I acknowledge that the Tomcalas also question why the judge appears to have described the monetary *remedy* he granted as itself being “unjust enrichment”. Ultimately, there is no issue here because, regardless of the misnomer, the remedy the judge granted was equitable compensation or restitution, which was the appropriate remedy in the circumstances. Put another way, though one could take issue with the nomenclature and framework used by the judge in his analysis, any error in that regard is without consequence to the remedy he ultimately awarded. To explain these conclusions, I begin by agreeing with the Tomcalas that “unjust enrichment” is not

the appropriate way to describe the monetary damages award or the reason why it was appropriate to award monetary damages to SSC Security in this case.

[84] In *The Canadian Law of Unjust Enrichment and Restitution*, M. McInnes, 2d ed (LexisNexis, 2022), the learned author states that, “while unconscionability may allow for rescission of an agreement, it cannot serve as a vehicle for unjust enrichment. The parties generally must pay, at an appropriate rate, for any benefits actually received” (at 758). I understand this statement to mean that a finding of unconscionability should not result in the advantaged or disadvantaged party receiving a windfall. In that regard, the learned professor noted that *quantum meruit* awards have been made in other circumstances, there referring to *Nanaimo Shipyard Ltd. v Keith*, 2008 BCSC 1150. That equitable remedy does not suit the circumstances here, so different equitable tools for addressing the effects of the unconscionable agreements had to come into play (*Rick v Brandsema*, 2009 SCC 10 at para 67 [*Brandsema*]). In *Heller*, the majority of the Supreme Court held:

[78] Because improvidence can take so many forms, this exercise cannot be reduced to an exact science. When judges apply equitable concepts, they are trusted to “mete out situationally and doctrinally appropriate justice” (Rotman, [(2016), 2 *Canadian Journal of Comparative and Contemporary Law*] at p. 535). Fairness, the foundational premise and goal of equity, is inherently contextual, not easily framed by formulae or enhanced by adjectives, and necessarily dependent on the circumstances.

[85] Rescission was typically the appropriate equitable remedy when a contract was found to be unenforceable under the doctrine of unconscionability (*Brandsema* at para 66). The objective of rescission is to restore the parties to their pre-contract positions by rendering the unconscionable agreement void *ab initio*. For reasons related to the initial validity and performance of some contracts, the long and laboured evolution of the parties’ relationship, the unconscionable nature of the latter most contracts, and the comprehensive security instruments held by SSC Security in the overall arrangement, I agree with the judge’s conclusion that rescission was an impractical and therefore inappropriate remedy in this case.

[86] Where rescission is impractical, “equitable compensation” or equitable damages may be an appropriate substitute (*Brandsema* at paras 66-67). The objective of equitable compensation is generally to remedy any unfairness that would arise if the unduly advantaged party retained the

benefit of the unconscionable agreement. The remedy is awarded as “damages in the form of ‘equitable compensation’ to provide relief to the wronged party” (at para 66).

[87] As noted, in this case the judge made “no finding that ICC acted improperly, falsely or deceptively”. Rather, he concluded that circumstances had overtaken contracts *that had been fair when they were formed*, and they “became much too one-sided” (*Merits Decision* at para 332). He also found that the “Tomcalas’ crisis” was not the responsibility of ICC because the Tomcalas had had “opportunities in several of the years leading up to the signing of the 2015 restructuring agreement to meet their obligations and substantially lessen them as a total debt and for whatever reasons did not do so” (at para 333). The judge repeated these conclusions in slightly different terms in the *Damages Award*. He then remarked, as noted above, that “[i]mposing what is fair, equitable and reasonable is ultimately what the law requires. Here that means that the amount forwarded to the Tomcalas by ICC and unrepaid must be repaid with an appropriate rate of interest” (at para 18). I agree that that was the appropriate remedy in the unusual circumstance where the stronger party is also an innocent party.

[88] Although the compensatory remedy the judge awarded cannot be properly characterised as “unjust enrichment”, I agree that, if all of the contracts between the parties were rescinded with no fault being attributed to ICC (*Merits Decision* at para 333), then SSC Security had claim to the funds ICC advanced to the Tomcalas for the canola they were no longer required to deliver. In my opinion, although the judge approached this issue incorrectly, under the doctrine of unjust enrichment, the monetary remedy he ultimately granted was available and appropriate under the doctrine of unconscionability itself.

[89] For these reasons, I conclude that the restitution order the judge effectively made plainly and properly reflects his decision to award SSC Security monetary damages based on the amount by which he found the Tomcalas had been enriched without any legal reason (since the contracts were held to be unconscionable at their insistence and without fault being attributed to ICC).

[90] While these are entirely unusual circumstances, regardless of how the judge described the remedy he granted, I find it was appropriate for him to have made a monetary award requiring the Tomcalas to repay the amount they had been paid for canola they did not deliver under contracts that the judge had set aside based on their own claims in equity.

b. The availability of equitable defences

[91] As to the Tomcalas' contention that the judge failed to consider equitable defences such as detrimental reliance, setoff and laches, I would simply observe that the record and the judge's findings do not support the availability of those defences in the circumstances of this case.

[92] I disagree, however, with SSC Security's submission that the judge presumably considered equitable defences as part of his analysis of the juristic-reason element of unjust enrichment. Even if SSC Security had advanced an unjust enrichment claim against the Tomcalas in its counterclaim, which it did not, the concept of juristic reason does not extend to equitable defences. They arise, as their name implies, *after* the court has found that the evidence satisfies all three elements of an unjust enrichment, and they operate as a defence to the award of a monetary or proprietary remedy made in restitution of the unjust enrichment (e.g., see *Garland v Consumers' Gas Co.*, 2004 SCC 25 at para 62 et seq.). For example, a judge cannot apply the defence of equitable setoff unless they have made an award of damages on a crossclaim that may be setoff against the monetary award remedying the unjust enrichment. That is, under equitable setoff, there must be something to set off and something to set off against — and that happens at the remedy stage not the liability stage.

c. The Tomcalas' other grounds related to the damages awarded

[93] The remainder of the Tomcalas' grounds relate to the remedy granted and are not persuasive. First, there is no basis at law or on the record to conclude that the judge was required to expressly consider all available remedies (here, the Tomcalas identify rescission, constructive trust or no remedy at all). Moreover, I have earlier in these reasons explained why rescission was an appropriate remedy under the doctrine of unconscionability and why equitable compensation or restitution was the appropriate substitute for that because rescission was an impractical remedy in these circumstances.

[94] Next, because the judge found that the transactions between the parties were, at root, contracts for the sale of goods not loans, he did not err by not holding ICC to account for failure to register under *The Trust and Loan Corporations Act, 1997* or to comply with *The Cost of Credit Disclosure Act, 2002*, SS 2002, c C-41.01, or err by finding that *The Unconscionable Transactions Relief Act* did not apply. As well, the fact that SSC Security holds mortgages and security interests

over the Tomcalas' real and personal property does not establish that the parties' transactions were in essence loans.

[95] Lastly, the judge considered the issue but made findings that are inconsistent with the Tomcalas' contention that ICC had attracted liability under the *Canada Grain Act*, RSC 1985, c G-10.

d. SSC Security's grounds related to the damages awarded

[96] Because I would dismiss SSC Security's cross-appeal on the issue of unconscionability, I conclude that its arguments about the proper quantification of damages under the *SGA* are moot.

[97] As to SSC Security's alternative ground on the issue of damages, I would also reject its contention that the judge erred when calculating damages because he did not account for the Tomcalas' post-2016 outstanding obligations to deliver canola to ICC. Here, SSC Security overreaches by seeking to recover what would have been its losses *if* the Streaming Contracts had remained in place and had been enforceable for the 2017 to 2022 crop-years and *if* the Tomcalas had not delivered (as they did not) any canola whatsoever to ICC. In this regard, SSC Security asserts that the Tomcalas owed it 10,332.41 tonnes of canola, whereas the judge found that the shortfall was 4,537.66 tonnes (*Merits Decision* at para 304(d)). Moreover, if its submissions were to be accepted, SSC Security seeks to have this Court perform the necessary calculations based solely on its estimations about what the market prices were in those crop-years.

[98] Accordingly, I would dismiss this alternative ground of SSC Security's cross-appeal. As noted, I have explained why it was appropriate on the facts of this case for the judge to have made a monetary award requiring the Tomcalas to repay the \$4,494,385 that ICC had advanced to them. Under this alternative ground, SSC Security has asked this Court to reject, without establishing palpable error, the judge's factual findings about outstanding deliverables and then to make findings of fact that the judge did not make. A request of that nature goes beyond the powers of this Court to intervene in this matter.

III. DISPOSITION

[99] In the overall result, I would dismiss both the appeal and cross-appeal. Because the Tomcalas were unsuccessful in their appeal and SSC Security was unsuccessful in its cross-appeal, I would make no order as to costs in either. Each party shall bear its own costs in the appeal and cross-appeal.

“Caldwell J.A.”

Caldwell J.A.

I concur.

“Schwann J.A.”

Schwann J.A.

I concur.

“Kilback J.A.”

Kilback J.A.