Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC. and 3339611 CANADA INC.

Applicants

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November 27, 2018

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2017 ONSC 3448
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1511419 Ontario Inc. v. Canaccord Genuity Corp.

2017 CarswellOnt 8557, 2017 ONSC 3448, 280 A.C.W.S. (3d) 28, 48 C.B.R. (6th) 244

1511419 ONTARIO INC. (FORMERLY KNOWN AS THE CASH STORE FINANCIAL SERVICES INC.) (Plaintiff) and CANACCORD GENUITY CORP. (Defendant)

F.L. Myers J.

Heard: June 2, 2017
Judgment: June 5, 2017
Docket: CV-14-10773-00CL

Counsel: Pat Flaherty, Emilia Galan, for Canaccord Genuity Corp.
Gerald C.R. Ranking, Dylan Chocla, for KPMG LLP
Daniel Murdock, Michael Currie, for Cassels Brock & Blackwell LLP
John Finnigan, Megan Keenberg, for Plaintiff
Heather Meredith, for Monitor, FTI Consulting Canada Inc.

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.3 Security for costs
XXIV.3.d Grounds for requiring security
XXIV.3.d.vii Miscellaneous

Headnote

Civil practice and procedure --- Costs — Security for costs — Grounds for requiring security — Miscellaneous

Plaintiff brought three actions on behalf of commercial creditors who suffered substantial losses on plaintiff's insolvency — Creditor-directed plaintiff claimed there were significant misstatements made by plaintiff in its public disclosures prior to plaintiff and funding creditors entering into transaction by which creditors made ill-fated loans to plaintiff — Plaintiff claimed defendants ought to have known of and prevented plaintiff's misstatements, and plaintiff also blamed defendants for its insolvency, claiming it was caused by impugned transaction — Defendants brought motion for security for costs — Motion granted — Plaintiff conceded it had insufficient assets to pay costs if defendants were successful in defending actions, and that it had not met test to show it was impecunious — Merits were hard to assess at early stage of three complex actions but it appeared that legitimate claims were being made in that some valid causes of action were asserted that had some evidentiary basis — This was not meritless or vexatious claim but there was not strong claim that cried out for justice for powerless plaintiff — There were three complex, sophisticated, heavy duty, expensive pieces of commercial litigation — There was imbalance in action being pursued by shell company for benefit of creditors who were not parties — Creditors would be entitled to benefit of costs award if they won but they would not be liable for costs if plaintiff lost, and that was imbalance that security for costs was designed to remedy — It was fair and just for plaintiff to post security for costs in stages, with plaintiff to post aggregate sum of $1.6 million for three actions within 60 days.

Table of Authorities

Cases considered by *F.L. Myers J.*:

Georgian Windpower Corp. v. Stelco Inc. (2012), 2012 ONSC 292, 2012 CarswellOnt 1254 (Ont. S.C.J. [Commercial List]) — considered

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Proxema Ltd. v. Birock Investments Inc. (2016), 2016 ONSC 5686, 2016 CarswellOnt 14127 (Ont. S.C.J.) — considered

Statutes considered:

Bank Act, S.C. 1991, c. 46

Sched. I — referred to

MOTION by defendants for security for costs.

***F.L. Myers J.*:**

1 The endorsement applies as well to the action brought by the plaintiff against KPMG LLP under Court File No. CV-14-010771-00CL and to the action brought by the plaintiff against Cassels, Brock & Blackwell LLP under Court File No. CV-14-010774-00CL. A copy of this endorsement is to be placed in each court file.

2 The plaintiff in these three actions concedes that it has insufficient assets to pay the costs of the defendants if they successfully defend the actions. The plaintiff also concedes it has not met the test to show that it is impecunious (i.e. it cannot prove that those who will benefit from the plaintiff's success in the litigation cannot afford to fund the plaintiff).

3 The action is brought by the plaintiff on behalf of substantial, commercial creditors who suffered very substantial losses on the plaintiff's insolvency. The creditors have provided some funding to the plaintiff in a litigation trust established and funded in the plaintiff's CCAA proceeding. The plaintiff has approximately $1.5 million available to fund security for costs in the litigation trust fund. The plaintiff delivered no evidence to establish that the creditors lack the means (as distinct from the desire) to fund the trust further if called upon to do so.

4 The creditor-directed plaintiff points to what appear to have been significant misstatements made by the plaintiff in its public disclosures prior to the plaintiff and the bulk of its funding creditors entering into the transaction by which the creditors made their ill-fated loans to the plaintiff. The plaintiff claims that the defendants ought to have known of and prevented the plaintiff's misstatements. Had the defendants not violated their obligations, the plaintiff and its creditors say they could not have completed the impugned transaction and incurred their losses. Moreover, the plaintiff seeks to blame the defendants for its insolvency which it claims was caused by the impugned transaction among other things (like its regulatory non-compliance which it lays at the feet of the defendants or Cassels Brock & Blackwell at least).

5 The merits are very hard to assess at this early stage of three complex cases. Incorrect public disclosures can but do not inexorably lead to a finding of auditor's negligence. The assessment of claimed breaches of applicable auditing standards can be a difficult task. Similarly, assuming that an I-banker gives a fairness opinion based on erroneous facts, this merely begs the next questions, like: what did it know; what ought it to have known; and was any loss caused by any negligence that may be proved against the banker, for example. Finally, while there is a smell of conflict wafting from CBB's offices, that is but a single hurdle on a long track to prove lawyers' liability.

6 I do not doubt that there are legitimate claims being made in that some valid causes of action are asserted that have some evidentiary support from a 30,000 foot overview of a few select documents. But, nothing in my quick survey of the documents affects the balancing of interests in relation to the key factors affecting security for costs. That is, I do not see a meritless or vexatious claim. Nor do I see an especially strong claim that cries out for justice for a marginalized or powerless plaintiff regardless of the cost. Rather, I see three complex, sophisticated, hotly contested, commercial claims that may be provable after a thorough analysis of a very significant amount of documentation and testimony spanning several years.

7 These are heavy duty, expensive pieces of commercial litigation. The plaintiff seeks damages of more than $150 million. I agree with Charney J. in *Proxema Ltd. v. Birock Investments Inc.*, [2016] O.J. No. 4701 (Ont. S.C.J.), at paragraph 25, that there is an imbalance in an action that is being pursued by a shell company for the benefit of creditors who are not parties. The creditors are quite properly realizing on the plaintiff's causes of action. They will be entitled

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to the benefit of costs awards if they win. But as things currently stand, the creditors will not be liable for costs if the plaintiff loses. That is the imbalance that security for costs was designed to remedy.

8 I agree with Mr. Finnegan that the court's discretion is always to be exercised based on seeking a just outcome balancing the relevant inputs. See *Georgian Windpower Corp. v. Stelco Inc.*, 2012 ONSC 292 (Ont. S.C.J. [Commercial List]) (CanLII) at paras. 20 to 37. Security for costs is always a discretionary matter in which the court seeks to do justice - to be fair as between and among the parties. In this case, the merits are a neutral factor in my view as discussed above. As was the case in *Georgian Windpower*, assessing blame for the plaintiff's insolvency in this case necessarily becomes bound up in the assessment of the merits of the actions.

9 I do not agree with the thrust of Mr. Finnegan's argument that due to the losses they have already suffered, the creditors get to choose how much they will fund towards the defendants' costs if the plaintiff loses. Decisions as to the funding of a litigation trust in a CCAA proceeding do not limit the amount of security for costs that the trustee may be obliged to post in litigation that it brings. The consequences of the creditors' funding choices affect themselves not the defendants. That is, they can choose to fund the plaintiff as required or choose not to sue. They do not get to underfund the plaintiff to meet the costs burden that it undertook by suing - at least not in the absence of impecuniosity, a sufficiently strong case that justice demands be allowed to proceed, or other, sufficiently weighty equitable grounds.

10 I note that the creditors have already received substantial distributions in the millions of dollars under the CCAA plan successfully implemented by the plaintiff. Their outstanding losses are many times greater than the distributions that they have received. Nevertheless, they plainly can fund the litigation if they choose to do so.

11 The defendants seek over $10 million for security for their costs in the aggregate. The plaintiff did not deliver a bill of costs or provide much information as to its costs to date for comparison. I reviewed the draft omnibus discovery plan which is still not finalized despite months of negotiation. The parties have done an excellent job agreeing on a large number of specific categories for document production. This should aid their computer search efforts. But the parties advise that the sheer number of categories will lead to productions in the tens of thousands of documents by each party. Combined discoveries provide some efficiencies but they also require each defendant to review all the documents and participate in the discovery of the other defendants. Ms. Keenberg argues that the defendants are not entitled to security for the costs of such efforts. But she agreed that the defendants were being reasonable and she could not articulate why costs reasonably incurred by a party in defending the claim could not be included in its bill of costs. It is not an expansion of any party's liability to have to pay the other side its reasonably incurred costs.

12 The plaintiff also chose to bring its *Pierringer* agreement approval motion as part of its CCAA plan approval process. It is appropriate for the defendants to seek those costs which quite properly are considered costs of these proceedings to which the *Pierringer* provisions relate.

13 I am satisfied that it is fair and just for the plaintiff to post security for the costs of the defendants. The order should be staged to fairly reflect the outcome of the upcoming summary judgment motion(s) and to allow for better refinement of expensive pre-trial and trial steps once the facts are better understood.

14 In my view, the plaintiff should pay into court the aggregate sum of $1.6 million in relation to steps 1 to 3 on Mr. Finnegan's chart at this time. I have reduced the chart total from $1.846 million to account for some liberality in costs estimates. The plaintiff is to pay $533,333 into court for each action within 60 days. Order to go in form 56A. Security should be in cash or by an unconditional letter of credit with no time limit drawn on a bank listed in Schedule I of the *Bank Act*, SC 1991, c 46.

15 There will be a further amount to be posted 45 days before the date scheduled for the first examination for discovery. That amount will be set by agreement of the parties or further order made at a case conference. A final instalment will be set at the pretrial conference if not on consent before then.

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16 Defendants may each deliver no more than five pages of costs submissions by June 12, 2017. The plaintiff may deliver no more than five pages of costs submissions by June 19, 2017. All parties, other than the Monitor, will deliver costs outlines regardless of whether they seek costs. In addition, any party relying on an offer to settle may also deliver a copy of the offer. All documents shall be delivered to my office as attachments to an email in searchable PDF format. No case law or statutory material is to be delivered. References to case law or statutory material, if any, are to be made by hyperlink embedded in the party's submissions. There are no costs awarded to or against the Monitor.

Motion granted.

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Most Negative Treatment: Distinguished
Most Recent Distinguished: Romans Estate v. Tassone | 2009 BCSC 194, 2009 CarswellBC 377, 177 A.C.W.S. (3d) 263, [2009] B.C.W.L.D. 2703, [2009] B.C.W.L.D. 2774, [2009] B.C.W.L.D. 2776, 47 E.T.R. (3d) 286 | (B.C. S.C. [in Chambers], Feb 20, 2009)

1999 CarswellOnt 3365
Ontario Superior Court of Justice

Bank Leu AG v. Gaming Lottery Corp.

1999 CarswellOnt 3365, [1999] O.J. No. 3949, 43 C.P.C. (4th) 73, 92 A.C.W.S. (3d) 270

Bank Leu Ag, Plaintiff and Gaming Lottery Corporation, Helix Capital Corporation, Helix Capital Corp. Ltd., Montreal Trust Company of Canada, Equity Transfer Services Inc., The Royal Bank of Canada and Giodo Franz-Josef Bensberg, Defendants

Ground J.

Heard: August 24 and 25, 1999
Judgment: October 26, 1999 *
Docket: 97-CL-000556

Counsel: *David C. Moore*, for Cassels, Brock & Blackwell and Paul M. Stein, Moving Parties.
Allan Sternberg and *Robert Bernstein*, for Responding Party, Gaming Lottery Corporation.

Subject: Corporate and Commercial; Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.i Solicitor-client privilege
Headnote
Practice --- Discovery — Discovery of documents — Privileged document — Solicitor-client privilege
Bank brought action against issuer of unpaid and unissued share certificate used to secure loan — Issuer brought third party claim against its solicitors claiming that solicitors breached duty to warn with respect to share program — Solicitors brought motion for production of documents for which issuer claimed solicitor-client and litigation privilege — Motion granted in part — Communications between issuer and in-house counsel in relation to share program were protected by solicitor-client privilege — Documents obtained or gathered by solicitors or in-house counsel were subject to litigation privilege — Issuer waived privilege with respect to all documents relating to advice or information provided with respect to risks of program, by claiming breach of solicitors' duty to warn of risks — Waiver applied to documents on issuer's state of mind and documents establishing that issuer would have proceeded notwithstanding solicitors' advice — Documents that did not relate to share program were not relevant to action — Evidence of relationship between solicitors and issuer in other legal transactions was not relevant to issue of failure to warn.
Table of Authorities
Cases considered by *Ground J.*:
Allen v. Tory, Tory, Deslauriers & Binnington (1996), 19 O.T.C. 59 (Ont. Master) — considered
Flores v. Fourth Court of Appeals (1989), 777 S.W.2d 38 (U.S. Tex.) — referred to

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Fraser Park South Estates Ltd. v. Lang Michener Lawrence & Shaw (January 28, 1999), Doc. Vancouver C918006 (B.C. S.C.) — considered
Froates v. Spears (January 7, 1999), Doc. Welland 7671/96 (Ont. Gen. Div.) — considered
General Accident Assurance Co. v. Chrusz (1999), 45 O.R. (3d) 321, 124 O.A.C. 356, 180 D.L.R. (4th) 241 (Ont. C.A.) — applied
Lillicrap v. Nalder & Son, [1993] 1 All E.R. 724, [1993] 1 W.L.R. 94 (Eng. C.A.) — considered
Lloyds Bank Canada v. Canada Life Assurance Co. (1991), 47 C.P.C. (2d) 157 (Ont. Gen. Div.) — considered
Sealed Case, Re (1988), 856 F.2d 268, 272 U.S. App. D.C. 314, Fed. Sec. L. Rep. 94,009, 12 Fed. R. Serv. 3d 344 (U.S. D.C. Cir. Ct.) — referred to
Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of) (1997), 32 O.R. (3d) 575, (sub nom. *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Bankrupt)*) 31 O.T.C. 267 (Ont. Gen. Div. [Commercial List]) — considered
Woodglen & Co. v. Owens (1995), 24 O.R. (3d) 261, 38 C.P.C. (3d) 361 (Ont. Gen. Div.) — considered

MOTION by solicitors for production of privileged documents.

***Ground J.*:**

Background

This motion arises in an action brought by Bank Leu AG ("Bank Leu") against Gaming Lottery Corporation ("GLC") with respect to the issue by GLC of a certificate for shares, which in fact had not been paid for or issued, and which certificate was pledged with Bank Leu as security for loans made by Bank Leu.

The share certificate was issued by GLC as part of a rather peculiar transaction incorrectly called a "Reg S stock roll program." In the action, GLC has issued a third party claim against Cassels Brock and Paul Stein, a partner of Cassels Brock (collectively "Cassels Brock/Stein"). The essence of the third party claim is that Cassels Brock/Stein, who were acting for GLC at the time, failed to warn GLC of the risks involved in Reg S stock roll programs. In Schedule B to the Affidavits of Documents of Cassels Brock/Stein and of GLC, certain documents are listed in respect of which solicitor-client privilege and/or litigation privilege is claimed. The motion brought by Cassels Brock/Stein is for an order directing the production of certain of those Schedule B documents on the basis that they are not subject to privilege in view of the third party claim made by GLC against Cassels Brock/Stein in the action.

The documents in question fall into three categories:

1. Documents reflecting communications between GLC and its U.S. counsel after December 8, 1994 when GLC became aware of an investigation being commenced by the United States Securities and Exchange Commission (the "SEC") with respect to Reg S stock roll programs.

2. Documents reflecting communications with inhouse counsel of GLC after December 8, 1994 when GLC became aware of the investigation being commenced by the SEC.

3. Documents reflecting other contacts between Cassels Brock/Stein and GLC with respect to other legal matters which GLC says are not relevant; the documents in this category were not listed by GLC in its Affidavit of Documents.

Cassels Brock/Stein deny any liability for breach of a duty to warn with respect to the Reg S stock roll programs in that it is their position that GLC was well aware of the risks involved. Cassels Brock/Stein also take the position that it would not have made any difference if Cassels Brock/Stein had warned GLC of the risks in that GLC would have entered into the subject transaction in any event, and that Cassels Brock/Stein were in no way responsible for the subject share certificate getting into the market place. Cassels Brock/Stein take the position that GLC was well warned by U.S.

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counsel about the risk of these transactions at the time when Cassels Brock/Stein were Canadian counsel to GLC and that GLC ignored these warnings.

Issues

The issues on this motion would appear to be as follows:

1. Whether litigation privilege applies in the case of an investigation by a regulatory authority such as the SEC or the Ontario Securities Commission.

2. Where a client alleges breach of a solicitor's duty to the client in connection with a particular transaction, whether the client will be deemed to have waived privilege as to all communications relevant to the issues involved in that particular transaction, including communications between that client and other counsel.

3. Whether the waiver applies to documents which would indicate the client's state of mind and knowledge of the issues involved, including information and advice from other counsel.

4. Whether the waiver of privilege also relates to documents relevant to the issue of causation as between the alleged breach of duty and the loss claimed, including documents in other transactions, which would establish that the client would have gone ahead with the transaction in any event.

5. Is there any distinction on the above issues based upon whether a document was prepared by or forwarded to inside counsel or outside counsel?

6. Are documents reflecting other contacts between GLC and Cassels Brock/Stein which had nothing to do with the Reg stock roll programs relevant to the issues in this action?

Reasons for Judgment

Solicitor-Client Privilege

1 Cassels Brock/Stein acted for GLC in the transaction which gave rise to this litigation and continued to act for GLC until early 1996. They were not directly involved in the SEC investigation. GLC retained United States counsel, initially Jones, Day and later White and Case, to advise it concerning Reg S stock roll programs and the SEC investigation. There is no dispute that communications between GLC and Cassels Brock/Stein and between GLC and its United States counsel relating to the subject transaction and relating to Reg S stock roll programs are protected by solicitor-client privilege.

2 Eleesha Swartz was inhouse counsel for GLC and played a significant role in the transaction which gave rise to this litigation. I think it is settled law that solicitor-client privilege applies to communications with inhouse counsel provided that inhouse counsel is acting in his or her capacity as a solicitor when the communications are made, the communications are in the context of a solicitor-client relationship, are in the course of requesting or providing legal services and are intended to remain confidential. In my view documents authored by, or directed to, Ms. Swartz relating to the subject transaction or to Reg S stock roll programs are protected by solicitor-client privilege.

Litigation Privilege

3 Litigation privilege originated as an extension of solicitor-client privilege. It applies to documents containing communications between the solicitor or client and third parties which are obtained by the solicitor in contemplation of litigation. Documents prepared by the client and forming a part of the solicitor's file are also protected by solicitor-client privilege if they form part of a collection of documents which were assembled in anticipation of litigation.

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4 To determine if litigation privilege applies to certain documents, the Ontario Court of Appeal in *General Accident Assurance Co. v. Chrusz* (1999), 124 O.A.C. 356 (Ont. C.A.) adopted the dominant purpose test. The test is strict and requires that the documents must have been created or obtained for the dominant purpose of litigation, actual or contemplated. The documents must be created or obtained for the purpose of obtaining legal advice and the prospect of litigation must be reasonable. Considering the rationale for litigation privilege, it is reasonable to conclude that an investigation by a regulatory authority such as the SEC can give rise to litigation privilege in the same manner as a court proceeding. Although there appear to be no Canadian authorities directly on point, courts in the United States have recognized such an extension of privilege to proceedings before administrative agencies which determine "contested cases": *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38 (Tex. 1989) and to certain proceedings before the SEC: In *Sealed Case, Re*, 856 F.2d 268 (D.C. Cir. 1988). In the case at bar, I conclude from the evidence that litigation privilege arose from the onset of the SEC investigation since GLC retained counsel and prepared its strategy for purposes of the investigation. The prospect of litigation was clearly reasonable. Accordingly, in my view, documents obtained or gathered by Cassels Brock/Stein, GLC's U.S. counsel or Ms. Swartz in contemplation of the SEC investigation would be subject to litigation privilege. It is not clear to me whether any of the disputed documents on this motion fall into this category.

Implied Waiver of Privilege

5 Privilege may be waived expressly or impliedly. In the case at bar it is not disputed that there was no express waiver of privilege by GLC. When determining whether privilege should be deemed to have been waived, the court must balance the interests of full disclosure for purposes of a fair trial against the preservation of solicitor client and litigation privilege. Fairness to a party facing a trial has become a guiding principle in Canadian law. Privilege will be deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. When a party places its state of mind in issue and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice.

6 In *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1997), 32 O.R. (3d) 575 (Ont. Gen. Div. [Commercial List]), the Bank placed its state of mind in issue through its pleadings, evidence and opening statements. Winkler J. held that waiver of privilege may occur in absence of intention to waive privilege where interests of fairness and consistency dictate and that, since the legal advice formed in part the Bank's state of mind and the Bank alleged detrimental reliance on the defendant's representations on matters on which legal advice had been received, privilege was deemed waived with respect to such legal advice.

7 In *Woodglen & Co. v. Owens* (1995), 24 O.R. (3d) 261 (Ont. Gen. Div.), the plaintiff had retained the defendant law firm for conveyancing matters in the development of lands in the City of North York. Weir & Foulds were retained by the plaintiffs for planning matters in the same development and for litigation against the city. The plaintiffs brought an action against the defendants claiming that they failed to register road access and servicing easements for the creation of five marketable lots. In their defence, the defendants claimed that the plaintiffs received legal advice from Weir & Foulds with respect to this aspect of the transaction. The defendants sought production of documents in Weir & Foulds files. Some of these documents were protected by litigation privilege while other were protected by solicitor-client privilege. E. Macdonald J. found that there is a deemed waiver of privilege when the plaintiff alleges reliance on the defendant's legal advice and the defendant denies reliance on its legal advice by alleging that the plaintiff relied on other legal advice. She also concluded that fairness is a determining factor when considering what constitutes waiver since it would be unfair to deny the defendant access to documents that could clarify the plaintiff's instructions and state of mind and to determine which law firm was responsible.

8 In *Allen v. Tory, Tory, Deslauriers & Binnington* (1996), 19 O.T.C. 59 (Ont. Master), the defendant solicitors brought a motion for the production of three letters over which the plaintiffs claimed solicitor-client privilege. The three letters were from Freeman & Co. (Vancouver solicitors to the plaintiffs), Goodwin, Procter and Hoar (Boston solicitors for the plaintiffs) and United Services Funds. The defendants argued that the letters should be produced to identify the instructing mind in an action in which the plaintiff was suing the defendant, Tory, Tory, Deslauriers & Binnington, for

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negligence in the prosecution of an interlocutory proceeding regarding a certificate of pending litigation. The defendants also argued that the letters would clear up the question of who the plaintiffs relied on for the prosecution of the action. The defendant pleaded that it had been instructed by Freeman & Co. and as such, Freeman & Co. was in complete control of the action. Finally, the defendant argued that if the letters showed that the plaintiffs had relied on Freeman & Co.'s advice and not its advice, the action against it should be dismissed.

9 In his decision, Master Clark stated:

> The facts of the within case very closely follow the spirit and thrust, if not the exact facts of, *Woodglen*, wherein the plaintiff-clients alleged that they relied on the advice of the solicitor-defendant, who in turn alleged that the plaintiff had had advice from another source.

The court accepted that it was a proper defence to an allegation of negligence for the defendant to plead that it was not responsible given the nature, quality and extent of the instructions it received from the client, or in this case, from the Vancouver solicitors. Relying on the *Woodglen* decision, the court found that the plaintiffs had waived their privilege by claiming negligence against the defendant. The three letters were ordered to be produced.

10 In *Lloyds Bank Canada v. Canada Life Assurance Co.* (1991), 47 C.P.C. (2d) 157 (Ont. Gen. Div.) Van Camp J. stated that, where a plaintiff alleges that he or she relied on the defendant's representations and the defendant denies these allegations on the basis that the plaintiff obtain legal advice and relied upon that legal advice, the plaintiff will be deemed to have waived solicitor-client privilege in respect of the legal advice received.

11 In my view, the case law supports the proposition that, where the client puts in issue its state of mind or knowledge with respect to matters on which it alleges breach of duty owed to it by its solicitors, it will be deemed to have waived privilege as to all communications and advice received by it relating to such matters. Accordingly, I find that by alleging breach of duty by Cassels Brock/Stein in failing to warn of the risks involved in the subject transaction on Reg S stock roll programs, GLC is deemed to have waived privilege with respect to all documents relating to advice or information provided to GLC with respect to the risks inherent in entering into the subject transaction or Reg S stock roll programs generally, including documents in categories 1 and 2 above.

Causation

12 In *Froates v. Spears* (January 7, 1999), Doc. Welland 7671/96 (Ont. Gen. Div.), Fleury J. stated on page 3

> I am satisfied that, where one party chooses to sue his solicitor for advice given to the party, that very action constitutes a waiver of solicitor-client privilege for all matters going to the issue of what caused the loss suffered by the client and to what extent the loss may be attributable to the solicitor in question.

The court found that any information which addresses the issue of the consequences of the alleged wrongdoing is relevant to the issue of quantum of damages claimed by the plaintiff.

13 In the case at bar, it is the position of Cassels Brock/Stein that, if the court finds that a warning on their part would have made no difference to the course of action which would have been followed by GLC with respect to the Reg S stock roll programs, the claim against them should be dismissed. In determining liability for failure to meet a standard of reasonable care of a solicitor when advising a client with respect to the risk of a transaction, the court must find that the client probably would not have undertaken that transaction if properly advised as to the risks. Accordingly, GLC has the onus of establishing not only the failure to warn on the part of Cassels Brock/Stein, but also that if properly warned, it would not have entered into the subject transaction. To determine this question it is in my view relevant to look at what the client did do when properly advised of the risks.

14 In *Fraser Park South Estates Ltd. v. Lang Michener Lawrence & Shaw* (January 28, 1999), Doc. Vancouver C918006 (B.C. S.C.), an action was brought against a solicitor for breach of fiduciary duty, breach of contract and negligence.

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The solicitor failed to discover a Pollution Abatement Order issued by the Ministry of the Environment against the vendors of the property purchased by Fraser Park in 1989. The court examined the plaintiff's behaviour after finding out that there was a Pollution Abatement Order on the land it purchased. The court found that since the plaintiff made no attempt to get rid of the property or to alert its engineers once it found out that there was a Pollution Abatement Order on the property, it would most likely have completed the purchase of the property, even if it had known about the Pollution Abatement Order before the purchase. The court concluded that if the plaintiff had learned about the Pollution Abatement Order before closing and made any investigation, it would have concluded that the consequences were minimal and inexpensive to control and would have concluded that the consequences were minimal and inexpensive to control and would probably have completed the purchase of the property. Accordingly, documents relating to the issue of what advice GLC did receive as to the risks of Reg S stock roll programs and relating to its participation in other Reg S stock roll transactions after the time of the alleged failure by Cassels Brock/Stein to warn of the risks are relevant to the issues of causation and quantum of damages and any privilege with respect to such communications is deemed to be waived. This would apply to documents reflecting communications between GLC and its U.S. counsel and communications to and from Ms. Swartz which are relevant to GLC's knowledge at various times of the risks involved in participating in such programs and to its participation in such programs after the time of the alleged failure to warn on the part of Cassels Brock/Stein.

Waiver of Privilege Re. Documents Relating to Other Contacts Between Cassels Brock/Stein and GLC

15 The documents in the third category appear to relate to other legal matters in respect of which Cassels Brock/Stein were representing GLC during the relevant period, but have no connection to the subject transaction or to Reg S stock roll programs.

16 Counsel for Cassels Brock/Stein appear to take the position that these documents should be produced because they are relevant to show the nature of the relationship between Cassels Brock/Stein and GLC and to compare that relationship to the relationship between GLC and other counsel. He also submits that such documents are relevant to the issue of the credibility of officers of GLC with respect to its relationship with Cassels Brock/Stein.

17 In *Lillicrap v. Nalder & Son*, [1993] 1 All E.R. 724 (Eng. C.A.), the plaintiffs brought an action against the defendant, a firm of solicitors, for failing to advise them of the existence of a right of way over a parcel of land they had purchased. The defendants argued that the plaintiffs would have purchased the land even if they had known about the right of way. In support of that argument, the defendants referred to six other transactions in which they had acted for the client and the client had disregarded their advice. The plaintiffs pleaded that the other transactions were the subject of separate retainers and not one general retainer and that they were protected by solicitor-client privilege. The Court of Appeal found that the action against the solicitors constituted an implied waiver of privilege relating to all relevant documents concerning the suit and which were necessary to permit the court to adjudicate the dispute fully and fairly. Lord Justice Dillon stated at page 729:

> The waiver can only extend to matters which are relevant to an issue in the proceedings and, privilege apart, admissible in evidence. There is no waiver for a roving search into anything else in which the solicitor or any other solicitor may have happened to have acted for the client. But the waiver must go far enough not merely to entitle the plaintiff to establish his cause of action, but to enable the defendant to establish a defence to the cause of action.

The court in this case found that documents relating to the other six transactions were relevant to the issue of the plaintiff's traditional failure to follow the defendant's advice and privilege was waived.

18 In my view, this is a situation where one must balance the interests of full disclosure against the preservation of solicitor-client privilege. In the case at bar, Cassels Brock/Stein do not appear to take the position that GLC traditionally ignored their advice and I have some difficulty concluding that evidence as to the relationship between GLC and Cassels Brock/Stein in other legal transactions, which may be totally different in nature and scope and totally different as to the risks involved from the subject transaction, would be relevant to the issue of the failure to warn or the issue of causation

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and quantum of damages. Accordingly, I am of the view that deemed waiver of privilege would not apply to documents in this category.

19 In the result, the questions listed above which raise the issues on this motion are answered as follows:

(a) Whether litigation privilege applies in the case of an investigation by a regulatory authority such as the SEC or the Ontario Securites Committee. Yes.

(b) Where a client alleges breach of a solicitor's duty to the client in connection with a particular transaction, whether the client will be deemed to have waived privilege as to all communications relevant to the issues involved in that particular transaction, including communications between the client and other counsel. Yes.

(c) Whether the waiver applies to documents which would indicate the client's state of mind and knowledge of the issues involved, including information and advice from other counsel. Yes.

(d) Whether the waiver of privilege also relates to documents relevant to the issue of causation as between the alleged breach of duty and the loss claimed, including documents in other transactions, which would establish that the client would have gone ahead with the transaction in any event. Yes.

(e) Is there any distinction on the above issues based upon whether a document was prepared by or forwarded to inside counsel or outside counsel? No.

(f) Are documents reflecting other contacts between GLC and Cassels Brock/Stein which had nothing to do with Reg S stock roll programs relevant to the issues in this action? No.

20 Accordingly, an order will issue that:

(i) documents reflecting communictions between GLC and its U.S. counsel after December 8, 1994, when GLC became aware of an investigation being commenced by the SEC with respect to Reg S stock roll programs be disclosed.

(ii) documents reflecting communications with inhouse counsel of GLC after December 8, 1994 when GLC became aware of the investigation being commenced by the SEC be disclosed.

(iii) documents reflecting other contacts between Cassels Brock/Stein and GLC with respect to other legal matters unrelated to the subject transaction or to Reg S stock roll programs need not be disclosed.

21 If there is any dispute as to whether a particular document falls into one of the above categories, I will be prepared to examine the document.

22 Counsel may make brief written submissions to me with respect to the cost of this motion on or before November 15, 1999.

Motion granted in part.

Footnotes

* Affirmed (January 27, 2000), Doc. 796/99 (Ont. Div. Ct.)

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2001 ABCA 255
Alberta Court of Appeal

Bre-X Minerals Ltd., Re

2001 CarswellAlta 1363, 2001 ABCA 255, [2001] A.J. No. 1264, [2002] 2 W.W.R. 71, [2002] A.W.L.D. 6, 109 A.C.W.S. (3d) 369, 12 C.P.C. (5th) 41, 206 D.L.R. (4th) 280, 257 W.A.C. 73, 293 A.R. 73, 29 C.B.R. (4th) 1, 97 Alta. L.R. (3d) 1

In the Matter of the Bankruptcy of Bre-X Minerals Ltd.

Deliotte & Touche Inc. Trustee in Bankruptcy of Bre-X Minerals Ltd., Appellants and Bennett Jones Verchere, Respondent

Conrad, Wittmann JJ.A., LoVecchio J. (ad hoc)

Heard: October 10, 2000
Judgment: October 5, 2001
Docket: Calgary Appeal 98-18077

Proceedings: affirming (1998), 168 D.L.R. (4th) 215 (Alta. Q.B.)

Counsel: *W.L. Severson*, for Appellants.
R.A. McLennan, *Q.C.*, *K. Fitz*, for Respondent.

***Conrad J.A.* (*Wittmann J.A.* concurring):**

1 After a spectacular run in the market, the shares of Bre-X Minerals Ltd. ("Bre-X") took an equally dramatic fall, resulting in bankruptcy. The Trustee in Bankruptcy for Bre-X (the "Trustee") appealed an order refusing to declare that the Trustee has the authority and power to waive solicitor-client privilege on behalf of Bre-X.

Issues and Conclusions

2 Principally, the issues in this appeal are:

> 1. Does a trustee have the right to documents protected by solicitor-client privilege and does it have the power to waive solicitor-client privilege for a bankrupt?
>
> 2. If not, is this an occasion which justifies an exception to the privilege?

3 Solicitor-client privilege is the privilege of the bankrupt. It is a personal right and a protection which must be zealously protected. The privilege does not vest in a trustee upon bankruptcy, nor does the trustee have the authority to waive this privilege. Once privilege attaches to a document it need not be produced unless a governing statute says that it is subject to production whether or not privilege applies. While solicitor-client privilege is not an absolute right and exceptions apply, the Trustee in the within action has failed to demonstrate any basis for a court-sanctioned exception to the privilege. I would dismiss the appeal.

Background

4 Bre-X made an assignment in bankruptcy on November 7, 1997. Prior to the assignment, Bennett Jones Verchere ("BJV") acted as corporate and securities counsel to Bre-X providing advice and information to Bre-X, its officers and

directors. Bre-X remains a subsisting corporate entity but, at present, has no directors or officers. BJV has not acted for Bre-X since May of 1997.

5 In August of 1998, the Trustee filed a notice of motion seeking a declaration that it had the power and authority to waive the solicitor-client privilege of Bre-X. The notice of motion references affidavit materials as well as ss. 34, 67(1), 71(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA" and the rules thereunder. Specifically, the Trustee sought a declaration that would confirm its power and authority to waive "any applicable solicitor-client privilege of Bre-X with respect to advice, information, opinions given to Bre-X by Bennett Jones Verchere . . . " BJV has conceded that its documents, records, files and solicitors are producible in respect of Bre-X's affairs and property, but it submits that professional advice, opinions and assistance provided to Bre-X are privileged and not compellable. For the purposes of the application, the parties agreed that the advice and information at issue constitute privileged communications between solicitor and client.

6 The Trustee argues, *inter alia*, that the information subject to solicitor-client privilege is critical to the proper administration of the bankrupt's estate. During argument, counsel conceded that a trustee may not automatically have the right to waive privilege. The Trustee, however, argues that in this case, a court sanctioned exception should be allowed because the information is critical to the administration of the bankrupt's estate and because Bre-X no longer has any officers or directors who could direct such a waiver and demand production.

7 The evidence in support of the application is minimal, and consists of the following allegations set out in the supporting affidavit of R. Ross Nelson, licensed Trustee:

> 7. In the course of its administration of the bankruptcy estate of Bre-X, and for use in the attempted realization by the Trustee of assets of Bre-X and to potentially realize upon claims against other parties, the Trustee is desirous of obtaining and using some information that may have been provided by Bennett Jones Verchere to Bre-X.
>
> 8. The Trustee views the receipt of such information as being a very important element to the administration of the Estate and to the realization of Bre-X property and to claims made against other parties.
>
> 9. Bennett Jones Verchere have taken the position that such information is the subject of Bre-X solicitor-client privilege with Bennett Jones Verchere, and that Bennett Jones Verchere cannot divulge that information without a waiver and consent by Bre-X or some authorized party on behalf of Bre-X.
>
> 10. Although Bre-X exists as a corporate entity, it has no officers or directors, and has no one to make corporate decisions for Bre-X, and has no one to exercise a will or directing mind on behalf of Bre-X.
>
> 11. In the current circumstances, it appears that if the Trustee is unable to waive such privilege on behalf of Bre-X, and if there is no other person who has the ability to waive such privilege on behalf of Bre-X, then in that case the Trustee's ability to administer the bankrupt estate, and the Trustee's ability to put forward its best case to realize upon property of Bre-X and/or prosecute claims against third parties, will be severely prejudiced, if not entirely negated.
>
> 12. If the Trustee has the ability and authority to waive solicitor-client privilege on behalf of Bre-X, the Trustee would propose to assess the merits of waiving that privilege and make a decision accordingly.

8 The application is a very general one. The affidavit evidence does not specify any particular information which the Trustee expects to obtain from BJV, nor does it identify any specific action or potential actions which turn on the information sought. As well, the evidence does not demonstrate how any interest (neither the creditors' nor Bre-X's) may be affected by the disclosure or non-disclosure of privileged communications between Bre-X and BJV. Overall, the Trustee seeks a blanket exemption to solicitor-client privilege based on general evidence that such information would benefit the administration of the estate. The parties have agreed for the purposes of this application that solicitor-client

privilege exists. The only issues are whether a Trustee has the right to waive this privilege for Bre-X and, if not, whether a court is justified in permitting an exception to the privilege.

Decision of the Chambers Judge

9 Relying upon *Clarkson Co. v. Chilcott* (1984), 48 O.R. (2d) 545 (Ont. C.A.), the learned Chambers Judge, in a well-reasoned judgment, refused to grant the declaration sought by the Trustee. In *Chilcott*, the trustee in bankruptcy sought to compel a solicitor to disclose privileged communications that might reveal the whereabouts of some of the bankrupt's property. The bankrupt did not waive his privilege and, at the time, was facing criminal charges for fraud allegedly associated with the bankruptcy.

10 The Ontario Court of Appeal varied the lower court's decision to compel evidence from the solicitor to avoid disclosure of any privileged communications. Specifically, the court confirmed that the privilege could not be waived by the trustee, as the privilege resides with the bankrupt. The Ontario Court of Appeal also limited the earlier decision of *Re Cirone* (1965), 8 C.B.R. (N.S.) 237 (Ont. S.C.) to its particular facts. In *Re Cirone*, the Ontario Supreme Court permitted a waiver of solicitor-client privilege by a trustee in circumstances where allegations of fraudulent preference had been made against the solicitor who refused to disclose certain communications. The Chambers Judge in the within action wholly adopted the reasoning of the Ontario Court of Appeal in *Chilcott*.

11 In addition, the Chambers Judge rejected the Trustee's analogies between this case and wills cases in which waiver of privilege by a third party may be permitted. Although he accepted the established nature of the exception in wills cases and acknowledged a superficial attraction in the analogy, he distinguished the estates cases. Namely, estates cases focus on the ascertainment of a deceased's intentions by disclosure of information protected by solicitor-client privilege. Waiver, in this situation, does not offend the rationale for this privilege.

12 The Chambers Judge denied the application and held that the Trustee does not have the legal right, power or authority to waive Bre-X's solicitor-client privilege. He confirmed that BJV could be compelled to produce its solicitors and their files, documents and records respecting the assets, affairs and transactions of Bre-X for examination, to the extent that solicitor-client privilege would not be compromised.

13 The Trustee's submissions in support of waiver of privilege may be distilled into two main categories. First, the Trustee submits that the case law, but for *Chilcott*, supports a waiver of privilege in this appeal. Second, the Trustee submits that exceptions to solicitor-client privilege exist and that the circumstances of the within appeal (e.g., the absence of directors to effect a waiver) justify an exception.

14 For the reasons that follow, I am of the view that the powers conferred on a trustee in bankruptcy do not include the general power to waive solicitor-client privilege and documents subject to that privilege need not be produced. There are no facts that justify an exception to the privilege here.

Analysis

1. Does a trustee have the power to waive solicitor-client privilege for a bankrupt?

a) Solicitor-Client Privilege

15 A basic understanding of the history and role of solicitor-client privilege is critical to the determination of both issues in this appeal. The case law specifically considering a trustee's power and authority to waive solicitor-client privilege is not extensive and is somewhat inconsistent. A broader appreciation, however, of the nature of solicitor-client privilege and its role in our legal system readily reveals the almost absolute protection afforded by this privilege.

16 Solicitor-client privilege, one of the oldest forms of common law privilege, protects the sanctity of the confidence between client and lawyer. The current rationale for solicitor-client privilege has remained unchanged for some time.

The basis for this privilege was articulated aptly in *Greenough v. Gaskell* (1833), 1 My. & K. 98, at 103, 39 E.R. 618, at 620-21 (Eng. Ch. Div.):

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers.
>
> But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

17 The Supreme Court has consistently commented that solicitor-client privilege is an important cornerstone to the effective representation of clients by counsel. That court has gone as far as to characterize solicitor-client privilege as a "fundamental civil and legal right . . . ": *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), at 839.

18 It should be emphasized that solicitor-client privilege is not merely a rule of evidence but a substantive rule, which protects the client's *fundamental right* to confidentiality. The Supreme Court stated in *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), at 875:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

At 871, the court further noted:

> There is no denying that a person has a right to communicate with a legal adviser in all confidence, a right that is "founded upon the unique relationship of solicitor and client" (*Solosky*, *supra*). It is a *personal* and extra-patrimonial right which follows a citizen throughout his dealings with others.
>
> (Emphasis added.)

Thus, this privilege casts a wide protective net over communications between solicitors and their clients and is protected zealously by the courts.

19 Due to its critical function in our legal system, solicitor-client privilege is distinct from other forms of evidentiary privilege. Solicitor-client privilege has attained the status of a class privilege, and is not assessed on a case-by-case basis like other forms of relational privilege. A consideration of other forms of relational privilege (e.g., priest/penitent, therapist/patient and so on) that are decided on a case-by-case basis is, however, useful. In particular, the Wigmore

criteria, used to assess claims of privilege on a case-by-case basis, reveal the basic rationale for relational privilege and demonstrate why solicitor-client privilege constitutes an entrenched class of privilege.

20 The Wigmore criteria were quoted, perhaps most notably, by the Supreme Court in *Slavutych v. Baker* (1975), [1976] 1 S.C.R. 254 (S.C.C.). In *Slavutych*, the Supreme Court considered whether any privilege attached to a professor's comments about a colleague who was being considered for tenure. The professor was told by his superior that his comments and the evaluation form were part of a confidential review process. The professor's comments on the form were subsequently used in dismissal proceedings against him. When considering whether the professor's comments were privileged, the Supreme Court adopted the Wigmore criteria as the test for privilege at 260:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be *sedulously fostered.*
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

When assessing claims of relational privilege on a case-by-case basis, these four fundamental conditions must be met before privilege will be held to arise. These stringent conditions limit the circumstances in which privilege may be claimed.

21 Solicitor-client privilege is presumed to meet all four criteria. As noted in *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.), at 289: "[t]he *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system." Thus, it is essential that clients enjoy confidentiality in their pursuit of legal advice, otherwise clients might avoid seeking assistance from lawyers or might not disclose all necessary information to their lawyers when attempting to get advice. There is no question that this confidential relationship ought to be "sedulously fostered", as effective representation is a cornerstone of our legal system. The injury that would result from an erosion of solicitor-client privilege is great, including the collapse of effective legal representation.

22 Once solicitor-client privilege is established (i.e., the communication was in fact confidential, in the context of a professional relationship and in the course of seeking advice), the categorical circumstances in which disclosure of privileged information by a person other than the client will be permitted are very limited. Communications which are criminal or which seek to facilitate criminal activities are exempted: *Solosky*. Similarly, privilege may be set aside when the safety of the public is at risk from non-disclosure of the communications: *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.). In addition, the continued existence of solicitor-client privilege is not required where the client no longer has an interest to protect and where non-disclosure would compromise the ability of an accused to defend himself: *Smith*. Finally, while the duty of confidentiality survives the death of the client, the privilege enures to the client's successor in title (e.g., heirs) and may be waived by a successor in interest to the client: *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.), at 384. The within appeal does not fall within any of these categories nor is the Trustee's situation analogous to any of these exceptional circumstances.

23 The Trustee strongly urges an analogy between this action and estates cases in which disclosure is permitted. Disclosure in estates cases has been allowed to promote the deceased client's wishes and true testamentary intentions through disclosure of privileged communications. The interests that solicitor-client privilege seeks to protect are not compromised where the waiver will disclose the testator's intentions: Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, (Toronto: Butterworths, 1990) at 753-54. The rationale for disclosure is not only that disclosure is consistent with what the testator would have wanted, but also that the client's communication is presumed to have been intended to remain a secret only during the testator's lifetime: Wigmore, *Evidence in Trials at Common Law*, vol. 8, 4th ed. (Boston: Little, Brown & Co., 1961) at para. 2314; *Geffen* at 385. Thus, the exception in *Geffen* allows

the testator's intention to be carried out but should not be misinterpreted as authority for a widespread, case-by-case assessment of requests for waiver of privilege by third parties. The presumption described by Wigmore does not apply in the circumstances of this appeal.

b) The Powers of a Trustee in Bankruptcy

24 Solicitor-client privilege is the privilege of the client — in this case, Bre-X. Subject to an exception, the only basis upon which a trustee could claim the right or power to waive the bankrupt's solicitor-client privilege and demand disclosure would be statutory. It is important to understand the powers of a trustee when resolving the question of privilege. A trustee has no inherent authority over the bankrupt's affairs. Rather, the trustee's rights are statutory and it is empowered to assume conduct of the bankrupt's affairs and take possession of his property pursuant to authority granted by the BIA which provides, in part:

> 16. (3) The trustee shall, as soon as possible, take possession of the deeds, books, records and documents and all property of the bankrupt and make an inventory, and for the purpose of making an inventory the trustee is entitled to enter, subject to subsection (3.1), on any premises on which the deeds, books, records, and documents or property of the bankrupt may be, notwithstanding that they may be in the possession of a sheriff, a secured creditor or other claimant thereto.
>
> . . .
>
> (5) No person is, as against the trustee, entitled to withhold possession of the books of account belonging to the bankrupt or any papers or documents, including material in electronic form, relating to the accounts or to any trade dealings of the bankrupt or to set up any lien or right of retention thereon.
>
> 18. The trustee may when necessary in the interests of the estate of the bankrupt
>
> > (a) take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value; and
> >
> > (b) carry on the business of the bankrupt until the date fixed for the first meeting of creditors.
>
> 20. (1) The trustee may, with the permission of the inspectors, divest all or any part of the trustee's right, title or interest in any real property of the bankrupt . . .
>
> 21. The trustee may initiate such criminal proceedings as may be authorized by the creditors, the inspectors or the court against any person believed to have committed an offence under this Act.
>
> 67. (1) The property of a bankrupt divisible among his creditors shall not comprise
>
> > (a) property held by the bankrupt in trust for any other person,
> >
> > (b) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,
>
> but it shall comprise
>
> > (c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and
> >
> > (d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

71. (2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee, the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

163. (1) The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent, clerk, servant, officer, director or employee of the bankrupt, respecting the bankrupt, his dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, his dealings or property.

164. (1) Where a person has, or is believed or suspected to have, in his possession or power any of the property of the bankrupt, or any book, document or paper of any kind relating in whole or in part to the bankrupt, his dealings or property, or showing that he is indebted to the bankrupt, he may be required by the trustee to produce the book, document or paper for the information of the trustee, or to deliver to him any property of the bankrupt in his possession.

167. Any person being examined is bound to answer all questions relating to the business or property or the bankrupt, to the causes of his bankruptcy and the disposition of his property.

There are many other provisions which confer broad powers upon the trustee, but notably absent is the delegation of any power to waive privilege, such as contained in the British legislation. While these sections allow for the examination of a solicitor and disclosure of information relating to the bankrupt's transactions, the sections omit any reference to privileged communications.

25 British insolvency legislation (the *Insolvency Act*, 1986, c. 45 (U.K.)) explicitly refers to privileged communications:

311(1). The trustee shall take possession of all books, papers and other records which relate to the bankrupt's estate or affairs and which belong to him or are in his possession or under his control (including any which would be privileged from disclosure in any proceedings).

26 This provision expressly permits the production of privileged documents, unlike the Canadian statute where neither production of privileged documents nor waiver of privilege is mentioned. A cursory review of *Halsbury's Laws of England*, vol. 3(1), 4th ed. (London: Butterworths, 1980) and vol. 3(2), 4th ed. (London: Butterworths, 1980), and British case authorities reveals that even where the privileged document is expressly producible notwithstanding the privilege, the provision merely entitles the trustee to take possession. The protection afforded by solicitor-client privilege, however, is not displaced and the section does not confer any authority to waive the privilege upon the trustee.

27 The British legislation may be contrasted with comparable American provisions. The *Bankruptcy Code*, 11 U.S.C. §§ 542(e) provides:

Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records and papers relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

The American legislation recognizes that the privilege protects communications from disclosure and cannot be waived by the trustee.

28 The Canadian legislation is silent regarding solicitor-client privilege, and thus it is necessary to determine whether the documents must be produced notwithstanding the privilege. Keeping in mind the importance and purpose of the privilege, it is my view that, absent specific language such as that contained in the British statute, once the privilege attaches disclosure of the communication cannot be compelled. That is the essence of the privilege. The purpose of the privilege is a recognition of the importance of confidentiality to the judicial system generally. If the document must be disclosed to a trustee in bankruptcy, then confidentiality and the judicial system it supports is undermined. And it is not corrected by saying that the trustee cannot use the information. Indeed, if the trustee cannot use the information then there is no purpose in the disclosure. If it can, then the foundation for the privilege is damaged.

29 There may be occasions where the trustee inadvertently comes into possession of privileged information. Even then, a trustee cannot waive the privilege and make use of the documents unless they fall within an exception.

30 Parliament did not include a clause making privileged communications producible. In addition to excluding any reference to solicitor-client privilege, Parliament does not confer all the bankrupt's property and personal rights in the trustee. Section 2(1) of the BIA defines "property" to include:

> money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

The "property" that vests in the trustee includes almost "every conceivable type of asset": *Chetty v. Burlingham Associates Inc.* (1995), 121 D.L.R. (4th) 297 (Sask. C.A.), at 300. Some types of property, however, are specifically excluded (e.g., property held in trust for another person, pursuant to s. 67(1)) or do not fall within the confines of the definition.

31 Notably, personal property and personal rights are very different and the cases interpreting the BIA distinguish the two. For example, "things in action", such as a cause of action for custody or divorce, are matters personal to the bankrupt and are not captured by s. 2(1) of the BIA: *Gano v. Alberta Motor Assn. Insurance Co.* (1997), 202 A.R. 118 (Alta. Master). Tax refunds for the support of disabled person are the "property of the bankrupt": *Re Neufeld* (1993), 144 A.R. 182 (Alta. Q.B.). Nor does a cause of action for damage to the reputation of a bankrupt vest in a trustee: *Eggen v. Grayson* (1956), 8 D.L.R. (2d) 125 (Alta. T.D.); *Rahall v. McLennan* (1996), 190 A.R. 183 (Alta. Q.B.). In my view, solicitor-client privilege is a personal right, at least as fundamental and individual as damages to reputation, which falls into a category of interests which are not transferred to or conferred upon a trustee by the BIA. As noted by Yoine Goldstein in "Bankruptcy as it Affects Third Parties: Some Aspects", [1985] Meredith Mem. Lect. 198 at 227: "I can think of nothing more attached to the person and nothing less pecuniary, than a communication to a person bound by professional secrecy . . . "

32 The distinction between property rights and personal rights, such as privilege, however, is far from absolute. For example, the BIA dictates that trustees take possession of all property of the bankrupt, including books, records and documents. The trustee argues that if a privileged communication has been reduced to writing (for example, in the form of an opinion letter) the tangible letter is property that must be produced. But the very essence of the solicitor-client privilege (the personal right of the bankrupt) protects the privileged communication from being communicated. The BIA does not diminish the personal right of privilege enjoyed by the bankrupt in respect of that communication. Once privilege attaches to the communication, I am of the view that it need not be produced unless the statute specifically provides. Moreover, in cases where production of privileged material occurs inadvertently, the privilege remains extant and the bankrupt's right to privilege with respect to that document is maintained.

33 Section 16 of the BIA and other related provisions are neither sufficiently broad nor explicit enough to empower the trustee to take possession of and use privileged communications, advice or opinions which may fall under the BIA's definition of "property". Certainly a privileged communication is not property divisible amongst creditors such as that contemplated in s. 67. In short, while there may be a physical record or document which records the communication,

the essence of the document is still the privileged communication, a personal right and not property contemplated or falling under the BIA. The personal right of privilege attaches to the document and, in my view, that personal right, retained by the bankrupt, precludes disclosure of the communication to the trustee whatever form the communication takes. If disclosure of the physical document was permitted, the personal privilege right would be totally defeated. Had a transfer of solicitor-client privilege, or production of privileged communications (whatever their form) been intended, Parliament would have so provided in the BIA. This was not done.

34 In the case of a company, the privilege is solely the right of the company. There may also be situations where questions of privilege will arise with respect to individuals such as directors, officers and managers of the corporation who seek advice from the corporate solicitor as to their own obligations, which may become intertwined with corporate opinions. This variant on the issues that may arise out a trustee's attempt to disclose privileged information is not before us and I need not address the issue.

35 In my view, there is no attempt in the legislation to displace the common law confidentiality rights enjoyed by a bankrupt with respect to its communications with solicitors. The privilege itself is not property under the BIA. Nor is the right to waive a power attaching to property divisible amongst creditors under s. 67. The essence of the privilege, whatever its form, is the confidential communication to which privilege attaches. An explicit delegation would be required in order for trustees to have a categorical right to waive privilege for bankrupts and even for trustees to have an enhanced ability to seek the authority to waive from the courts on a case-by-case basis. Thus, the personal right of privilege is not altered by the BIA.

c) Jurisprudence

36 The Trustee submits that diverging and inconsistent views regarding the ability of a trustee to waive a bankrupt's privilege exist among courts in Canada. It suggests that, notwithstanding *Chilcott*, the continuing rule in the jurisprudence is that a bankruptcy trustee can waive a bankrupt's solicitor-client privilege. It is true that there is a dearth of authority on this issue and that some of the earlier authorities are inconsistent with *Chilcott*. In my view, however, the approach of the court in *Chilcott* is compelling.

37 As noted earlier, in that case, a solicitor acted on behalf of the bankrupt prior to the bankruptcy and advised the bankrupt on financial and other corporate matters. The trustee sought to examine the solicitor regarding privileged communications with the bankrupt. Although the court accepted that the solicitor could be compelled to disclose information about the bankrupt's property, affairs and transactions, the court held that information on any topic necessarily involving disclosure of communications made between the solicitor and the bankrupt for the purpose of giving legal advice could not be disclosed. Ultimately, the court refused to speculate on circumstances in which a trustee might properly waive a bankrupt's privilege, but it concluded that the goal of protecting creditors' rights, standing alone, could not defeat solicitor-client privilege.

38 In my view, *Chilcott* correctly balances the importance of solicitor-client privilege against creditors' rights and is relevant and applicable to the case at bar. The fact that the bankrupt was an individual in *Chilcott*, as compared to the corporate bankrupt involved in the within action, is not a relevant distinguishing factor. If anything, the bankrupt's refusal to waive privilege and the specific fraud allegations advanced against him in *Chilcott* resulted in a stronger case for disclosure than the Trustee has put before this Court.

39 In support of its submissions, the Trustee relies on the Alberta case of *Re Abacus Cities Ltd.* (1981), 40 C.B.R. (N.S.) 172 (Alta. Q.B.). In *Re Abacus Cities Ltd.*, a trustee sought the court's advice and direction regarding his authority over privilege applicable to communications between a bankrupt corporation and the bankrupt's solicitors where an officer of the bankrupt had been charged with fraud. The trustee's query arose when the Attorney General of Ontario, during a preliminary hearing into the fraud charges, asked the trustee to waive the bankrupt's solicitor-client privilege regarding certain communications relevant to the fraud charges. As the matter arose out of a bankruptcy action commenced in Ontario, the Alberta court declined to make a decision regarding the admissibility of evidence in Ontario proceedings and

the existence of solicitor-client privilege. The judge did, however, comment upon the trustee's ability to waive privilege. Following *Re Cirone*, he accepted that the privilege belonged to the bankrupt, but held that the trustee could step into the shoes of the bankrupt to waive the privilege. In particular, the court specified that the trustee was authorized to waive the bankrupt's privilege after considering issues of public interest and if such a waiver would not be prejudicial to the interests that the trustee represented.

40 With respect, I do not accept that a trustee steps into the shoes of the bankrupt for all purposes, including the purpose of waiving solicitor-client privilege. A trustee's powers are prescribed by statute. The BIA does not confer any authority over privilege and does not provide that the trustee steps into the shoes of the bankrupt for all purposes. Moreover, a proper consideration of the public interest must include a careful examination of the rationale for solicitor-client privilege, including the overriding need to guard this privilege in order to ensure the integrity of our legal process and a client's right to effective representation by counsel. In addition, I note that *Re Abacus Cities Ltd.* relied heavily upon *Re Cirone*, but was decided before *Re Cirone* was limited to its facts by the Ontario Court of Appeal in *Chilcott*. Finally, in both *Re Abacus Cities Ltd.* and *Re Cirone*, fraudulent behaviour was involved (fraud being a potential exception to the privilege) and that these cases may, on that basis alone, be distinguished from the within appeal.

41 The Trustee also refers to *Re Amonson* (1985), 57 C.B.R. (N.S.) 314 (Alta. Q.B.). In my view, this case does not assist the Trustee. In that case the court followed the reasoning of the Ontario Supreme Court in *Chilcott*, without reference to the Ontario Court of Appeal's decision in that case. In *Re Amonson*, the court again considered whether a solicitor was a compellable witness in bankruptcy proceedings and whether the trustee could waive solicitor-client privilege. Although the court agreed with the decision at first instance in *Chilcott*, the court in *Re Amonson* did not eventually permit a blanket waiver. Ultimately, the court remained reticent about waiver of a bankrupt's privilege and concluded at 317 that "care should be taken with respect to the solicitor-client privilege concerning the giving of the legal advice unless this advice was in furtherance of a criminal purpose."

42 Similarly, *Wolch's Guaranteed Foods Ltd. (Trustee of) v. Wolch* (1994), 24 C.B.R. (3d) 268 (Alta. Q.B.) does not support the Trustee's position in the within action. In this case, the Registrar considered, *inter alia*, whether a trustee could waive the solicitor-client privilege of a bankrupt, but ultimately concluded that the case did not require him to generally determine whether a trustee was entitled to waive a bankrupt's privilege. On the specific facts before him, the Registrar held that waiver was not warranted, in part, because wide disclosure about the bankrupt's property had already been made. Thus, there was no true necessity for the waiver.

43 The Trustee appears to argue that *Wolch* contemplates the possibility of trustees being able to waive a bankrupt's privilege because the Registrar declined to make a final determination on the issue. In my view, the ultimate result of *Wolch* supports the respondent's position that privilege should not be waived and the case indicates a preference for the Ontario Court of Appeal's reasoning in *Chilcott*. Namely, at 273, the Registrar stated: " . . . there is no authority for holding a trustee can waive the bankrupt's privilege."

44 Finally, while not referred to by counsel in argument, this Court discussed release of information by a solicitor to a trustee in bankruptcy in the case of *Clark v. Law Society (Alberta)*, [2000] 11 W.W.R. 520 (Alta. C.A.). In that case, a lawyer disclosed information about assets of the bankrupt to a trustee and the Law Society took disciplinary action. This Court granted relief to the lawyer. During the course of its reasons, this Court noted that the BIA conferred broad powers on a trustee to demand information about property, but held that the scope of these powers was not at issue because the lawyer had properly disclosed information (not privileged), as is clearly required by the BIA. The Court specifically declined to rule on the question of solicitor-client privilege, noting only that had privileged information been divulged, other problems might have arisen.

45 In my view, the state of the law regarding a trustee's ability to waive a bankrupt's privilege is not as ambiguous as the Trustee submits, nor is it evolving towards an exception favouring trustees generally. If anything, the common law is evolving in the contrary direction. While a small number of the cases put before us permitted disclosure, many of them predate *Chilcott*. Moreover, some deal with accepted exceptions, namely, criminal behaviour, which distinguishes

them factually from the within appeal. Overwhelmingly, jurisprudence reiterates that solicitor-client privilege must be guarded zealously and there are no common law developments which support an erosion of that privilege in favour of trustees in bankruptcy.

2. Is this an occasion which justifies an exception to the privilege?

46 Finally, it is necessary to address the Trustee's submissions relating to the existing exceptions at common law which might permit disclosure of Bre-X's privileged information by this Court. The bases for solicitor-client privilege must be weighed against the potential benefits to be derived from an exception displacing the privilege of bankrupts.

47 In my view, the fact that disclosure is sought in a bankruptcy context, where creditors' financial recovery might be enhanced by disclosure, is insignificant compared to the benefits derived from protection of a bankrupt's solicitor-client privilege. Insolvent entities and persons in financial difficulty frequently need legal advice, perhaps even more so than those who enjoy financial stability. The ability of these individuals or corporations to obtain fully informed and reliable legal advice should not be compromised by threat of disclosure in the possible event of a bankruptcy. In my view, creditors may benefit more from the provision of good legal advice to persons on the brink of insolvency than they would from disclosure of solicitor-client communications between these debtors and their lawyers.

48 It is not helpful to simply say that in the public's interest trustees obtain all information that will help maximize asset recovery without also recognizing the public interest in solicitor-client privilege. Frequently, contrary public interests may compete with the public interest in solicitor-client privilege, but most often, the public interest in and the rationale for solicitor-client privilege prevail. As noted in *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536 (S.C.C.), at 562, a class privilege such as solicitor-client privilege is not easily displaced:

> A class privilege entails a *prima facie* presumption that such communications are inadmissible or not subject to disclosure in criminal or civil proceedings and the onus lies on the party seeking disclosure of the information to show that an *overriding* interest commands disclosure.
>
> (Emphasis added.)

The potential benefits that may result from trustees generally being able to waive privilege for bankrupt persons simply cannot be viewed as "overriding" when compared to the interests protected and enhanced by solicitor-client privilege.

49 This begs the question — what interests will override solicitor-client privilege? In short, very, very few interests are more important than those protected by this privilege. The almost absolute nature of solicitor-client privilege was reiterated in the recent case of *R. v. McClure* (2001), 195 D.L.R. (4th) 513 (S.C.C.). In that case, an accused was charged with sexual offences. The Supreme Court considered whether to waive solicitor-client privilege over the litigation file of the lawyer representing the alleged victim in a related civil suit in order to allow the accused to explore and confirm potential defences in the criminal prosecution.

50 The Supreme Court noted that the occasions when this privilege will yield to other interests are rare and stated at 524 "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis." Ultimately, the court held that the file ought not to be produced, principally because the accused had not demonstrated that any useful information was in the litigation file and the necessity for disclosure was questionable.

51 In my view, the Supreme Court's recent decision in *McClure* narrows the exceptions to solicitor-client privilege significantly, particularly given that court's criticism of case-by-case assessment of requests to set aside privilege. The Trustee, however, argues that exceptions may arise on a case-by-case basis where a principled basis for waiver exists. Even if principled exceptions were permissible on a case-by-case basis, the Trustee has not demonstrated that the facts of this case merit any exception. The rationale for rejecting a categorical right by trustees to waive the solicitor-client privilege of bankrupts applies equally to the Trustee's request in this appeal for a principled exception.

52 In short, no overriding rationale for disclosure exists in the within action. There is simply no pressing objective that, in principle, surpasses in importance the interests protected by solicitor-client privilege, and thus no principled exception is justified. The factors that militate against disclosure and which reinforce the rationale for continued privilege include: the absence of any identity of interest between the bankrupt and the Trustee, the inability to displace any of the Wigmore justifications for continued privilege, the minimal importance of the creditors' likely financial recovery relative to the interests protected by solicitor-client privilege, and the absence of a demonstrated need for the waiver sought.

a) Identity of Interest

53 Because the evidence does not directly demonstrate what benefits the bankrupt or its estate will reap from disclosure, the materials before us invite a rather hypothetical debate about the potential identity and conflicts of interest between the Trustee and Bre-X (and trustees and bankrupts more generally). During oral submissions, the appellant and respondent took opposite positions on this point. The Trustee submits that the bankrupt could only benefit from proper administration of its estate. Conversely, the respondent suggested that a trustee in bankruptcy and the bankrupt likely never enjoy a unity of interest since a trustee's principal obligation is to the creditors.

54 The potential unity of interest that may hypothetically exist between a bankrupt and its trustee provides an interesting topic for debate and discussion, but this much is clear. The Trustee has not proven, with sufficient affidavit evidence, that disclosure of Bre-X's privileged communications with BJV will further the interests and intentions of the bankrupt. The trustee has simply asserted that a fishing expedition is something he is "desirous" of.

55 Furthermore, there is no obvious analogy between the Trustee's objectives in this case and the desire to determine a deceased person's intentions in estates cases. For example, in *Geffen*, the Supreme Court considered whether disclosure of privileged information (in order to obtain evidence from a solicitor regarding advice given to a client pertaining to the creation of a trust of which the client was a settlor) was justified. The action arose after the settlor/client's death, when her executor brought an action seeking to set aside the trust for undue influence. At trial, the solicitor, who advised the settlor prior to the creation of the trust, was permitted to give evidence regarding privileged communications with his client.

56 The Supreme Court considered the disclosure of privileged information permitted by the trial judge. The primary basis upon which the evidence was initially allowed was the accepted exception in wills cases. Namely, solicitors may be permitted to give evidence in wills cases to determine the validity of the will or intent of a testator. The Supreme Court accepted this exception and further elaborated upon the bases for the exception.

57 Traditionally, the exception for wills cases was rationalized on the grounds that the testator intended to disclose his intentions through the will and that communications with the solicitor were only intended to remain secret during his lifetime. The Supreme Court also appeared to justify the exception on the basis that the interests of the client and the claimants in wills cases were the same. In other words, both client and claimants wished to ensure the full expression of the client's intentions. Ultimately, the court permitted the disclosure of the privileged communications in *Geffen* because, as stated at 387:

> [T]he considerations which support the admissibility of communications between solicitor and client in the wills context apply with equal force to the present case. The general policy which supports privileging such communications is not violated. The interests of the now deceased client are furthered in the sense that the purpose of allowing the evidence to be admitted is precisely to ascertain what her true intentions were. And the principle of extending the privilege to the heirs or successors in title of the deceased is promoted by focussing the inquiry on who those heirs or successors properly are.

58 The court's decision in *Geffen* is based largely upon the obvious analogy between the disclosure of the settlor's intention and confirmation of a testator's intention in estates cases. Namely, both in estates cases and in *Geffen*, solicitor-client privilege was not violated by disclosure because of the identity of interest between the claimant and client and, to

a lesser degree, because of the deceased's presumed wish to have his intentions disclosed to his beneficiaries and other claimants.

59 No similar identity of interest can be assumed to exist between a trustee in bankruptcy and a bankrupt. While such a commonality may occasionally arise, any presumption that bankrupts and their trustees enjoy an identity of interest is obviously unwarranted. A trustee acts in the interests of the creditors, which are not identical to, and frequently conflict with, the interests of the bankrupt person. While a trustee is afforded broad powers to deal with a bankrupt's assets, the bankrupt still exists, whether as a person or a corporation. The interests of the two are not the same. Moreover, if they are identical, the bankrupt might well agree to waive the privilege.

60 Further, as noted earlier, in estates cases, the deceased person is presumed to have intended necessary disclosure of his intention after his death. No similar presumption may be advanced in this case. No one would suggest that a bankrupt anticipates or intends that privileged communications with his solicitor will be disclosed in the event of his insolvency and bankruptcy. Certainly, the directors of Bre-X did not waive the company's privilege prior to resigning. In the absence of any contrary evidence, we may assume that Bre-X intended to engage in fully confidential communications with its solicitor, without any intention to disclose such communications. Disclosure may compromise Bre-X's legitimate expectation of and entitlement to confidentiality. In addition, no identity of interest between the Trustee, who desires waiver, and Bre-X has been proven.

b) Creditors' Interests

61 Any decision about an exception invites a closer look at the interests of the estate and creditors which the trustee seeks to protect and enhance. Namely, how important are creditors' rights in the broader context of solicitor-client privilege? As noted earlier, it is obvious that a bankrupt's creditors might occasionally benefit from disclosure of privileged communications between the bankrupt and his solicitors. The mere fact that there might be a benefit is not a compelling reason to disclose information that is otherwise privileged.

62 By way of illustration, the disclosure of privileged discussions between the accused and his counsel in criminal cases might frequently promote convictions where evidence regarding the offence would be revealed by disclosure of privileged communications. There is a public interest in prosecuting criminals, yet the accused's solicitor-client privilege may prevent disclosure of material evidence and will be protected notwithstanding the possibility that a guilty party may not be convicted. The benefits of disclosure alone, whether in a civil or criminal context, are always outweighed compared to the societal benefit resulting from a legal system in which clients may freely seek advice from solicitors.

63 As noted earlier, there is simply no competition between creditors' rights and the collective benefits derived from effective legal representation within our legal system. Confidentiality is essential to the solicitor-client relationship and, using Wigmore's language, ought clearly to be sedulously fostered. Potentially insolvent corporations must not be discouraged from seeking legal advice due to the possibility of disclosure of their solicitor-client communications. Particularly during periods of financial instability, corporations and their creditors benefit from appropriate and complete legal advice that may assist the corporation (and by extension, its creditors). One expects that persons in financial difficulty would be reluctant to avail themselves of legal advice where a real possibility of disclosure existed. Thus, disclosure would compromise the effective provision of legal advice to clients experiencing financial difficulty. A great injury to individuals and corporations in financial difficulty, as well as the shareholders and other creditors of such persons, would result from an erosion of solicitor-client privilege. This injury to the legal system and its ability to provide legal advice to persons in dire financial straits vastly outweighs the occasional benefits that might flow to the estate of the bankrupt.

c) No Necessity for Waiver by the Trustee

64 Finally, I must deal with the argument that disclosure of Bre-X's privileged communications with BJV is required because of Bre-X's alleged inability to waive its own privilege. The Supreme Court emphasized in *McClure* that solicitor-

client privilege will not be set aside except in cases of dire need. When commenting on whether the accused's stated desire to review his alleged sexual assault victim's civil litigation file constituted a case of dire need, the court firmly stated at 527: "Before the test [for waiver of privilege] is even considered, the accused must establish that the information he is seeking in the solicitor-client file is not available from any other source and he is otherwise unable to raise a reasonable doubt as to his guilt in any other way." While this case was decided after this appeal was heard, it merely confirms my decision and in particular reiterates that waiver will only be permitted if there is no other way to obtain the information sought and if the information itself is demonstrably important and necessary.

65 The Trustee submits that an exception is necessary because all Bre-X's officers and directors resigned in 1997. That argument is difficult to entertain when one realizes that privilege continues even after death (with some exceptions): *Bullivant v. Attorney General*, [1901] A.C. 196 (U.K. H.L.), at 206; *Langworthy v. McVicar* (1913), 25 O.W.R. 297 (Ont. H.C.), at 298; *Stewart v. Walker* (1903), 6 O.L.R. 495 (Ont. C.A.), at 497. If privilege continues after death, surely the privilege of a corporation survives the mere resignation of its officers and directors. Moreover, the argument that there is no one to waive privilege is not persuasive because there are still Bre-X shareholders and a meeting could be called to deal with the issue of privilege, whether by the election of directors or otherwise. In the end, Bre-X retains the capacity in law to waive privilege, and no appropriate steps have been taken to perfect that capacity. This capacity for waiver seriously undermines the Trustee's request for an exception to Bre-X's privilege.

66 Furthermore, the BIA provides the Trustee with broad powers to take possession of property and obtain information regarding the bankrupt. For example, the Trustee has the discretion to examine witnesses, including BJV. Section 163(1) of the BIA provides:

> The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent, clerk, servant, officer, director or employee of the bankrupt, respecting the bankrupt, his dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, his dealings or property.

While privilege may arise in respect of certain communications, the Trustee is still entitled to examine BJV and any former employee, officer or director of Bre-X. That option has not been exhausted in this case.

67 Thus, we know that the Trustee is equipped with a broad range of powers to obtain information from and about the bankrupt. Yet, there is no unequivocal evidence which demonstrates that the Trustee cannot obtain the information he seeks without setting aside solicitor-client privilege. There is no evidence that all available options have been exhausted. Thus, even if a case-by-case review is available, until the Trustee adduces evidence on these points, this Court cannot conclude that the disclosure sought is necessary.

68 Finally, I do not accept that the information sought will demonstrably assist the administration of the estate. Even if the lack of a directing mind to grant the waiver were a valid reason for an exception and the information could not be obtained without disclosure of privilege communications, this Court has not been advised, with any degree of precision, what information the Trustee seeks. There are no specific questions which BJV has thus far refused to answer. In the absence of specifics, this Court is not in a position to decide whether the information will truly be beneficial to the creditors and to the Trustee's administration of the estate. The information will not be disclosed so that the Trustee can go on a fishing expedition. A benefit must be anticipated and the likelihood of that benefit must be more than speculative.

Conclusion

69 In summary, the jurisprudence regarding solicitor-client privilege creates an extremely high threshold for disclosure of these communications. The Supreme Court has repeatedly reiterated the fundamental role which solicitor-client

privilege plays in the trial process and the importance of the confidentiality right enjoyed by clients seeking advice from counsel. Accordingly, the privilege will only be displaced in exceptional circumstances, which overcome the important goals protected by solicitor-client privilege. In this case, the pecuniary interests of creditors of the bankrupt do not trump the interests protected by solicitor-client privilege.

70 Overall, no authority at common law, nor any provisions in insolvency legislation, nor any principle underlying solicitor-client privilege relax the application of solicitor-client privilege in the bankruptcy context. The BIA does not contain provisions forcing production of information notwithstanding solicitor-client privilege. There is no demonstrated identity of interest between the bankrupt and the Trustee. Furthermore, the evidence in this case, at best, expresses a hope that creditors might benefit from the disclosure of certain privileged communications, but the evidence does not specify what benefits are anticipated. Moreover, the mere resignation of the directors of the bankrupt does not, by itself, prove that the disclosure is necessary as other means to obtain the information may exist. Ultimately, the privilege cloaking communications between a bankrupt and his solicitor constitutes a personal and fundamental right over which a trustee in bankruptcy has no authority and may only be displaced in the most exceptional circumstances.

71 In the end, the relief sought by the Trustee would involve a significant relaxation of the rules of solicitor-client privilege. Given the somewhat common circumstances of this bankruptcy, in order to permit the Trustee to waive Bre-X's privilege, this Court would necessarily have to recognize a wide range of circumstances in which trustees in bankruptcy were entitled to waive bankrupts' solicitor-client privilege. I am not prepared to permit, nor has the Trustee advanced any reasonable basis for, such a massive erosion of solicitor-client privilege.

72 The appeal is dismissed.

***LoVecchio J.* (ad hoc) (dissenting in part):**

73 I have had the benefit of reading the reasons of my colleague, Madam Justice Conrad. Although I agree with her conclusion, my road to that conclusion follows a slightly different path.

Background:

74 While the Bre-X story has been the subject matter of several books and lawsuits, the background facts for the application heard by the Chambers Judge are relatively simple. Prior to November 7, 1997, Bre-X retained Bennett Jones Verchere as corporate and securities counsel. Pursuant to this retainer, Bennett Jones Verchere provided advice and information to Bre-X. As a result of this solicitor-client relationship, some of these communications became privileged.

75 On November 7, 1997, Bre-X made an assignment in bankruptcy.

76 Bennett Jones Verchere argues that the professional advice and opinions are subject to solicitor-client privilege, and are not compellable. The trustee filed a Notice of Motion, seeking a declaration that it has the right to all files, documents, and records of Bennett Jones Verchere concerning the assets and affairs of Bre-X and that it has the right to waive Bre-X's solicitor-client privilege.

77 On November 23, 1998, the Chambers Judge ordered that Bennett Jones Verchere are compellable witnesses together with their *non-privileged* files, documents, and records respecting the assets, business affairs, and transactions of Bre-X. Further, the Chambers Judge ordered that the Trustee did not have the right or power to waive the solicitor-client privilege of Bre-X.

78 The Notice of Motion for Leave to Appeal only mentioned the order of the Chambers Judge with respect to waiver of solicitor-client privilege. While no mention is made in the Notice of Motion for Leave to Appeal respecting the denial by the Chambers Judge of the Trustees request for the production of privileged documents, in my view, a consideration of that decision is a necessary part of the analysis of this appeal.

Issues:

79 The issues in this appeal are as follows:

> 1. Does a trustee have the right to obtain from the bankrupt's solicitor possession of all of the files, documents, and records respecting the assets, business affairs, and transactions of the bankrupt, including those that are subject to solicitor-client privilege?
>
> 2. Does a trustee have the inherent power or right to waive the solicitor-client privilege of the bankrupt?
>
> 3. If the trustee does not have the inherent power or right to waive the bankrupt's privilege, should the court exercise its overriding jurisdiction and grant this right or power to the trustee?

Decision Issue 1:

80 For the reasons outlined below, Bennett Jones Verchere may not object to the transfer of their entire files, documents, and records of Bre-X respecting the assets, business affairs, and transactions of Bre-X to the trustee, including those that are subject to solicitor-client privilege. However, in view of my decision respecting Issues 2 and 3, proper safeguards would have to be established respecting the transfer of possession to the trustee of materials on the Bre-X file that are privileged.

Analysis:

81 In the administration of the bankrupt's estate, the trustee is given very wide powers. The sections of the *Bankruptcy and Insolvency Act* [1] that are relevant to this appeal are as follows:

> 16(3) The trustee shall, as soon as possible, take possession of the deeds, books, records and documents and all property of the bankrupt . . .
>
> 163(1) The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent, clerk, servant, officer, director or employee of the bankrupt, respecting the bankrupt, his dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, his dealings or property.
>
> 164(1) Where a person has, or is believed or suspected to have, in his possession or power any of the property of the bankrupt, or any book, document or paper of any kind relating in whole or in part to the bankrupt, his dealings or property, or showing that he is indebted to the bankrupt, he may be required by the trustee to produce the book, document or paper for the information of the trustee, or to deliver to him any property of the bankrupt in his possession.
>
> 167 Any person being examined is bound to answer all questions relating to the business or property or the bankrupt, to the causes of his bankruptcy and the disposition of his property.

82 These sections quite clearly allow for the examination of a solicitor. A solicitor may be compelled to disclose all information relating to the transactions of the bankrupt and the location of the bankrupt's property. Further, these sections allow for the trustee to obtain possession of all of the property of the bankrupt.

83 However, there is an omission in these sections: no reference is made to the delivery of privileged communications. This omission raises a question. Does the omission mean that privileged documents need not be delivered to the trustee? That is clearly the effect of the ruling of the Chambers Judge.

84 With respect to the examinations of solicitors, Holden & Morawetz in *Bankruptcy and Insolvency Law in Canada* [2] note:

> In the examination, the solicitor can be compelled to disclose all information regarding the bankrupt's affairs, transactions, whereabouts of his property, etc., which do not require the disclosure of communications made to the solicitor for the purpose of receiving legal advice or assistance [3]

Such an examination is limited to the goal of assisting the trustee in the administration of the estate by realizing property of the bankrupt and distributing the proceeds of this property to the bankrupt's creditors. [4] However, privileged communications are subject to solicitor-client privilege, and unless this privilege is waived by the bankrupt, this information may not be disclosed. This is a reference to communications. Such communications could be oral or written and in the case of written, the analysis is more complicated. It is axiomatic that a solicitor would have on their client's file a copy of any written opinions or advice given to a client.

85 Under s. 164 of the BIA, the solicitor may be compelled to provide the trustee with all "property" of the bankrupt and documents relating to the bankrupt's property. I believe it is settled law that a solicitor's file is really the property of the client and the definition of property in the BIA is so broad, it must be seen as encompassing the solicitor's file.

86 As a result, a potential problem exists if a solicitor could be compelled to deliver privileged communications (by this I mean the file copy of written communications which by any test are privileged) to the trustee and the trustee did not have the power to waive the privilege associated with the document just received. The problem is ensuring the confidentiality of the privileged communications when the documents are in the hands of the trustee, particularly when one concludes (as the Chambers Judge did and as will be noted below, I do) that the trustee does not have the power to waive the privilege. The Chambers Judge sidestepped the problem by only ordering the delivery to the trustee of the non-privileged materials.

87 British insolvency legislation explicitly refers to materials of the bankrupt that are privileged:

> 311(1) The trustee shall take possession of all books, papers and other records which relate to the bankrupt's estate or affairs and which belong to him or are in his possession or under his control (including any which would be privileged from disclosure in any proceedings). [5]

88 This legislation highlights that we are really dealing with two different issues: the trustee obtaining physical possession of the file and waiver. I do not accept that merely because the trustee may obtain possession of the solicitors file, this alone would give the trustee the power to waive the privilege. That is a different issue. I also note that the obtaining of possession relates only to materials of the bankrupt and would not extend to materials associated with advice given solely to the directors or officers of Bre-X as opposed to the company itself.

89 In addition, even though the trustee is entitled to possession of these privileged documents, their use would be limited to the affairs and property of the bankrupt. [6] The trustee must not use these documents to aid third parties in any action against Bre-X or any other party.

90 Put simply, the focus of the trustee in examining the solicitor's files, privileged and non-privileged, must be the property and affairs of the bankrupt. Further, the trustee, as an officer of the court, must strictly ensure the sanctity of the solicitor-client privilege of Bre-X. In other words, the trustee must not disclose the contents of these privileged communications to any third party. The trustee must take the greatest of care in its use of these important documents.

91 Given my decision below, rather than not order the production of the privileged, I would have ordered the delivery of all materials, both privileged and non-privileged, as they are property of the bankrupt. However, I would

have ordered that Bennett Jones Verchere separate the privileged materials from the non-privileged materials and deliver these privileged materials separately and I would have ordered them sealed.

Decision Issue 2:

92 For the reasons that follow, a trustee does not have the inherent right or power to waive the solicitor-client privilege of a bankrupt.

Analysis:

93 This appeal deals solely with the question of whether the trustee has the power to waive the solicitor-client privilege of the bankrupt. Consequently, questions of whether a trustee *should* or *would* exercise such a power are not relevant to this appeal. That is a decision the trustee would make were the Court to find that the trustee was entitled to make such a decision.

94 The starting point for this analysis includes an examination of the bankrupt and its status and capacity. Notwithstanding its status as a bankrupt, it is clear that Bre-X continues to exist as a corporate entity. Stated another way, although all of the assets of Bre-X passed to the trustee through operation of the BIA, this does not destroy the corporate entity or totally restrict its ability to function as a corporation. [7]

95 As Bre-X continues to exist as a corporation, it continues to possess the power to waive its solicitor-client privilege. [8] Bre-X has not waived the privilege because of its particular situation. Bre-X, like most bankrupts, has no officers or directors at present. Because of this fact, Bre-X has no present corporate means to authorize such a waiver. This obstacle could be removed by holding a shareholders' meeting and electing directors. I recognize for practical purposes that it is unlikely this would be done.

96 As a result of this situation, the trustee wishes to waive the solicitor-client privilege of Bre-X.

97 Subject to the third issue, the only basis upon which a trustee could claim the right or power to waive the bankrupt's solicitor-client privilege would be statutory. This may explicitly appear in the BIA. Alternatively, the trustee may obtain this privilege, and therefore the right to waive it, under s. 71(2) of the BIA.

a. Explicit Provision

98 It may be argued by the trustee that the fact alone that it will receive possession of privileged documents from the solicitor through the operation of s. 164 is sufficient to waive privilege. However, for the reasons that follow, this argument must fail.

99 The trustee may come into possession of privileged documents through the operation of the BIA, as discussed in detail above. This mandated possession alone is not sufficient to allow the trustee to waive the privilege of the bankrupt. An analogous situation occurs in the context of medical reports:

> So where a statute requires disclosure, e.g., of a report, no voluntariness is said to be present and no implied waiver occurs. For example, where a medical report is disclosed pursuant to the Ontario *Evidence Act*, the attendant communications (e.g., surveillance films used to produce the report) remain privileged as there has been voluntariness in the disclosure of the report and no implied waiver of the attendant materials. [9]

Similarly, under the BIA, the transfer of possession of some privileged communications of the bankrupt and third persons, such as the solicitor, may be compelled. Such a transfer is likewise involuntary and therefore, cannot constitute waiver of the solicitor-client privilege.

100 The BIA is silent on the ability of the trustee to waive the solicitor-client privilege of the bankrupt. There is nothing in the BIA which gives the trustee the right or power to waive this privilege. The issue is simply not addressed in the BIA.

101 The rules of statutory interpretation shed light upon this omission in the BIA. The doctrine of "implied exclusion" or *expressio unius est exclusio alterius* provides:

> An implied exclusion argument lies whenever there is a reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there was no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature. [10]

This rule of statutory interpretation has been applied by the Supreme Court of Canada in *Nfld. Telephone Co. v. TAS Communications Systems Ltd.*. [11]

102 If Parliament had meant to exclude solicitor-client privilege, it would have referred to this expressly. The fact that privilege is not mentioned in the BIA leads to the implication that this omission was deliberate. Therefore, it is reasonable to conclude that Parliament intended that the ability to waive solicitor-client privilege remain with the bankrupt under the BIA.

b. Section 71(2)

103 In the absence of an express entitlement to waive Bre-X's privilege, the trustee suggested that s. 71(2) of the BIA indirectly provides this right:

> 71(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

104 Section 71(2) provides that the "property" of Bre-X vested in the trustee upon bankruptcy. If solicitor-client privilege constitutes "property" under the BIA, then the trustee is vested with this privilege and consequently, has the power to waive it.

105 Section 2(1) of the BIA defines "property" very broadly:

> 2(1) "property" includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

106 *Prima facie*, the "property" that vests in the trustee includes almost "every conceivable type of asset." [12] Some property is then excluded from sale and division among the creditors. [13] For example, s. 67(1) of the BIA excludes property held in trust for another person or property that is exempt according to provincial legislation.

107 In *Gano v. Alberta Motor Assn. Insurance Co.*, Master Funduk notes that there is a third category of property that is not available for distribution: matters very personal to the bankrupt. [14] These "personal rights" are not "property" under the BIA, based upon the purpose of the BIA:

> *Husky Oil Operations Ltd. v. Minister of National Revenue et al.*, [1995] 3 S.C.R. 453, 188 N.R. 1, 137 Sask. R. 81, 107 W.A.C. 81, says that there are two fundamental purposes underlying the B.I.A. One is to ensure the equitable distribution of a bankrupt's assets among his creditors and the second is the financial rehabilitation of the bankrupt. Given those purposes it becomes quickly apparent that certain "things in action" simply do not fit into the objectives of the B.I.A. even though in law they are "things in action". For example, a bankrupt has a cause of action for divorce. It would be stupid to suggest that that cause of action is "property" of the bankrupt available for distribution among his creditors. A bankrupt has a cause of action for voiding his marriage because his wife was still married to someone else at the time of the marriage to the bankrupt. A bankrupt has a cause of action for custody of his children. None of these would be "things in action" within the scope of the B.I.A. *They are all matters very personal to the bankrupt*. [15]

108 Various other authorities reveal that such "personal rights" are not "property" under the BIA. In *Re Neufeld*, the Court concluded that tax refunds received by the bankrupt for the support of a disabled person are not the "property" of the bankrupt and therefore, do not vest in the trustee. [16] A right of action for injury to character and reputation remains vested in the bankrupt. [17] Punitive damages are not "property" of the bankrupt. [18] All of these relate to matters very personal to the bankrupt and as such, are not included as "property" under the BIA.

109 The right of privileged communications with a solicitor must be equally personal. In fact, one author noted that "I can think of nothing more attached to the person and nothing less pecuniary, than a communication to a person bound by professional secrecy". [19]

110 There is ample case authority to support this proposition that the solicitor-client privilege constitutes a "personal right". [20] The Supreme Court of Canada noted that:

> There is no denying that a person has a right to communicate with a legal adviser in all confidence, a right that it "founded upon the unique relationship of solicitor and client" (*Solosky*,*supra*). *It is a personal and extra-patrimonial right which follows a citizen throughout his dealings with others*. [21]

111 In my view, matters that are very personal in nature are not included within the definition of "property" in the BIA. This conclusion is based upon the fundamental purpose of the BIA, as set out by the Supreme Court of Canada in *Husky Oil Operations Ltd. v. Minister of National Revenue* [(1995), 128 D.L.R. (4th) 1 (S.C.C.)]. Further, the right of solicitor-client privilege has been affirmed by the Supreme Court and other authorities as a "personal" right. As a result, one must conclude that the solicitor-client privilege is a personal right and as such, is not "property" that vests in the trustee. The solicitor-client privilege remains with the bankrupt. Therefore, the trustee has no power to waive the solicitor-client privilege.

112 Many authorities support this result. [22] Further, *Re Laprairie Shopping Centre Ltd.* [23] and *Re 164461 Canada Inc.* [24] support the above analysis. However, because of their roots in the civil law, these two cases should be viewed with caution in this common law jurisdiction.

Decision Issue 3:

113 The Court should not exercise its overriding jurisdiction and grant the right or power in the circumstances of this case.

Analysis:

114 Although the trustee has no right to waive the bankrupt's privilege, the court may, in appropriate circumstances, apply its inherent jurisdiction to grant this right to the trustee.

115 In a recent judgment of the Supreme Court of Canada, the Court reinforced the importance of solicitor-client privilege:

> Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interest to be fully represented. [25]

116 As noted by Madam Justice Conrad in her reasons for judgment, solicitor-client privilege "protects the sanctity of the confidence between client and lawyer." Without such privilege, there could not be effective representation of clients by counsel. The Supreme Court of Canada in *Solosky v. Canada* has gone so far as to classify solicitor-client privilege as a "fundamental civil and legal right". [26]

117 Given the sanctity of solicitor-client privilege, it will not be disregarded lightly. Very few interests will prove important enough to override solicitor-client privilege. The Supreme Court in *R. v. McClure* has recently further narrowed the exceptions to solicitor-client privilege. The Court noted that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances and does not involve a balancing of interest on a case-by-case basis." [27] Unless there are extremely pressing considerations, solicitor-client privilege will not be ignored.

118 No reason exists for making an exception in this action as no evidence was presented on the basis of which any of the exceptions set out in *R. v. McClure* could be applied.

Conclusion

119 As the trustee has not appealed the part of the Order which in effect declined to order the delivery of the privileged documents to the trustee, even on my analysis, the appeal should be dismissed and the order of the Chambers Judge confirmed.

Appeal dismissed.

Footnotes

1 R.S.C. 1985, c. B-3.

2 Houlden & Morawetz, *Bankruptcy and Insolvency Law in Canada*, Vol. 2, 3rd ed. (Toronto: Carswell, 1998).

3 *Ibid.* at 6-16.

4 *Ibid.* at 6-15.

5 *Insolvency Act*, 1986, c. 45 (U.K.).

6 *Re Taylor Ventures Ltd.* (1999), 60 B.C.L.R. (3d) 348 (B.C. S.C.), at 363-64. See also Houlden & Morawetz, *supra* at 6-18.15 - 6-18.16.

7 *Ciriello v. R.* (2000), 21 C.B.R. (4th) 9 (T.C.C. [Informal Procedure]) at 17, citing with approval *National Trust Co. v. Ebro Irrigation & Power Co.*, [1954] 3 D.L.R. 326 (Ont. H.C.).

8 *Shepherd (Trustee of) v. Shepherd* (1997), 50 C.B.R. (3d) 115 (Ont. Gen. Div. [Commercial List]).

9 R.D. Manes & M.P. Silver, *Solicitor-Client Privilege in Canadian Law*, (Markham, Butterworths, 1993) at 191 [footnotes omitted]. See also *Cameron v. Campbell* (1987), 29 C.P.C. (2d) 41 (Ont. H.C.).

10 R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Markham: Butterworths, 1994) at 168. See also P. Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Les Éditions Yvon Blais Inc., 1992) at 282.

11 [1987] 2 S.C.R. 466 (S.C.C.), at 483-84.

12 *Chetty v. Burlingham Associates Inc.* (1995), 121 D.L.R. (4th) 297 (Sask. C.A.), at 300.

13 *Chetty v. Burlingham Associates Inc.*, *supra* at 300.

14 (1997), 202 A.R. 118 (Alta. Master) at para. 33.

15 *Gano v. Alberta Motor Association Insurance Co.*, *supra* at 125.

16 (1993), 144 A.R. 182 (Alta. Q.B.), at 184.

17 *Eggen v. Grayson* (1956), 8 D.L.R. (2d) 125 (Alta. T.D.); *Rahall v. McLennan* (1996), 190 A.R. 183 (Alta. Q.B.).

18 *Gano v. Alberta Motor Assn. Insurance Co.*, *supra* at 133.

19 Y. Goldstein, "Bankruptcy as it Affects Third Parties: Some Aspects" (1985) Meredith Mem. Lect. 198 at 227.

20 *Taberner Investments Ltd. v. Price Waterhouse*, [2000] O.J. No. 2595 (Ont. S.C.J.) at para. 18; *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), at 871; *Festing v. Canada (Attorney General)*, [2000] 5 W.W.R. 413 (B.C. S.C.), at 433-34.

21 *Descôteaux v. Mierzwinski*, *supra* at 871, cited with approval in *Festing v. Canada (Attorney General)*, *supra* at 433-34.

22 *Taberner Investments Ltd. v. Price Waterhouse*, *supra*; *Clarkson Co. v. Chilcott* [(1984), 48 O.R. (2d) 545 (Ont. C.A.)], *supra*; *Canbook Distribution Corp. v. Borins* (1999), 7 C.B.R. (4th) 121 (Ont. Gen. Div. [Commercial List]). See also R.D. Manes & M.P. Silver, *Solicitor-Client Privilege in Canadian Law* (Markham: Butterworths, 1993) at 68-69.

23 [1998] R.J.Q. 448 (C.A. Que.).

24 [1996] A.Q. No. 4203 (C.S. Que.).

25 *R. v. McClure* (2001), 195 D.L.R. (4th) 513 (S.C.C.), at 517.

26 (1979), [1980] 1 S.C.R. 821 (S.C.C.), at 839.

27 *R. v. McClure*, *supra* at 524.

COURT FILE NO.: CV-07-0385
CV-06-0679
CV-06-0679-A1
CV-07-0506
CV-08-0002
CV-08-0141
CV-08-0083
CV-08-0083-A
CV-08-0142
CV-09-0021
DATE: 2009-03-30

2009 CanLII 16738 (ON SC)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DAVID DASTI et al v. DTE INDUSTRIES et al

BEFORE: REGIONAL SENIOR JUSTICE J.F. MCCARTNEY

COUNSEL: Mr. S. Wojciechowski
Mr. Davis/Sydor
Ms. Bertoni
Mr. Sherbo
Mr. R. Macgillivray

HEARD: 2009-03-30

E N D O R S E M E N T

[1] This is a Motion in Action CV-07-0385 brought by the defendant Pye Bros. Fuels Ltd. for an Order that all Motions in ten actions (including Third Party Actions) be heard by a particular Judge, and that this Judge be otherwise appointed as Case Management Judge. Counsel for the Plaintiff, David Scott, in two other related actions, Wilson et al v Imperial Oil Limited et al (CV-07-0521) and Garth Clifford et al v Imperial Oil et al (CV-07-0522) ask that these two actions be subject to the same Order.

[2] It should be noted that in Action CV-09-0021 Pye Bros. Fuels Ltd. is not represented.

[3] All parties, with the exception of Imperial Oil Ltd. and Kaemingh Fuels Ltd., represented by Mr. Davis-Sydor, basically consented to, or took no position with respect to the Motion. Mr. Wojciechowski, acting for the defendant, Pye Bros. Fuels Ltd. and Mr. Sherbo, acting for several plaintiffs, were strongly of the opinion, because of the commonality of parties and issues – the main issue being leakage from oil storage tanks – and the apparent difficulty to date in organizing, for example, a schedule for discoveries, that a Case Management Judge would greatly streamline pre-trial proceedings.

[4] Mr. Davis-Sydor, on the other hand, argued that attempting to pull the lawyers and parties together in a situation where there are numerous actions and issues not of all of which are common, could create even further delays, and that it was actually more efficient to let each case proceed on its own.

[5] I tend to agree with Mr. Sherbo's assessment that it is premature to worry about how the Case Management Judge would organize the ongoing situation. No one is suggesting that all pre-trial matters would have to be done in common – some would lend themselves to a joint procedure and some would not. Deciding what was fair in any given circumstance would be the job of the Case Management Judge after he had heard the submissions of counsel. I believe this would be the most efficient way to proceed under the circumstances.

[6] In the result, a Case Management Judge will be appointed to hear all matters and other pre-trial proceedings regarding actions numbered CV-07-0385, CV-07-0506, CV-06-0679, CV-06-0679-A, CV-08-0002, CV-08-0141, CV-08-0083, CV-08-0083-A, CV-08-0142, CV-09-0021, CV-09-0521 and CV-07-0522.

[7] Costs may be spoken to if required in the next ten days.

Regional Senior Justice J. F. McCartney

DATE: 2009-03-30

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2009 CanLII 16738 (ON SC)

COURT FILE NO.: CV-07-0385
CV-06-0679
CV-06-0679-A1
CV-07-0506
CV-08-0002
CV-08-0141
CV-08-0083
CV-08-0083-A
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CV-09-0021

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SUPERIOR COURT OF JUSTICE - ONTARIO

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v.
DTE INDUSTRIES et al

BEFORE: Regional Senior Justice J.F. McCartney

COUNSEL: Mr. S. Wojciechowski, Mr. Davis/Sydor, Ms. Bertoni, Mr. C. Sherbo, Mr. R. Macgillivray

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ENDORSEMENT

REGIONAL SENIOR JUSTICE J.F. MCCARTNEY

DATE: 2009-03-30

2015 ONSC 3580
Ontario Superior Court of Justice [Commercial List]

Nelson Education Ltd., Re

2015 CarswellOnt 8313, 2015 ONSC 3580, 255 A.C.W.S. (3d) 22, 26 C.B.R. (6th) 161

In the Matter of the Companies' Lenders Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Nelson Education Ltd. and Nelson Education Holdings Ltd., Applicants

Newbould J.

Heard: May 29, 2015
Judgment: June 2, 2015
Docket: CV15-10961-00CL

Counsel: Robert J. Chadwick, Caroline Descours, Sydney Young for Applicants
D.J. Miller, Kyla E.M. Mahar for Royal Bank of Canada
Kevin J. Zych for First Lien Lenders
Jay Swartz, Robin Schwill for Alvarez & Marsal Canada Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.g Monitor
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Monitor
On May 12, 2015, companies sought and obtained initial order pursuant to Companies' Creditors Arrangement Act — Notice was given to bank late on day before and bank took position that it had not had sufficient time to consider or prepare response to application — Resulting initial order was pared down from what was sought by companies — Order provided that on comeback date hearing was to be true comeback hearing and that in moving to set aside or vary any provisions of initial order, moving party did not have to overcome any onus of demonstrating that order should be set aside or varied — On comeback date, bank brought motion to have AMC replaced with FTI as monitor — Motion granted — AMS was affiliate of AMC and had acted as financial advisor to applicants for two years prior to initial order — There was no suggestion that AMS were not professional or not aware of their responsibilities to act independently in role of monitor — AMS was not to be put in position of being required to step back and give advice to court on essential issue before court in light of its central role in whole process that would be considered — It was preferable for another monitor to be appointed and AMC was replaced as monitor with FTI — Pending further order, companies were prevented from paying any interest or other expenses to first lien lenders unless same payments owing to second lien lenders were made.
Table of Authorities
Cases considered by *Newbould J.*:
Winalta Inc., Re (2011), 2011 ABQB 399, 2011 CarswellAlta 2237, 84 C.B.R. (5th) 157, 521 A.R. 1 (Alta. Q.B.) — followed
Statutes considered:

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Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 4 — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — considered

MOTION by bank to replace monitor in Companies' Creditors Arrangement Act proceeding.

***Newbould J.*:**

1 On May 12, 2015, Nelson Education Ltd. ("Nelson") and its parent company, Nelson Education Holdings Ltd. sought and obtained an initial order pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA"). Notice had been given to RBC only late the day before and RBC took the position that it had not had sufficient time to consider or prepare a response to the application. The resulting initial order was pared down from what was sought by the applicants and it provided that on the comeback date the hearing was to be a true comeback hearing and that in moving to set aside or vary any provisions of the initial order, a moving party did not have to overcome any onus of demonstrating that the order should be set aside or varied.

2 On the comeback date, RBC moved to have Alvarez & Marsal Canada Inc. ("A&M Canada") replaced with FTI Consulting Canada Inc. ("FTI") as the Monitor, and for other relief. At the conclusion of the hearing, I ordered that FTI replace A&M Canada as Monitor for reasons to be delivered. These are my reasons.

Relevant History

3 Nelson is a Canadian education publishing company, providing learning solutions to universities, colleges, students, teachers, professors, libraries, government agencies, schools, professionals and corporations across the country.

4 The business and assets of Nelson were acquired by an OMERS entity and certain other funds from the Thomson Corporation in 2007 together with U.S. assets of Thomson for U.S. $7.75 billion, of which US$550 million was attributed to the Canadian business. The purchase was financed with first lien debt of approximately US$311.5 million and second lien debt of approximately US$171.3 million.

5 The first lien debt is currently approximately US$269 million plus accrued interest. There are 22 first lien lenders. RBC is a first lien lender holding approximately 12% of the principal amount outstanding. The first lien debt matured on July 3, 2014. It has not been repaid.

6 The second lien debt is currently approximately US$153 million plus accrued interest. RBC is a second lien lender, holding the largest share of the principal amounts outstanding, and is the second lien agent for all second lien lenders. The maturity date is July 3, 2015 subject to acceleration.

7 According to Mr. Greg Nordal, the CEO of Nelson, the business of Nelson has been affected by a general decline in the education markets over the past few years. In the past year, overall revenues in the K-12 market have declined by 13% and in the higher education market by 3%.

8 Notwithstanding the industry decline over the past few years, Nelson according to Mr. Nordal has maintained strong EBITDA, which is a credit I am sure to the efforts of Mr. Nordal and the management of Nelson. Nelson's EBITDA has remained positive over the last several years. For the fiscal year ended June 30, 2011 it was $47.4 million, for the fiscal year ended June 30, 2012 it was approximately $37.3 million and for the year ended June 30, 2013 it was approximately $40.9 million.

9 Mr. Nordal is of the view that Nelson is well positioned to take care of increasing future opportunities in the digital educational market.

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10 Nelson had a leverage ratio of debt to EBITDA of approximately 17:1 for the fiscal year 2015. Its first lien debt matured and has not repaid and it has made no interest payments on the second lien debt since March 31, 2014.

11 Nelson's efforts to deal with this situation have led to a proposed sale transaction under which the business of Nelson would be sold to the first lien lenders by way of a credit bid and the second lien lenders would be wiped out. In their application requesting an initial order, the applicants proposed a hearing date to be held nine days after the Initial Order to approve this sale transaction. That request was not granted.

12 In March 2013, Nelson engaged Alvarez and Marsal Canada Securities ULC ("A&M") as its financial advisor to assist the Company in reviewing and considering potential strategic alternatives, including a refinancing and/or restructuring of its credit agreements.

13 Commencing in April 2013, Nelson, with the assistance of A&M and legal advisors, entered into discussions with a number of stakeholders, including RBC as the second lien agent, the first lien steering committee, and their advisors, in connection with potential alternatives to address Nelson's debt obligations. A number of without prejudice and confidential proposed transaction term sheets were discussed between August 2013 and September 2014, without any agreement being reached.

14 During this time, interest continued to be paid on the first lien debt. In March, 2014 Nelson did not paid interest on the second lien debt. In return for a short cure period to May 9, 2014, a partial payment of US$350,000 towards interest was paid on the second lien debt. A further cure period to May 30, 2014 was given on the second lien debt but nothing was paid on it by that date. No further cure period was agreed and no further interest has been paid. Initially during the discussions that took place with the second lien lenders' agent, the professional fees of the advisors to the second lien lenders were paid by Nelson but these were stopped in August, 2014 after there was no agreement regarding further extensions of the second lien debt or agreement on any term sheet.

15 On September 10, 2014, Nelson announced to the first lien lenders Nelson's proposed transaction framework on the terms set out in the First Lien Term Sheet dated September 10, 2014 (the "First Lien Term Sheet") for a sale or restructuring of the business and sought the support of all of its first lien lenders.

16 In connection with the First Lien Term Sheet, Nelson entered into a support agreement (the "First Lien Support Agreement") with first lien lenders representing approximately 88% of the principal amounts outstanding under the first lien credit agreement. The consenting first lien lenders comprise 21 of the 22 first lien lenders, the only first lien lender not consenting being RBC. Consent fees of approximately US$12 million have been paid to the consenting first lien lenders.

17 Pursuant to the terms of the First Lien Term Sheet and the First Lien Support Agreement, Nelson, with the assistance of its financial advisor, A&M, commenced on September 22, 2014, a sale and investment solicitation process (the "SISP") to identify one or more potential purchasers of, or investors in, the Nelson business, which process was conducted over a period of several months. According to Mr. Nordal, Nelson and A&M conducted a thorough canvassing of the market and are satisfied that all alternatives and expressions of interest were properly and thoroughly pursued.

18 The SISP did not result in an executable transaction acceptable to the first lien lenders holding at least 66 2/3% of the outstanding obligations under the first lien credit agreement. Accordingly, pursuant to the First Lien Support Agreement Nelson wishes to proceed with a transaction pursuant to which the first lien lenders will exchange and release all of the indebtedness owing under the first lien credit agreement for: (i) 100% of the common shares of a newly incorporated entity that will own 100% of the common shares of the purchaser to which substantially all of the Nelson's assets would be transferred, and (ii) the obligations under a new US$200 million first lien term facility to be entered into by the purchaser.

19 The proposed transaction provides for:

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(a) the transfer of substantially all of Nelson's assets to the purchaser;

(b) the assumption by the purchaser of substantially all of Nelson's trade payables, contractual obligations (other than certain obligations in respect of former employees, obligations relating to matters in respect of the second lien credit agreement, and a Nelson promissory note) and employment obligations incurred in the ordinary course and as reflected in the Nelson's balance sheet; and

(c) an offer of employment by the purchaser to all of Nelson's employees.

20 Under the proposed transaction, with the exception of the obligations owing under the second lien debt and intercompany amounts, substantially all of the liabilities of Nelson are being paid in full in the ordinary course or are otherwise being assumed by the purchaser. The purchaser will not assume Nelson's obligations to the second lien lenders.

21 On September 10, 2014, pursuant to the First Lien Support Agreement Nelson agreed not to make further payments in connection with the second lien debt, including any payment for fees, costs or expenses to any legal, financial or other advisor to RBC, the second lien agent, without the consent of the consenting first lien lenders.

Role of A&M Securities

22 Nelson engaged A&M, an affiliate of Alvarez & Marsal Canada Inc., as its financial advisor in March, 2013. A&M has been operating as a financial advisor to Nelson for more than two years prior to the date of the Initial Order.

23 The scope of A&M's engagement in 2013 included the following:

(a) Analyze and evaluate Nelson's financial condition;

(b) Assist Nelson to prepare its 5-year financial model, including balance sheet, income statement and cash flow statement and its 5-year business plan;

(c) Assist Nelson to respond to questions from its lenders regarding Nelson's business plan and financial model;

(d) If requested by management, attend and participate in meetings of the board of directors with respect to matters on which A&M was engaged to advise Nelson; and

(e) Other activities as approved by management or the board of Nelson and agreed to by A&M.

24 In September 5, 2014 A&M was further engaged to act as the exclusive lead advisor for the transaction that has led to the proposed transaction, including the SISP process undertaken by Nelson. A&M's goal was identified as completing a successful transaction in the most expedient manner. Under this second engagement, A&M's compensation was described as being based on time billed at standard hourly rates and "subject to any other arrangements agreed upon among Nelson, the lenders and A&M". The word "lenders" referred only to the first lien lenders.

25 In undertaking its mandate under the 2013 and 2014 engagements, A&M was authorized to utilize the services of employees of its affiliates under common control with A&M and subsidiaries. The sample accounts provided by A&M indicate that a substantial number of hours were billed to the A&M engagement for work of the personnel who are intended to act on behalf of the Monitor in this proceeding. A total of approximately $5.5 million plus HST and disbursements have been billed by A&M for its services to Nelson.

26 An affiliate of A&M was engaged in 2013 to advise Cengage Learnings, the name of the U.S. operations of Thomson that was changed when Thomson sold its business. The 2013 and 2014 engagements of A&M by Nelson sought Nelson's waiver of any conflict of interest in connection with an A&M affiliate's engagement with Cengage. At the time of the 2013 engagement, A&M U.S. was engaged by Cengage to provide restructuring and financial advisory services and Cengage and Nelson had common shareholders. At the time of the September 2014 engagement, an A&M affiliate was providing

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financial advisory and financial management services to Cengage. Nelson maintains a strong relationship with Cengage and is the exclusive distributor for Cengage educational content in Canada pursuant to an agreement that expires on January 1, 2018. Cengage also provides certain operational support to Nelson. According to Mr. Nordal, Cengage is a preferred and key business partner of Nelson.

27 A&M was present at the meetings of Nelson's board of directors wherein the decision was made by that board to not make interest payments to the second lien lenders on March 20, 2014, March 27, 2014, April 7, 2014 and June 27, 2014. A&M was also involved in discussions with RBC and its financial advisors in connection with the extension of the cure period for payment of interest to the second lien lenders as the financial advisor to Nelson.

Analysis

28 In its factum, RBC asserted that the application by Nelson was not an appropriate use of the CCAA as it was intended to be a nine-day proceeding to bless a quick flip credit bid by the first lien lenders to acquire the business of Nelson and extinguish the second lien lenders interest in the assets. RBC however also took the position that it would support a CCAA proceeding on the basis that there would be a neutral Monitor. I must say that in reviewing the circumstances of this application, I can see the issues raised by RBC as to whether this CCAA proceeding was an appropriate use of the CCAA. However in light of the position taken by RBC and my ruling that A&M Canada should be replaced by FTI as Monitor, I make no further comment or finding on the issue.

29 This is a true comeback motion with no onus on RBC to establish that A&M Canada should not be the Monitor. Rather the situation is that it is Nelson who is required to establish that A&M Canada is an appropriate monitor.

30 The problem is that Nelson has proposed a quick court approval of a transaction in which the first lien lenders will acquire the business of Nelson and in which essentially all creditors other than the second lien lenders will be taken care of. Nelson has asserted in its material that the SISP process undertaken by Nelson prior to the CCAA proceedings has established that there is no value in the Nelson business that could give rise to any payout to the second lien lenders. The SISP process was taken on the advice of A&M and under their direction. It was put in Nelson's factum that:

> The Applicants, with the assistance of their advisors, conducted a comprehensive SISP which did not result in an executable transaction that would result in proceeds sufficient to repay the obligations under the First Lien Credit Agreement in full or would otherwise be supported by the First Lien Lenders;

31 Nelson intends to request Court approval of the proposed transaction. An issue that will be front and centre will be whether the SISP process prior to this CCAA proceeding can be relied on to establish that there is no value in the security of the second lien lenders and whether other steps could have been taken to obtain financing to assist Nelson in continuing in business other than a credit bid by the first lien lenders. A&M was centrally involved in that process. It is in no position to be providing impartial advice to the Court on the central issue before the Court.

32 There is no suggestion that A&M are not professional or not aware of their responsibilities to act independently in the role of a monitor. A&M is frequently involved in CCAA matters and is understandably proud of its high standard of professionalism. However, that is not the issue. In my view, A&M should not be put in the position of being required to step back and give advice to the Court on the essential issue before the Court in light of its central role in the whole process that will be considered.

33 In an article in the Commercial Insolvency Reporter, (LexisNexis, August 2010), entitled *Musings (a.k.a. Ravings) about the Present Culture of Restructurings*, former Justice James Farley, the doyen of the Commercial List for many years and no stranger to CCAA proceedings, had this to say about the role of a monitor:

> I mean absolutely no disrespect or negative criticism towards any monitor when I observe that they are only human. I think it is time to consider whether a monitor can truly be objective and neutral under present circumstances- it would take a true saint to stand firm under the pressures now prevailing. It should be appreciated that monitors are

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> in fact hired by the debtor applicant (aided by perhaps a party providing interim financing, possibly in the role of the power behind the throne) and retained to advise the debtor well before the application is made. Is it not human nature for a monitor to subconsciously wonder where the next appointment will come from if it crosses swords with its hirer?

34 Mr. Farley went on to suggest that the role of a monitor be split in two. That may be a laudable objective, but would require legislation. In this case, I do not think it would be appropriate in light of the extremely extensive work done by A&M over the course of two years.

35 A monitor is an officer of the Court with fiduciary duties to all stakeholders and is required to assist the Court as requested. It has often been said that a monitor is the eyes and ears of the Court. It is critical that in this role a monitor be independent of the parties and be seen to be independent. I can put it no better than Justice Topolniski in *Winalta Inc., Re*, 2011 ABQB 399 (Alta. Q.B.) in which she said:

> **67** A monitor appointed under the *CCAA* is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.
>
> **68** Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236:
>
> > The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

36 In this case, A&M is in no position to comment independently on the activities of Nelson in regards to the very issue in this case, namely the reliability of the SISP program in determining whether the second lien lenders' security has any value.

37 There is also a question of the appearance of a lack of impartiality. During the two years that A&M was engaged prior to this CCAA proceeding, for which it billed over $5 million, it was involved in advising Nelson during negotiations with the interested parties, including RBC, and in participating in those negotiations with RBC on behalf of Nelson. This history can cause an appearance of impartiality, something to be avoided in order to provide public confidence that the insolvency system is impartial. See *Winalta* at para. 82. It was this concern of a perception of bias that led to the prohibition being added to section 11.7(2) of the CCAA preventing an auditor of a company acting as a monitor of the company.

38 The issue of an appropriate monitor requires the balancing of interests. This is not like some cases in which a financial advisor has had some advisory role with the debtor and then becomes a monitor, usually with no objection being raised. Often it may be appropriate for that to occur taken the knowledge of the debtor acquired by the advisor. This case is different in that the financial advisor has been front row and centre in the very sales process that will be the subject of debate in these proceedings and has engaged in negotiations on behalf of Nelson.

39 In all of the circumstances of this case, I concluded that it would be preferable for another monitor to be appointed and for that reason replaced A&M Canada as Monitor with FTI.

Other issues

40 In the Initial Order, RBC was directed to continue its cash management system. There was no charge provided in favour of RBC. RBC says that it should not be required to continue the cash management system without the protection

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of a charge. During this hearing, Mr. Chadwick on behalf of Nelson said that it might be possible to satisfy RBC by requiring some minimum balance in the accounts, failing which a charge would be provided in favour of RBC. I take it that this issue will be worked out.

41 In the draft Initial Order that accompanied the CCAA application at the outset, a paragraph was included that provided that Nelson could not pay any amounts owing by Nelson to its creditors except in respect of interest, expenses and fees, including consent fees, payable to the first lien lenders and fees and expenses payable to the first lien agent under the support agreement. That provision was deleted from the Initial Order. It was replaced with a provision that Nelson could pay expenses and satisfy obligations in the ordinary course of business.

42 RBC takes the position that there should be a level playing field for the second lien lenders consistent with the treatment of the first lien lenders in this CCAA process, and that if interest is to be paid to the first lien lenders and expenses of their financial and legal advisors paid, the same should happen to the second lien lenders.

43 RBC points out that it was Nelson who decided in June, 2014 to stop paying interest on the second lien debt and a little later reduce paying RBC's advisors in light of Nelson's view that there was not sufficient progress in negotiations with RBC. Payment of these professional fees was stopped in August, 2014. In September 2014 Nelson agreed in the First Lien Support Agreement not to make further payments in connection with the second lien debt, including any payment for fees, costs or expenses to any legal, financial or other advisor to RBC, the second lien agent, without the consent of the consenting first lien lenders. The consenting first lien lenders are opposed to any interest or expenses being paid to the second lien lenders.

44 The second lien credit agreement provides for interest to be paid on the debt and in section 10.03 for all costs of the second lien agent, RBC, arising out of CCAA proceedings. The intercreditor agreement between the first and second lien agents provides in section 3.1(f) that nothing in the agreement save section 4 shall prevent receipt by the second lien agent payments for interest, principal and other amounts owed on the second lien debt. Section 4 provides that any collateral or proceeds of sale of the collateral shall be paid to the first lien agent until the first lien debt has been repaid and then to the second lien agent. As there has been no sale of the collateral, there is nothing in the intercreditor agreement that prevents payment of interest and expenses of the second lien lenders. The second lien lenders are contractually entitled to receive payment of their interest, costs, expenses and professional fees.

45 No determination has been made in these proceedings that there is no value available for the second lien lenders. RBC disputes the applicants' views on this point. RBC contends that these CCAA proceedings should not commence with the Court accepting as a *fait accompli* that the second lien lenders should not be paid in the proceeding when every other stakeholder is being paid.

46 There is no evidence that Nelson has not been in a position to pay the interest, costs, expenses and professional fees of the second lien lenders since it made a decision in 2014 to stop paying these amounts. Since the First Lien Support Agreement with the consenting first lien lenders, the decision has been taken out of the hands of Nelson and turned over to the consenting first lien lenders.

47 In my view, on the basis of the evidence, there is no justification to pay all of the interest, costs and expenses of the first lien lenders but not pay the same to the second lien lenders. In the circumstances, it is only fair that pending further order, Nelson be prevented from paying any interest or other expenses to the first lien lenders unless the same payments owing to the second lien lenders are made, and it is so ordered.

48 RBC has requested costs of the comeback motion and I believe other costs. A request for costs may be made in writing by RBC within 10 days, along with a proper cost outline, and the parties against whom costs are claimed shall have 10 days to file a response to the cost request.

Motion granted.

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2016 ONSC 5686
Ontario Superior Court of Justice

Proxema Ltd. v. Birock Investments Inc.

2016 CarswellOnt 14127, 2016 ONSC 5686, [2016] O.J. No. 4701, 271 A.C.W.S. (3d) 48, 71 C.L.R. (4th) 113

PROXEMA LIMITED (Plaintiff / Responding Party) and BIROCK INVESTMENTS INC., 2182537 ONTARIO LTD., operating as YORK MEDICAL GROUP, 972579 ONTARIO LTD., operating as YORK MEDICAL, YORK MEDICAL MOBILITY INC. and DR. KEN LAI (Defendants / Moving Parties)

R.E. Charney J.

Heard: August 3, 2016
Judgment: September 12, 2016
Docket: CV-10-100673-00

Counsel: Arnold H. Zweig, for Plaintiff
Mark H. Arnold, for Defendant, "York Medical"

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.3 Security for costs
XXIV.3.d Grounds for requiring security
XXIV.3.d.ii Lack of assets
Civil practice and procedure
XXIV Costs
XXIV.3 Security for costs
XXIV.3.f Order for security
XXIV.3.f.i Form and amount of security
Construction law
IV Construction and builders' liens
IV.10 Practice on enforcement of lien
IV.10.l Costs
IV.10.l.ii Security for costs

Headnote

Construction law --- Construction and builders' liens — Practice on enforcement of lien — Costs — Security for costs
Contractor registered claim for lien against title to property in July 2010 and issued statement of claim against owners for unpaid amounts in relation to construction contract totalling $1,210,256 — Total of all unpaid claims of subtrades was over $1.3 million and total unpaid lien claims was $1 million — Parties agreed there was little, if any, chance of contractor receiving any money itself if successful in litigation since any proceeds would be distributed to subtrades — On examination for discovery, owners discovered contractor had not been carrying on business since June 2010 — Sole director and shareholder had taken over contractor in 2016 and confirmed it was insolvent — Financial statements produced for contractor for years 2010 and 2013 confirmed contractor's liabilities exceeded its assets — Owners brought motion under Construction Lien Act for leave to bring motion for security for costs, and motion for security for costs — Motions granted — Owners brought motion for leave promptly after learning that contractor appeared to have insufficient assets to pay owners' costs — Contractor was insolvent corporation that was pursuing litigation on behalf of

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solvent corporations that were not parties to litigation and therefore not subject to award of costs — Fairness required that court grant leave and consider motion on its merits — Director claimed to be impecunious but had arranged his personal financial affairs to ensure that his personal assets were judgment proof because they were in name of his wife, which was not same as impecuniosity — Subtrades were prepared to finance prosecution of action and should also be prepared to either provide security for costs of owners in event claim failed or to establish that security could not be raised — Section 44(1)(d) of Act imposed maximum limit of $50,000 for security for costs for defendant to vacate lien — Security for costs in amount of $50,000 were ordered paid into court.

Civil practice and procedure --- Costs — Security for costs — Grounds for requiring security — Lack of assets

Contractor registered claim for lien against title to property in July 2010 and issued statement of claim against owners for unpaid amounts in relation to construction contract totalling $1,210,256 — Total of all unpaid claims of subtrades was over $1.3 million and total unpaid lien claims was $1 million — Parties agreed there was little, if any, chance of contractor receiving any money itself if successful in litigation since any proceeds would be distributed to subtrades — On examination for discovery, owners discovered contractor had not been carrying on business since June 2010 — Sole director and shareholder had taken over contractor in 2016 and confirmed it was insolvent — Financial statements produced for contractor for years 2010 and 2013 confirmed contractor's liabilities exceeded its assets — Owners brought motion under Construction Lien Act for leave to bring motion for security for costs, and motion for security for costs — Motions granted — Owners brought motion for leave promptly after learning that contractor appeared to have insufficient assets to pay owners' costs — Contractor was insolvent corporation that was pursuing litigation on behalf of solvent corporations that were not parties to litigation and therefore not subject to award of costs — Fairness required that court grant leave and consider motion on its merits — Director claimed to be impecunious but had arranged his personal financial affairs to ensure that his personal assets were judgment proof because they were in name of his wife, which was not same as impecuniosity — Subtrades were prepared to finance prosecution of action and should also be prepared to either provide security for costs of owners in event claim failed or to establish that security could not be raised — Section 44(1)(d) of Act imposed maximum limit of $50,000 for security for costs for defendant to vacate lien — Security for costs in amount of $50,000 were ordered paid into court.

Civil practice and procedure --- Costs — Security for costs — Order for security — Form and amount of security

Contractor registered claim for lien against title to property in July 2010 and issued statement of claim against owners for unpaid amounts in relation to construction contract totalling $1,210,256 — Total of all unpaid claims of subtrades was over $1.3 million and total unpaid lien claims was $1 million — Parties agreed there was little, if any, chance of contractor receiving any money itself if successful in litigation since any proceeds would be distributed to subtrades — On examination for discovery, owners discovered contractor had not been carrying on business since June 2010 — Sole director and shareholder had taken over contractor in 2016 and confirmed it was insolvent — Financial statements produced for contractor for years 2010 and 2013 confirmed contractor's liabilities exceeded its assets — Owners brought motion under Construction Lien Act for leave to bring motion for security for costs, and motion for security for costs — Motions granted — Owners brought motion for leave promptly after learning that contractor appeared to have insufficient assets to pay owners' costs — Contractor was insolvent corporation that was pursuing litigation on behalf of solvent corporations that were not parties to litigation and therefore not subject to award of costs — Fairness required that court grant leave and consider motion on its merits — Director claimed to be impecunious but had arranged his personal financial affairs to ensure that his personal assets were judgment proof because they were in name of his wife, which was not same as impecuniosity — Subtrades were prepared to finance prosecution of action and should also be prepared to either provide security for costs of owners in event claim failed or to establish that security could not be raised — Section 44(1)(d) of Act imposed maximum limit of $50,000 for security for costs for defendant to vacate lien — Security for costs in amount of $50,000 were ordered paid into court.

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Statutes considered:

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Generally — referred to

s. 44(1)(c) — considered

s. 44(1)(d) — considered

s. 67(2) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 56.01 — pursuant to

R. 56.01(1)(d) — considered

MOTIONS by property owners for leave to bring motion for security for costs, and for security for costs.

***R.E. Charney J.*:**

Introduction

1 This motion is brought by the defendant York Medical Group ("York") for security for costs against the plaintiff Proxema Ltd. ("Proxema") under Rule 56.01 of the *Rules of Civil Procedure*. Pursuant to s. 67(2) of *Construction Lien Act*, R.S.O. 1990, c. C.30 ("CLA"), York requires leave of the court to bring this motion. Consistent with the practice in these cases, I heard both the s. 67(2) leave application and the Rule 56.01 motion together.

Facts

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2 The parties agree that York is deemed to be the owner of a commercial building (a multi-purpose medical centre) on Leslie Street in Newmarket, Ontario. Proxema was the general contractor for the construction of that building from August 2009 to June 2010.

3 Proxema registered a claim for lien pursuant to the CLA against the title to the property on July 2, 2010, and issued a Statement of Claim against the defendants for unpaid amounts in relation to the construction contract totalling $1,210,256. Approximately half the claim relates to the balance due under the contract and the other half relates to unpaid extras. The total of all unpaid claims of all subtrades is over $1,300,000, and the total unpaid lien claims is $1,000,000.

4 The parties agree that there is little, if any, chance of Proxema receiving any money itself if it succeeds in this litigation since any proceeds would be distributed to the subtrades. Proxema has no issue with what the subtrades are owed. The subtrades are all active companies, but are not parties to this litigation.

5 Pursuant to the March 7, 2012 order of Boswell J., York has paid a holdback to Proxema of $175,000. That payment was made on an "interlocutory basis, without prejudice to any party's arguments or position . . . " The plaintiff alleges that the defendant still owes $77,000 by way of hold back, but this is disputed by the defendant and no additional holdback claim has been made.

6 While the litigation has been going on for many years, York examined Proxema's representative, John DiTomaso (DiTomaso), at an examination for discovery on September 24, 2015, and discovered for the first time that Proxema had not been carrying on business or contracting work since June 2010.

7 DiTomaso was also cross-examined on June 8, 2016, on his affidavit, dated May 12, 2016, opposing this motion for security for costs. He confirmed that he took over Proxema on February 28, 2015, becoming its sole director and shareholder and that he paid nothing for it. He confirmed that in 2015 Proxema had no viable business in process and that Proxema had no hard assets such as equipment or machinery. He acknowledged that Proxema was "basically insolvent" and that one of the reasons he took over Proxema was to continue this litigation. The evidence from the cross-examination supports the position that the litigation is being funded by the subtrades even though they are not parties to the litigation.

8 The financial statements produced for Proxema for the years 2010 and 2013 confirm that Proxema's liabilities exceed its assets.

9 The parties agree that the trial of this action will take approximately 4 to 6 weeks. York takes the position that if successful its partial indemnity fees will be approximately $112,000 to $168,000 plus $40,000 for disbursements including experts and HST.

10 Proxema takes the position that it is not a "shell corporation". DiTomaso testified that as of November 2015 Proxema landed a project for the construction of a commercial bakery worth $600,000 and is putting forward proposals to other potential clients. He acknowledges, however, that Proxema has "no retained earnings" which he can use to borrow any funds. DiTomaso has also indicated that he and his wife have arranged their finances such that all family or personal property is in the name of his wife and all business matters and corporations are in his name. He has only about $15,000 in liquid assets and no means personally to borrow any funds to post security for costs.

Analysis

Leave to Bring an Interlocutory Step

11 Section 67 (2) of the CLA reads as follows:

Interlocutory Steps

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> . . . .Interlocutory steps, other than those provided for in this Act, shall not be taken without the consent of the court obtained upon proof that the steps are necessary or would expedite resolution of the issues in dispute.

12 In *Prasher Steel Ltd. v. D. Grant & Sons Ltd.*, 2014 ONSC 3576 (Ont. S.C.J.) McCarthy J. considered the circumstances in which leave to bring a motion for security for costs should be brought. He stated (at para. 12):

> Where, as here, the Defendant has put forth cogent evidence upon which a court may order security for costs and where, as here, the Defendant has itself posted a form of security for costs in the nature of a bond posted in order to vacate a lien, the interlocutory step of a motion for security for costs becomes necessary. The possible availability to one party of substantive relief under the Rules coupled with the goal of promoting an even playing field in order to enhance procedural fairness combine here to make the interlocutory step proposed necessary.

13 In *Melco Construction Inc. v. Jack Frost Sparkling Springs Co.*, 2011 ONSC 2197 (Ont. S.C.J.) Quinlan J. concluded that leave to bring a motion for security for costs was necessary under s. 67(2) of the CLA where the financial viability of the plaintiff is called into serious question and it is in the interests of procedural fairness to the parties. She stated:

> I find that this motion for security for costs is "necessary" in the interest of doing procedural justice to both parties. Now that the defendant is aware of the precarious financial position of the plaintiff, it is appropriate to have the court adjudicate on whether the plaintiff should be ordered to provide security for costs.

14 See also: *Asphalt Plant Supply Inc. v. Aecon Construction and Materials Ltd.*, 2012 ONSC 4977 (Ont. S.C.J.) at para. 5; *European Flooring Contract Services Ltd. v. Toddglen ILofts Ltd.*, 2013 ONSC 6445 (Ont. S.C.J.) at para. 6: "where it is shown that there is good reason to believe that at a corporate plaintiff . . . does not have sufficient assets in Ontario to pay the defendants' costs, the defendants have met the test of "necessity" under s. 67(2) of the *Construction Lien Act*."

15 In the present case the moving party has put forth cogent evidence upon which a court could order security for costs. The purpose of security for costs is to even the playing field by ensuring that an "insolvent plaintiff should not be given risk-free opportunities to pursue litigation" (*1244034 Alberta Ltd. v. Walton International Group Inc.*, 2007 ABQB 197 (Alta. Q.B.) at para. 8). In this case, the defendant raises a *prima facie* case that the plaintiff is an insolvent corporation that is pursuing litigation on behalf of solvent corporations that are not parties to the litigation and therefore not subject to an award of costs. Fairness requires that the court grant leave and consider the motion on its merits. In this sense, I am of the view that this step is necessary within the meaning of s. 67(2) of the CLA.

16 Another consideration before leave is granted under s. 67(2) is whether York brought this motion promptly. Following the September 24, 2015 examination for discovery counsel for York advised counsel for Proxema that York intended to bring this motion for security for costs. Due to scheduling difficulties involving cross-motions the motion was not heard until August 3, 2016. I am satisfied that the motion was brought promptly upon learning that Proxema appeared to have insufficient assets to pay the defendant's costs, and there has been no delay on the part of York in this regard.

17 Leave to bring the motion for security for costs is therefore granted.

Rule 56.01 and Security for Costs

18 Rule 56.01(1) (d) provides as follows:

> 56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
>
> (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent.

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19 The initial onus is on the defendant to demonstrate that it appears "there is good reason to believe" that the plaintiff corporation has insufficient assets in Ontario to pay the defendant's costs: *Coastline Corp. v. Canaccord Capital Corp.*, 2009 CanLII 21758, [2009] O.J. No. 1790 (Ont. Master) at para. 7; *Sadat v. Westmore Plaza Inc.*, 2013 ONSC 469 (Ont. S.C.J.) at paras. 20-21; *Sheridan v. Goldstone Resources Inc.*, 2011 ONSC 1034 (Ont. Master) at paras. 6 and 7. *Cobalt Engineering v. Genivar Inc.*, 2011 ONSC 4929 (Ont. Master) at para. 9.

20 A helpful summary of the applicable principles under Rule 56.01(1) (d) is set out in the case of *Health Genetic Center Corp. v. Reed Business Information Ltd.*, 2014 ONSC 6449 (Ont. S.C.J.) at para. 4:

> There is a two-step process under rule 56.01(1)(d). The initial onus is on the defendants to satisfy the court that it "appears" that there is "good reason to believe" that the corporate plaintiff has insufficient assets to satisfy a costs award. They need not go so far as to actually prove that the plaintiff has insufficient assets. If the defendants satisfy the first stage of the enquiry, the onus switches to the plaintiff to either demonstrate that it has sufficient and appropriate assets in Ontario to satisfy any order for costs or alternatively satisfy the court that an order for security for costs would be unjust, for example by demonstrating that the plaintiff is impecunious and the action is not devoid or merit.

21 In *Health Genetic Center*, Master Dash describes this initial onus as a "low threshold" (para. 16).

22 With respect to the first stage of the rule, I am satisfied that the defendant has established good reason to believe that the corporate plaintiff has insufficient assets to satisfy a costs award.

23 Where the onus switches to the plaintiff the court must consider the following factors in examining the evidence of the sufficiency of assets (*Health Genetic Center* at para. 5):

> (a) The court must consider critically the quality as well as the sufficiency of the assets presently held and whether they are bona fide assets of the company; (b) There must be demonstrated exigible assets. It is insufficient for the company to show that it is profitable since the focus of the rule is not on income, but rather on the nature and sufficiency of assets; (c) The court must consider the liabilities of the company as well as its assets and in particular whether the assets to which the defendant is expected to look are secured to another creditor; (d) The rule does not countenance extensive and speculative inquiries as to the future value and availability of the asset. A mere possibility that the assets may be removed at some future time is not, without more, grounds for security; (e) The failure of a plaintiff to respond to a defendant's enquiry as to the availability of assets may raise a doubt as to the existence of assets.

24 Taking these factors into account, the evidence confirms that Proxema is a shell-corporation with insufficient assets to satisfy any costs award if it is not successful in this litigation. DiTomaso's statement that he is trying to make a go of Proxema by putting forward proposals to other potential clients does not demonstrate exigible assets that could be used to satisfy any costs award at the end of the litigation. There is no evidence of existing assets or future revenue that could cover a costs award.

25 The evidence clearly demonstrates that there is an imbalance: this action is being pursued for the benefit of the subtrades, which are not parties to this litigation. Proxema owes money to the subtrades. The subtrades are using Proxema to recoup the money they hope is owed by York to Proxema. There is nothing wrong with that; it is a legitimate litigation strategy. As things stand, however, they are not liable for costs if Proxema loses, but will be entitled to costs if Proxema wins. That is the very situation that Rule 56.01(1)(d) was designed to remedy.

26 While DiTomaso has claimed that he is impecunious, his affidavit merely demonstrates that he has arranged his personal financial affairs to ensure that his personal assets are judgment proof because they are in the name of his wife. That is not the same as impecuniosity. It also tells me nothing of the other subtrades which, the evidence indicates, are

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funding this litigation. The onus is on the plaintiff to show that it has no means of funding the litigation if security for costs is ordered. Based on the evidence I have reviewed on this motion, the plaintiff has failed to meet this onus.

27 The subtrades are prepared to finance the prosecution of this action. They should also be prepared to either provide security for the costs of the defendant in the event the claim fails or to establish that security cannot be raised (*Melco Construction* at para. 33). In my view, the evidence of DiTomaso is not sufficient to establish that he is impecunious or that he could not continue with this action if the plaintiff was ordered to pay some reasonable amount as security for costs.

28 This case, in effect, is an action that is being pursued for the benefit of the creditors (in this case the subtrades). I find the following statement from *Design 19 Construction Ltd. v. Marks* (2002), 22 C.P.C. (5th) 117, 2002 CarswellOnt 1414 (Ont. S.C.J.) to be apposite:

> While that statement is fair enough in the abstract, it is one that is difficult to sustain in these circumstances where the action is being pursued expressly for the benefit of the creditors . . . If the creditors are prepared to take the benefit of this action, then I fail to see why they should not also have to accept the burden of it. We are, of course, only speaking of a requirement that security for costs be posted. If the plaintiff is ultimately successful, then those funds will be returned to the creditors. If the plaintiff is not, I fail to see why the creditors should be able to avoid the consequences of standing behind an unsuccessful action. I find, therefore, that the Master's conclusion that the plaintiff was impecunious in the absence of any evidence as to whether the creditors of the plaintiff were in a position to fund the payment of security for costs reflects an error in principle.

29 In *2016637 Ontario Inc. v. Catan Canada Inc.*, 2012 ONSC 2055 (Ont. S.C.J.) the court stated (at para. 12):

> In my view, cases in which consideration should be given to requiring creditors of a plaintiff to post the security should be confined to situations where the creditors are in control of, or somehow directly connected to, the litigation, or are standing in the shoes of the plaintiff (see *United General Contracting Ltd. v Sioux Lookout (Municipality)* 2011 ONSC 4691 (CanLII), at paras. 30-35).

30 The evidence on this motion persuades me that this is a situation in which the subtrades are in control of and directly connected to the litigation, and the plaintiff is, at this time, a shell corporation that continues to exist primarily to pursue the litigation on behalf of the subtrades.

31 The defendant argues that the plaintiff's claim is bound to fail because Proxema does not have an expert engineering opinion on the issues of deficiencies, delay or extras. The defendant has obtained expert engineering reports in support of its position on these issues. Proxema recently obtained an engineering report that reviews the independence and objectivity of the defendant's reports, but it is a paper review and the authors did not conduct an on-site review of deficiencies. The plaintiff responds that its expert report challenges the admissibility of the defendant's expert report.

32 In my view it is not necessary for me to assess the relative merits of the plaintiff's case given that the plaintiff has not persuaded me that the persons actually supporting the plaintiff's litigation are impecunious. "A detailed consideration of the merits of the plaintiff's claim should only be undertaken at this step of the proceeding if the plaintiff is able to demonstrate its impecuniosity, and that an injustice would result if it were not allowed to proceed . . . "(*Sterling Electrical Contractors Inc. v. 20887585 Ontario Inc.*, 2010 ONSC 5346 (Ont. S.C.J.) at para. 12; *Estates Associates Inc. v. 1645112 Ontario Ltd.*, 2016 ONSC 150 (Ont. Div. Ct.) at para. 9)

33 The real question in relation to security for costs is how much. Rule 56.01 requires the court to exercise its discretion taking into account such considerations as the merits of the plaintiff's case, whether there is a counterclaim, and whether the defendant's conduct giving rise to the claim is responsible for the plaintiff's impecuniosity or insufficient assets. In this regard I adopt the following statement from *1244034 Alberta Ltd.* which, in my view, accurately reflects the considerations that must be balanced under the Ontario rule:

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> [I]nsolvent plaintiffs should not be given risk-free opportunities to pursue litigation; conversely, defendants should not be able to tactically prevent a prosecution of a valid claim by obtaining a prohibitive security for costs order. The Court has to balance these competing interests. A costs order should not have a chilling effect in relation to the ardour with which a valid claim is advanced. It should impose a fair obligation on the plaintiff that would check litigation without merit. This is the balance that must be struck.

34 In the present case there is a counterclaim. A defendant should not be given security for costs with respect to costs that will arise from its counterclaim. See: *Unimac-United Management Corp. v. Canadian National Railway*, 2015 ONSC 2372 (Ont. S.C.J.): "Where the "real driver" of the action will be the moving defendant's counterclaim, there is authority for the proposition that the court may not only discount the award of security for costs by the estimated costs of litigating the counterclaim, but refuse the award altogether." Even where the counterclaim is only a portion of the estimated costs of the litigation the court should discount any award of security for costs by the anticipated costs of the counterclaim, as it would be unfair for the plaintiff to pay security for costs to defend a counterclaim (*Unimac* at para. 50).

35 There is a dispute with regard to how much of the case will be about the counterclaim. The plaintiff argues that 2/3 of the case is counterclaim. The defendant disputes this, and argues that if the claim disappeared then the whole action would disappear; the counterclaim is really just a re-statement of the defence.

36 This is a question that cannot be resolved on a pre-trial motion. It will depend on a number of factors that I cannot know or predict at this stage of the proceedings. Still, the existence of the counterclaim is a factor that I must consider when assessing the appropriate amount of security for costs.

37 In *Yong Tai Construction Ltd. v. Unimac Group Ltd.*, 2015 ONSC 4866 (Ont. S.C.J.) Healey J. dealt with this uncertainty by dividing the costs equally between the claim and counterclaim (at para. 17): "the court will have to exercise "rough justice" by apportioning the estimated costs equally between the claim and counterclaim."

38 In determining the quantum of security for costs the plaintiff references s. 44(1)(d) of the CLA, which permits any person to bring a motion for an order vacating a lien by paying into court or posting security in an amount equal to the total of:

> (c) the full amount claimed as owing in the claim for lien; and
>
> (d) the lesser of $50,000 or 25 per cent of the amount described in clause (c), as security for costs.

39 This provision imposes a maximum limit of $50,000 for security for costs for a defendant to vacate a lien. The plaintiff argues that while the provision does not, on its terms, apply to a defendant's motion for security for costs against a plaintiff under Rule 56.01(d), a court concerned with a "level playing field" should apply "by analogy" the $50,000 limit to security for costs ordered under Rule 56.01(d). What's sauce for the goose is sauce for the gander.

40 In his decision in *Prasher*, McCarthy J. appears to accept this principle and relied on s. 44(1)(d) to establish the quantum for security for costs that the plaintiff should have to pay. He stated: (at para. 17):

> I am not prepared to accede to the quantum sought by the Defendants. In my view, procedural fairness dictates that an order for security for costs should be proportionate not only to the amount of the lien claim but also to the notionally off setting security posted by the Defendant when it elected to have the lien on the project property vacated. In their infinite wisdom, the drafters of the legislation in question arrived at a formula for calculating the amount of costs that must form part of the bond posted in order to obtain the order vacating the lien. I find this approach helpful to the court in determining the quantum of security to be posted by the Plaintiff. That amount should be $30,000.

41 I find this logic persuasive. I recognize that the $50,000 maximum is not a statutory requirement under s. 56.01(d), and the legislative policy considerations under s. 44(1)(d) of the CLA are not identical to those under Rule 56.01(d). Still,

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in an effort to achieve "rough justice" under rule 56.01(d), and properly balance the competing interests of the insolvent plaintiff that "should not be given risk-free opportunities to pursue litigation" and the defendant that "should not be able to tactically prevent a prosecution of a valid claim by obtaining a prohibitive security for costs order" the limit prescribed by s. 44(1)(d) of the CLA is a helpful reference point. The court may take this provision into account in determining the quantum of security for costs to be ordered.

42 If the action is as meritorious as the plaintiff claims, the subtrades supporting the litigation should be able to raise $50,000 to stand behind the litigation in the event that it is not successful. If the action is as unmeritorious as the defendant claims, I do not see why the action (excluding the counterclaim) should take 4 to 6 weeks of court time. In my view, this is an appropriate case to require the posting of security for costs by the plaintiff and I order that security for costs be paid into court in the amount of $50,000 within 45 days of this endorsement.

Costs

43 Given this decision, the defendant is presumptively entitled to costs for this motion. If the parties cannot agree on costs, the defendant may file written submissions limited to three pages plus a costs outline and any offer to settle, within 25 days of the date of this endorsement. The plaintiff has 10 days to file responding submissions on the same terms.

Motions granted.

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[17]

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

2009 NBQB 9 (CanLII)

Citation: 2009NBQB009 **F/C/88/08**
Date: 20090122

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT
OF THE PROVINCE OF NEW BRUNSWICK

Plaintiff

AND:

ROTHMANS INC., ROTHMANS, BENSON & HEDGES INC., CARRERAS ROTHMANS LIMITED, ALTRIA GROUP, INC., PHILIP MORRIS U.S.A. INC., PHILIP MORRIS NTERNATIONAL, INC., JTI- MACDONALD CORP., R.J. REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS TOBACCO INTERNATIONAL INC., IMPERIAL TOBACCO CANADA LIMITED, BRITISH AMERICAN TOBACCO P.L.C., B.A.T. INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED, and CANADIAN TOBACCO MANUFACTURERS' COUNCIL

Defendants

BEFORE: The Honourable Mr. Justice Thomas E. Cyr

DATE OF HEARING: January 8th, 2009

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DATE OF DECISION: January 22nd, 2009
APPEARANCES:

Counsel for the Plaintiff	Philippe J. Eddie, Q.C. Paul Monaghan Robin Ryan-Bell
Counsel for the Defendants Rothmans Inc., Rothmans Benson & Hedges Inc.	David Hashey, Q.C. Charles D. Whelly, Q.C.
Counsel for the Defendants B.A.T. Industries P.L.C., British American Tobacco (Investments) Limited and Carreras Rothmans Limited	William L. Ryan, Q.C. **(qualified appearance)**
Counsel for the Defendants Altria Group Inc. and Philip Morris U.S.A. Inc.	Rodney J. Gillis Q.C.
Counsel for the Defendant Philip Morris International Inc.	Robert G. Basque, Q.C.
Counsel for the Defendants JTI-MacDonald Corp., R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc.	Michael D. Brenton Ian Kelly
Counsel for the Defendant Imperial Tobacco Canada Limited	Thomas G. O'Neil, Q.C. Deborah A. Glendinning
Counsel for the Defendant British American Tobacco P.L.C.	Edwin G. Ehrhardt, Q.C. David Byers **(qualified appearance)**
Counsel for the Defendant Canadian Tobacco Manufacturers' Council	Mark A. Canty

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CYR, J.;

I. INTRODUCTION

[1] The Province has filed a motion for case management requesting that I set a procedural timetable up to the setting down for trial of this action and an order providing for the electronic discovery of documents. The defendants contend that the lawyers representing the Province of New Brunswick are in a disqualifying conflict of interest and should be removed. The defendants do not contest case management in this matter on condition that it takes place in phases. They maintain, however, that the conflict of interest issue must be dealt with immediately and prior to a procedural timetable being put in place.

II. FACTS

[2] This matter arises out of an action brought by the Province of New Brunswick pursuant to the recently enacted *Tobacco Damages and Health Care Costs Recovery Act*, S.N.B. 2006, c.T-7.5, for the recovery of tobacco related health care costs against a number of tobacco product manufacturers.

[3] The action was introduced on March 13, 2008. All defendants, save and except Carreras Rothmans Limited, British American Tobacco P.L.C., B.A.T. Industries P.L.C., and British American Tobacco (Investments) Limited (B.A.T. defendants), have filed and served notices of Intent to Defend. Upon the request of several parties to these proceedings, the

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Chief Justice of the Court of Queen's Bench of New Brunswick has ordered, pursuant to Rule 37.11, that all motions in this case shall be heard by me.

[4] The Province has filed a motion for case management requesting that I set a procedural timetable up to the setting down for trial of this action and an order providing for the electronic discovery of documents.

[5] All of the defendants who have attorned to jurisdiction do not oppose case management. However, they oppose the Province's motion because they allege that the court should deal with preliminary motions prior to setting a procedural timetable. Further, they argue that the proposed timetable is unrealistic and unworkable, and will not secure a just and most expedient determination of the issues.

[6] In support of their motion, the Province submits that the court should consider that this action was instituted more than ten months ago and that all of the defendants, save and except the B.A.T. defendants, have submitted to the court's jurisdiction. However, none of the defendants have yet filed a Statement of Defence. Further, the parties have not been able to agree on a procedural timetable.

[7] All parties recognize that this is an extremely complicated matter and that a case management judge will be necessary in order to oversee the overall progress in a fair, efficient, and orderly fashion.

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III. THE C.F.A. MOTION

[8] Imperial Tobacco Canada Limited has filed a motion whereby they claim that the Attorney General for New Brunswick contracted the conduct of this action to a consortium of U.S., Ontario, and New Brunswick lawyers (Crown Counsel Consortium). According to Imperial Tobacco, the Province has agreed to pay the lawyers a very large contingency fee in the event it is successful in this litigation. In this motion, (C.F.A. motion), Imperial Tobacco is challenging the constitutionality, legality, and ethical integrity of the contingent fee agreement. Other defendants have informed the court that they intend to file a similar motion which could be heard at the same time.

[9] The defendants take the position that the Attorney General hired external counsel by way of a contingent fee agreement thereby violating the *Constitution Act, 1867*. Further, that these lawyers are in conflict of interest in prosecuting this action and that the U.S. law firms retained are and would continue to be engaged in the unauthorized practice of law in the Province of New Brunswick.

[10] The defendants say that the Attorney General for New Brunswick retained the legal services of the Crown Counsel Consortium thereby authorizing them to act in the public's interest. They believe that the Crown Counsel Consortium should be removed and that their contingent fee agreement should be declared void for they have a disqualifying conflict of interest between their public duties as counsel for the Attorney General and their private financial interests under the agreement.

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[11] Furthermore, they argue that the Attorney General of New Brunswick had no constitutional authority to enter into the contingent fee agreement and to commit such vast sums of public money to anyone without proper legislative approval. They are of the view that the contingent fee agreement breaches s. 53 of the *Constitution Act, 1867*, and s. 30 of the *Financial Administration Act,* R.S.N.B., 1973, c.F-11. They add that the contingent fee agreement contravenes accepted public law principles of fiscal management.

[12] The defendants further allege that they are being sued for potentially billions of dollars by lawyers acting in circumstances which offer them the prospect of enormous wealth in the event of success. Included in this group are foreign lawyers who, according to the defendants, are unauthorized to practice law in this jurisdiction. Consequently, they believe that the contingent fee agreement breaches the *Law Society Act, 1996,* S.N.B.1996, c.89, due to the fact that foreign lawyers have been engaged in the unauthorized practice of law and further by failing to comply with the Contingent Fee Rules put in place under s. 83 of the act.

[13] All defendants, who do not contest the jurisdiction of the court, maintain that the C.F.A. motion raises a critical threshold question that must necessarily be determined before any other aspect of this litigation.

IV. THE ALLEGED DISQUALIFYING CONFLICT OF INTEREST

[14] The defendants maintain that the Canadian and U.S. law firms that have been retained for this litigation, with the contingent fee agreement, face an irremediable conflict of interest for their duty to seek justice in their capacity as representatives of the Crown is inherently in conflict with the anticipation of a huge payout.

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[15] The lawyers for the Province of New Brunswick take the position that the C.F.A. motion is an objection only to a private arrangement for the payment of fees entered into by the Province and its counsel and that the defendants' motion does not raise an argument that would have bearing on the substantive issues involved in this action. Accordingly, the disposition of the motion would therefore have no affect on either the cause of action asserted by the plaintiff or on the relevant issues to be determined by the court. In short, the action will continue with the same legal and factual parameters irrespective of the outcome of the motion.

[16] As well**,** they argue that by not setting a procedural timetable prior to the hearing of the C.F.A. motion, the Province would be deprived of the right to move its case forward even though the issues relevant to pretrial procedures do not depend, in any way, on the outcome of the C.F.A. motion.

[17] The plaintiff maintains that they should proceed with a procedural timetable in the action on a parallel track with the C.F.A. motion.

[18] According to the defendants, this would create a substantial risk that the C.F.A. motion will be perceived to be prejudged. For example, they argue that motions pertaining to issues, such as particulars and the production of documents, would be litigated prior to or at the same time as a determination of whether the Crown Counsel Consortium is legally permitted to represent the Province. They add that it would be entirely inappropriate and inequitable to the defendants to require them to serve preliminary motions on the plaintiff's lawyers when they are currently challenging their lawful capacity to represent the Province. Further, to permit

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the Province's lawyers to continue with the case while the C.F.A. motion is pending would prejudice the defendants in the event that they are successful with their motion in that the Crown Counsel Consortium will have become fully engaged in all aspects of the litigation and the defendants will possibly face arguments that their removal would place an undue hardship on the plaintiff. Moreover, they insist that it would not be efficient or appropriate to require them to serve preliminary motions on those whose ability to represent the Province they are presently challenging.

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[19] They contend that if the court ultimately decides that the plaintiff's counsel are conflicted, it would only compound the problem to permit them to begin making decisions now about how the case should proceed. These decisions, according to them, would have to be revisited because of the conflict. Moreover, that it would be inappropriate and inefficient to involve private lawyers in the substantive preparation of the case before deciding whether they are ethically and legally permitted to appear and proceed in this action. Lastly, they argue that to permit the Crown Counsel Consortium to continue with the case while the C.F.A. motion is pending effectively prejudges the merits of the motion itself.

V. THE DEFENDANTS' POSITION REGARDING A PROCEDURAL TIMETABLE

[20] The defendants are of the view that this motion should be adjourned so that once a decision of the C.F.A. motion is rendered, the court should hold another scheduling conference. Although they agree that case management is necessary and that a procedural timetable is required due to the fact that this is an action which involves complicated issues, they believe that it is premature to determine how the case should proceed up to trial. According to them, case management should proceed in phases for any scheduling beyond

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that is likely to become obsolete and inefficient. For these reasons, they are of the view that the court should deny the Province's motion to set a schedule now covering the next several years of the case.

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VI. DISCUSSION

[21] In New Brunswick there is no case management rule *per se*. The practice is that the Chief Justice appoints a motions judge pursuant to Rule 37.11 and the parties, by way of motion, seek case management. The Province relies on Rule 2.04 of the *New Brunswick Rules of Court* which provides:

> **2.04 Where No Procedure Provided**
>
> **In any matter of procedure not provided for by these rules or by an Act the court may, on motion, give directions.**

[22] Further, s. 21 of the *Judicature Act*, R.S.N.B. 1973, c-J-2 gives the court inherent jurisdiction to manage its own procedures.

[23] The record shows that as early as May 16, 2008 counsel for Imperial Tobacco advised lead counsel for the plaintiff that they opposed the manner in which the Attorney General of New Brunswick was proceeding with the litigation. The Province was then informed that, according to Imperial Tobacco, the resolution of the C.F.A. motion should be the first step in the litigation and they suggested that counsel for the Province and the defendants coordinate on issues of timing to ensure an orderly process of the motion. The record further discloses that the parties were unable to reach a consensus pertaining to the disposition of the C.F.A.

motion. However, in the absence of an agreement on scheduling, Imperial Tobacco filed its motion on December 4th, 2008.

[24] The plaintiff seeks the procedural timetable set out in its Notice of Motion up to the setting down of this matter for trial and an order providing for electronic discovery of documents. I am of the opinion that case management is required in such a complicated proceeding. Consequently, an order for a procedural timetable should be granted. However, I believe it is premature to set a schedule for the next several years at such an early stage in this massive and complex lawsuit. It would be unwise to schedule for the entire matter at the outset for it is reasonable to expect that the court may be called upon to rule on motions which are unforeseen by the parties at this time. For these reasons, I believe that it is preferable that scheduling take place in phases. The first phase should deal with a schedule for filing and serving pleadings and producing documents. Any scheduling beyond that is likely to become obsolete and inefficient. Other scheduling conferences will be held from time to time as may be required.

[25] The C.F.A. motion contains a serious allegation that the plaintiff's counsel are in a disqualifying conflict of interest and that they should be removed as counsel for the Province. I believe that the conflict of interest issue must be dealt with immediately and prior to setting the first phase of the procedural timetable for the following reasons:

- an allegation of a conflict of interest is very serious and must be dealt with forthwith;
- to permit the Province's lawyers to continue with the case by setting the first phase of the procedural timetable while the C.F.A. motion is pending could be perceived as I have prejudged the merits of the motion itself;

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- to permit the Province's lawyers to continue with the case while the C.F.A. motion is pending may prejudice the defendants in the event that they are successful with their motion in that the Province's lawyers will have become fully engaged in all aspects of the litigation and the defendants may possibly face the argument that the removal of these lawyers would place an undue hardship on the plaintiff;

- to require the defendants to proceed with the case when they are currently challenging the Province's lawyers' capacity to represent their client would place an unfair burden on the defendants and their counsel;

- if the court concludes that the plaintiff's counsel are conflicted, it would only compound the problem to permit them to begin making decisions now about how the case should proceed.

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VII. CONCLUSION

[26] The C.F.A. motion(s) must be heard expeditiously and in accordance with the timetable provided for in Annexe "A" hereto attached.

[27] The scheduling of the procedural timetable for this matter shall take place in phases. The first phase will deal with the schedule for filing and serving pleadings and producing documents.

[28] I am adjourning the Province's motion for a procedural timetable and for an order providing for the electronic discovery of documents pending my decision on the C.F.A. motion(s). I will reschedule the hearing of the plaintiff's motion in order to address the first phase of the procedural timetable dealing with the schedule for the filing and serving of pleadings and producing documents. In addition, I will deal with the Province's request for an order providing for the electronic discovery of documents at that time**.** The Clerk of the Court

for the judicial district of Edmundston shall advise the parties of the time and place of the resumption of the hearing of the plaintiff's motion.

(a) MOTIONS REGARDING JURISDICTION

[29] As a result of an agreement reached with the plaintiff's counsel, lawyers representing defendants who have not attorned to the jurisdiction of the court appeared at the motion for the unique purpose to advise the court that they were presently engaged in discussions with the plaintiff's representatives in order to agree on a timetable to deal with motions whereby these defendants will contest the court's jurisdiction. They informed the court that if they are unable to agree on a date for the hearing of these motions, they will ask the court to set dates so that these preliminary motions may be dealt with diligently. In order to avoid any other delays, these motions should be heard prior to the scheduling of the first phase of the procedural timetable and to providing directions for the electronic discovery of documents.

DATED at Edmundston, New Brunswick this 22nd day of January 2009.

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MR. JUSTICE THOMAS E. CYR
Judge of the Court of Queen's Bench of New Brunswick

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[15]

ANNEXE « A »

PROCEDURAL TIMETABLE FOR THE HEARING OF THE C.F.A. MOTION(S)

1. **ON OR BEFORE FEBRUARY 13, 2009:**
Filing of C.F.A. motion(s) by other defendants, if any;

2. **MARCH 10, 2009;**
Hearing of the motion(s) to strike affidavits in support of the C.F.A. motion(s);

3. **APRIL 7, 2009:**
Argue motion(s) for examinations under Rule 39.02, if any;

4. **MAY 5 AND 6, 2009:**
Conduct examinations, if any;

5. **ON OR BEFORE MAY 22, 2009:**
Defendants file their written submissions;

6. **ON OR BEFORE JUNE 3, 2009:**
Plaintiff files its written submissions;

7. **ON OR BEFORE JUNE 10, 2009:**
Defendants file their reply(ies), if any;

8. **JUNE 16, 17, 18, 2009:**
Hearing of the C.F.A. motion(s).

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[15]

Rodaro et al. v. Royal Bank of Canada et al.

[Indexed as: Rodaro v. Royal Bank of Canada]

2002 CanLII 41834 (ON CA)

59 O.R. (3d) 74
[2002] O.J. No. 1365
Docket Nos. C33844 and C33883

Court of Appeal for Ontario
Doherty, Weiler and Feldman JJ.A.
March 26, 2002

Civil procedure -- Pleadings -- Trial judge not entitled to find liability on basis not pleaded by plaintiff -- Fundamental to litigation process that lawsuits be decided within boundaries of pleadings.

Contracts -- Assignment -- Banker lending money to developer -- Bank assigning loan and associated securities to third party -- Assignment of benefits of contract permissible without consent of other contracting party.

Intellectual property -- Confidential information -- Breach of confidence -- Disclosure of confidential information actionable if it results in detriment or damage to confider -- Damages or detriment may include lost opportunity.

FR, an engineer and land developer, purchased 751 acres of land in the City of Barrie for development. Beginning in 1988, the Royal Bank of Canada ("RBC") advanced funds for the project, and its security included a debenture. The loan agreement between FR and RBC contained an assignment clause, which stated that: "The Bank may assign or sell participations in or transfer all or any portion of its rights, benefits and obligations under this agreement to any other financial institution." The agreement further stated that: "In assigning,

transferring or participating all or any part of its rights or obligations as aforesaid, the Bank may reveal to potential Assignees or participants all or any information regarding the Borrower and related corporations as the Bank deems necessary or desirable."

Initially, the development went well, but the project suffered because of the recession and the collapse of the real estate market in 1990. In late 1991 and early 1992, FR, to obtain further financing from RBC, disclosed to the bank business information and a detailed business plan relating to the project's long-term development. In April 1992, RBC advised FR that the loan was in default. In June 1992, RBC stated that it would make no more advances. In July 1992, RBC assigned its debt and related security to Barbican Properties Inc. ("Barbican"). In the course of negotiations for the assignment, RBC disclosed to Barbican the business information that FR had provided to it.

In September 1992, Barbican demanded payment, and FR responded by suing RBC and Barbican alleging, amongst other things, misrepresentation, conspiracy, misuse of confidential information, and an agreement to provide funding for the project. In December 1992 and January 1993, Barbican commenced power of sale proceedings, which led to the sale of the lands but with a recovery that left a shortfall on the debt of about $11.8 million. Barbican counterclaimed for this shortfall in the action brought by FR.

The claim and counterclaim came on for trial. It was agreed that the trial would proceed in phases, with the second phase to determine the quantum of damages for the claim and for determining liability and quantum for the counterclaim. At the trial, Spence J. found against FR on all issues except one. He found that RBC had improperly given confidential information to Barbican and that this disclosure had caused FR to lose an opportunity to sell his interest, which was a lost opportunity valued at a minimum of $1 million. Further, he held that if FR had been given the opportunity to negotiate the sale of his interest with Barbican, the debt with RBC would have been eliminated. Spence J. held that the debt and the security could

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not be enforced.

RBC and Barbican appealed. They contended that RBC was entitled to assign the debt and share information provided by FR and that they did not misuse confidential information. They further argued that the lost opportunity theory of damages developed in the reasons for judgment of Spence J. was unsound in law and unsupported by the pleadings, evidence, or argument advanced at trial. Barbican submitted further that it was improper for Spence J. to declare the debt and security unenforceable as these were to be determined in phase 2 of the trial. FR cross-appealed and renewed the arguments and claims that had been unsuccessful at trial.

Held, the appeal should be allowed and the cross-appeal should be dismissed.

None of Spence J.'s findings of fact could be set aside. They were firmly rooted in the evidence. His reasons demonstrated that he appreciated the argument, understood the legal principles and reviewed and understood the evidence.

The appeal raised three main issues: (1) Could RBC assign the debt? (2) Was RBC entitled to share FR's confidential information with Barbican in the course of negotiating the assignment? (3) If the disclosure was improper, did Spence J. err in holding that the disclosure caused detriment based on the lost opportunity theory?

The assignment was valid. Aside from limitations imposed by statute or public policy (neither of which were issues in this case), or the terms of a specific contract, a party to a contract may assign its rights, but not its obligations to a third party without the consent of the other party to the contract. A party will not, however, be allowed to assign its rights if that assignment increases the burden on the other party or if the contract is based on confidences, skills or special personal characteristics such as to implicitly limit the contract to the original parties. In the immediate case, RBC assigned only its rights and the assignment did not increase the burden or adversely affect FR's position. RBC

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assigned to Barbican the right to collect a debt and realize on the security. Those rights were not personal in nature. The remaining issue was the meaning of the assignment provision in the loan agreement, but this provision broadened and did not limit RBC's rights to assign.

Given the broad language of the assignment provision about the disclosure of information, it was doubtful that the bank improperly disclosed confidential information to Barbican. However, it was not necessary to come to any final determination on this point, and for the purposes of the appeal it could be assumed that Spence J. correctly held that at least some of the information was improperly disclosed by RBC to Barbican.

Disclosure of confidential information is actionable if it results in detriment or damage to the confider or wrongful gain to the confidant. Contrary to the argument of RBC and Barbican, detriment will include a lost opportunity. A lost opportunity analysis can be used to determine whether the misuse of confidential information has caused detriment to the person whose information was improperly used. The quantification of that loss may have to take into account contingencies and variables personal to the plaintiff and will often prove difficult; nevertheless, the plaintiff is entitled to compensation for the lost opportunity.

Spence J. rejected FR's arguments about detriment or damage. However, in his reasons for judgment he went on find that FR had suffered detriment in the form of a lost opportunity. This lost opportunity analysis was theoretically sound but it was not available in this case. First, it was never pleaded or otherwise raised by FR at any stage of the lengthy proceedings. Second, there was no evidence that the disclosure of confidential information by RBC to Barbican caused FR to lose the opportunity described by Spence J. It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings. By stepping outside of the pleadings and the case as developed by the parties to find liability, Spence J. denied RBC and Barbican the right to know the case they had to meet and the right to a fair opportunity

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to meet that case. Further, a theory of liability that emerges for the first time in the reasons for judgment is never tested in the crucible of the adversarial process. The error of finding liability on a theory never pleaded and with respect to which the battle was never joined at trial required the reversal of the trial judgment. Further, the lost opportunity analysis could not succeed on the evidence. Spence J. erred in holding that the misuse of the confidential information caused detriment. It followed that the order declaring the payment obligations to be unenforceable must be set aside. The appeal should be allowed. The trial judgment should be set aside and in its place there should be a judgment dismissing all claims against RBC and Barbican. The counterclaim remained outstanding.

Cases referred to

460635 Ontario Limited v. 1002953 Ontario Inc., [1999] O.J. No. 4071 (C.A.); Bank of Montreal v. Wilder, [1986] 2 S.C.R. 551, 8 B.C.L.R. (2d) 282, 32 D.L.R. (4th) 9, 70 N.R. 341, [1987] 1 W.W.R. 289, 37 B.L.R. 290, affg (1983), 47 B.C.L.R. 9, 149 D.L.R. (3d) 193 (C.A.); Cadbury Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142, 59 B.C.L.R. (3d) 1, 167 D.L.R. (4th) 577, 235 N.R. 30, [1999] 5 W.W.R. 751, 42 B.L.R. (2d) 159, 83 C.P.R. (3d) 289; Canadian Imperial Bank of Commerce v. Sayani (1993), 83 B.C.L.R. (2d) 167, [1994] 2 W.W.R. 260, 11 B.L.R. (2d) 28 (C.A.) [Leave to appeal to S.C.C. refused [1994] 1 S.C.R. vi, 11 B.L.R. (2d) 217n, 171 N.R. 244n]; Domowicz v. Orsa Investments Ltd. (1993), 15 O.R. (3d) 661 (Gen. Div.); Eastwalsh Homes Ltd. v. Anatal Developments Ltd. (1993), 12 O.R. (3d) 675, 100 D.L.R. (4th) 469, 30 R.P.R. (2d) 276 (C.A.) [Leave to appeal to S.C.C. refused [1993] 3 S.C.R. vi; ICAM Technologies Corp. v. EBCO Industries Ltd. (1993), 85 B.C.L.R. (2d) 318, [1994] 3 W.W.R. 419, 11 B.L.R. (2d) 205, 52 C.P.R. (3d) 61 (C.A.); International Corona Resources Ltd. v. Lac Minerals Ltd., [1989] 2 S.C.R. 574, 69 O.R. (2d) 287n, 36 O.A.C. 57, 61 D.L.R. (4th) 14, 101 N.R. 239, 44 B.L.R. 1, 26 C.P.R. (3d) 97, 35 E.T.R. 1, 6 R.P.R. (2d) 1; Montgomery v. Ryan (1908), 16 O.L.R. 75, 11 O.W.R. 279 (C.A.); Ticketnet Corp. v. Air Canada (1997), 154 D.L.R. (4th) 271 (Ont. C.A.) [Leave to

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appeal to S.C.C. refused (1998), 230 N.R. 400n, [1998] S.C.C.A. No. 4]; Tolhurst v. Associated Portland Cement Mfrs. (1900) Ltd., [1902] 2 K.B. 660, 71 L.J.K.B. 949, 87 L.T. 465, 51 W.R. 81 (C.A.), affg [1903] A.C. 414, [1900-3] All E.R. Rep. 386, 72 L.J.K.B. 834, 89 L.T. 196, 52 W.R. 143, 19 T.L.R. 677 (H.L.); Tournier v. National Provincial & Union Bank of England, [1924] 1 K.B. 461, [1923] All E.R. Rep. 550, 93 L.J.K.B. 449, 130 L.T. 682, 40 T.L.R. 214, 68 Sol. Jo. 441 , 29 Com. Cas. 129 (C.A.); Tru-Wall Group Ltd. v. Stadium Corp. of Ontario Ltd., [1995] O.J. No. 2610 (Gen. Div.)

Authorities referred to

Atiyah, P.S., An Introduction to the Law of Contract, 4th ed. (Oxford: Clarendon Press, 1989)
Baxter, I.F.G., The Law of Banking, 4th ed. (Toronto: Carswell, 1992)
Perell, P., "Breach of Confidence to the Rescue" (2002), 25 Advocates Q. 199
Pitch, H., Damages for Breach of Contract (Toronto: Carswell, 1985)

APPEAL from a judgment of Spence J., [2000] O.J. No. 272 (S.C.J.) in an action for damages for, amongst other things, misuse of confidential information.

Catherine Francis and Tamara Vanmeggelen, for appellant Royal Bank of Canada.
Paul Macdonald and Brett Harrison, for appellant Barbican Properties Inc.
Timothy H. Gilbert, Robert D. Minnes and Jean Claude J. Rioux, for respondents/cross-appellants.

The judgment of the court was delivered by

DOHERTY J.A.: --

I

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Overview

[1] Over a number of years, Mr. Frank Rodaro, an engineer and land developer, purchased 751 acres of land south of Barrie, Ontario. [See Note 1 at end of document] In the early 1980s, the lands were annexed by the City of Barrie. By 1988, Mr. Rodaro was prepared to develop the lands. He put together a potentially profitable proposal calling for development of the property, mostly with residential subdivisions, in phases over several years (the "project"). Two of Mr. Rodaro's lawyers, Saul Shulman and Paul Sullivan, held small interests in the project.

[2] In 1988, the Royal Bank of Canada ("RBC") was active as a lender in the real estate development market. Beginning in 1988, RBC advanced funds towards the development of the project. By the spring of 1992, RBC had advanced some $20 million. Its security included a $50 million debenture over the entire project.

[3] Initially, the development went well. Unfortunately, a recession in 1990 led to the collapse of the real estate market in Ontario. This collapse and other circumstances (e.g. a falling out among the partners) resulted in serious difficulties with the project. By April 1992, Mr. Rodaro was still struggling to complete Phase I. RBC advised Mr. Rodaro that he was in default on the loans. This was followed in June 1992 by notice that RBC would not advance any further funds. In July 1992, RBC assigned its debt and related security to Barbican Properties Inc. ("Barbican"), a development company owned in part by RBC. On September 24, 1992, Barbican demanded payment in full of the outstanding loans by no later than October 9, 1992. Repayment was not made and on that date, Mr. Rodaro commenced this litigation. Barbican issued notices of sale in December 1992 and January 1993. The lands were eventually sold in 1996. Those sales left a shortfall on the debt of about $11.8 million.

[4] Mr. Rodaro advanced many claims against RBC and Barbican. In essence, he alleged that through various improper means RBC and Barbican took the project from Mr. Rodaro and thereby

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deprived him of the potential profit from the project.

[5] RBC defended on the basis that it had acted as a lender only and had advanced funds in accordance with the terms of various loan agreements made with Mr. Rodaro. RBC claimed that by the spring of 1992, those loans were in default and it had lost all confidence in Mr. Rodaro's ability to bring the project to fruition. RBC made a business decision to assign the debt to Barbican.

[6] It was Barbican's position that the assignment was proper and that it had legitimately exercised its rights and took proper steps to realize on its security. Barbican counterclaimed for the $11.8 million shortfall after the sale of the lands.

[7] The evidence at trial lasted 92 days. Near the end of Mr. Rodaro's case, the parties agreed that the quantification of his damages would be dealt with in a later proceeding, described as phase 2 of the trial. It was also agreed that the determination of liability and damages on the counterclaim would be left to phase 2.

[8] The reasons of Spence J. fill some 300 pages (see [2000] O.J. No. 272 (S.C.J.) (QL)). They provide a detailed review of the evidence and comprehensively address the numerous factual and legal issues raised at trial. Those reasons were of great assistance to this court.

[9] Spence J. found against Mr. Rodaro on all issues except one. He found that RBC had improperly given confidential business information, provided to it by Mr. Rodaro, to Barbican, in the course of the negotiations which led to the assignment in July of 1992. This business information had been provided to RBC by Mr. Rodaro in the course of his attempts in late 1991 and early 1992 to secure further financing from RBC. Spence J. held that the disclosure of the information had caused Mr. Rodaro to lose an opportunity to sell his interest in the project at the same time that RBC assigned its debt. Spence J. valued that opportunity at a minimum of $1 million but left the assessment of the actual value of the lost

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opportunity to phase 2. Finally, Spence J. held that if Mr. Rodaro had been given the opportunity to negotiate the sale of his interest in the project with Barbican that sale would have included the elimination of the debt owed to RBC and assigned to Barbican. Accordingly, Spence J. held that the debt and security (including Mr. Rodaro's personal guarantee for $1 million) could not be enforced.

II

Nature of the Appeals

[10] RBC and Barbican appeal, contending that they did not misuse confidential information belonging to Mr. Rodaro. They contend that RBC was entitled to assign its debt to Barbican and that it was also entitled to share the information provided by Mr. Rodaro with Barbican in the course of the negotiations culminating in that assignment. RBC and Barbican further argue that the "lost opportunity" theory of damages developed in the reasons of Spence J. is unsound in law and is unsupported by the pleadings, evidence or argument advanced at trial. They maintain that Mr. Rodaro's theory at trial was that the misuse of the confidential information, in combination with other improper acts, caused Mr. Rodaro to lose the project and the profits flowing from the development of the project. RBC and Barbican submit that Spence J. properly rejected this argument but erred in going on to find a causal link between the disclosure of information and damages suffered by Mr. Rodaro on a theory that had no legal or factual basis.

[11] Barbican also submits that the trial judge improperly declared the debt and security held by Barbican unenforceable against Mr. Rodaro. Barbican contends that in so holding, the trial judge effectively dismissed the counterclaim despite the agreement between the parties that both liability and damages on the counterclaim would be determined in phase 2 of the trial.

[12] Mr. Rodaro cross-appeals. In the cross-appeal, he renews most of the arguments unsuccessfully advanced on his behalf at trial. He claims that the trial judge erred in failing to find

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that RBC and Mr. Rodaro entered into an oral "umbrella" agreement in August 1988, whereby RBC agreed to provide ongoing, long-term funding for the entire project. Mr. Rodaro submits that the bank repeatedly breached the terms of that "umbrella" agreement in 1990, 1991 and 1992.

[13] Mr. Rodaro further contends that the trial judge erred in finding that the relationship between RBC and Mr. Rodaro was simply that of borrower and lender. He argues that the evidence demonstrates a special relationship such as to make RBC a fiduciary. Mr. Rodaro submits that the trial judge should have found that RBC breached its fiduciary obligations repeatedly, culminating in the spring of 1992 when, in combination with Barbican, it effectively took Mr. Rodaro's project for its own use.

[14] Mr. Rodaro also contends that the trial judge erred in finding that officials of RBC did not make negligent misrepresentations concerning the availability of additional financing by RBC in 1991 and 1992. Mr. Rodaro maintains that those misrepresentations caused him to desist from seeking alternate financing or other equity partners until it was too late to save the project.

[15] Mr. Rodaro also argues that the trial judge erred in dismissing the conspiracy claim against RBC and Mr. Rodaro.

III

The Cross-Appeal

[16] It is convenient to address the cross-appeal first. Most of the arguments made in support of the cross-appeal are the same arguments that were advanced at trial. In the main, those arguments failed because of the factual findings made by Spence J. Those findings must be accepted in this court unless it can show that they are unreasonable, based on a material misapprehension of the evidence, or tainted by a failure to consider material, relevant evidence.

[17] None of the factual findings that are integral to Spence

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J.'s rejection of the various claims can be set aside by this court. They are firmly rooted in the evidence. While I do not propose to deal separately with each of the fact-bound arguments advanced by counsel, I will examine counsel's argument that the trial judge erred in failing to find that RBC and Mr. Rodaro entered into an oral "umbrella" agreement in August 1988, whereby RBC committed to fund the entire project. I will consider this submission in some detail, first because it was central to the case advanced by Mr. Rodaro at trial, and second, because it provides an excellent example of how Spence J. approached and determined the many arguments made before him.

[18] By late August 1988, RBC had provided some funding for the project. It was anxious to provide additional funding on appropriate terms. Mr. Rodaro and his advisers met with bank officials on August 23, 1988. Mr. Rodaro claimed that the "umbrella" agreement emerged from this meeting.

[19] Spence J. thoroughly reviewed the evidence of the three witnesses who were among those at the August 23 meeting. He rejected Mr. Rodaro's evidence that RBC committed to fund the needs of the entire project as those needs developed over time, even if there was a downturn in the economy or the real estate market. Spence J. accepted the evidence of Mr. Peter Conrod, the RBC account manager who attended the meeting, and of Mr. Shulman, Mr. Rodaro's lawyer at the time, [See Note 2 at end of doucment] that there was no commitment by RBC to finance the project put forward at the meeting. Rather, RBC merely extended an invitation to Mr. Rodaro to create a long-term relationship which would permit Mr. Rodaro to make specific submissions for loans to finance the project.

[20] After reviewing the evidence of the participants in the meeting, Spence J. went on to consider the evidence of the events following that meeting to determine whether any of those events suggested that the "umbrella" agreement relied on by Mr. Rodaro in fact existed. Spence J. reviewed these events in detail, including the placing of a $50 million debenture on the property by RBC in the summer of 1989. He ultimately concluded that the events following the meeting were inconsistent with

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Mr. Rodaro's claim that he and RBC had arrived at an agreement to fund the entire project at the August meeting. Spence J. placed considerable weight on Mr. Rodaro's failure to raise the existence of the "umbrella" agreement with RBC until very late in his relationship with RBC.

[21] Spence J. next turned to the applicable law. He accepted that parties could enter into a general "umbrella" agreement whereby the nature of their ongoing relationship was established while the detailed terms were left to subsequent discrete agreements: Bank of Montreal v. Wilder (1983), 149 D.L.R. (3d) 193, 47 B.C.L.R. 9 (C.A.), affd on other grounds, [1986] 2 S.C.R. 551, 32 D.L.R. (4th) 9. He held, however, that entirely apart from the evidence of those at the meetings that no such agreement was made, the agreement put forward by Mr. Rodaro was so void of terms (e.g. there was no maturity date agreed upon) that it could not amount to an agreement in law.

[22] After a careful and detailed review of the evidence, the submissions and the applicable legal principles, Spence J., at para. 219, concisely stated his crucial finding of fact:

> [T]he discussions that occurred in late August 1988 involved an invitation by the Bank to Rodaro to establish a banking relationship, and not an offer of financing. None of the events and matters that occurred subsequent to the communications of the fall of 1988 had the effect of creating an umbrella agreement for the financing of the Project.

[23] The reasons of Spence J. demonstrate that he appreciated the argument advanced on behalf of Mr. Rodaro, understood the legal principles relied on in support of that argument, reviewed and understood the relevant evidence, made the necessary credibility assessments and made the necessary findings of fact. Those findings were open to him on the evidence and doomed the appellant's claim based on the existence of an "umbrella" agreement to fund the entire project.

[24] Spence J. approached the other submissions made on

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behalf of Mr. Rodaro in the same thorough way that he considered the "umbrella" agreement argument. There is no basis upon which to interfere with the findings of fact that provide the basis for his rejection of those arguments.

[25] I would dismiss the cross-appeal with costs.

IV

The Appeal

[26] The appeal brought by RBC and Barbican focuses on the assignment of Mr. Rodaro's debt to Barbican by RBC. There are essentially three issues raised by the appeal:

-- Could RBC assign the debt to Barbican?

-- Was RBC entitled to share Mr. Rodaro's confidential business information with Barbican in the course of negotiating the assignment?

-- If the disclosure was improper, did the trial judge err in holding that the disclosure caused detriment or damage to Mr. Rodaro in that it caused him to lose the opportunity to negotiate the sale of his interest in the project?

(a) Was the assignment valid?

(i) Factual background

[27] By the summer of 1991, the project was in difficulty primarily, but not exclusively, because of the ongoing recession. RBC had soured on the financing of real estate projects. In August 1991, the status of the loans to Mr. Rodaro was downgraded and the supervision of the account was transferred to the "special loans" division of the RBC. RBC informed Mr. Rodaro that he should look for new equity for his project as RBC was not prepared to fund the project beyond the end of 1991. In October 1991, RBC retained the firm of Drivers Jonas Chartered Surveyors ("Drivers Jonas") to conduct an appraisal of the project. Drivers Jonas delivered its report in

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December 1991. The report indicated that the "as is" value of the project was well in excess of the funds advanced to that date by RBC. Although RBC had concerns about the accuracy of some of the projections in the Drivers Jonas report, it elected to provide some additional financing to Mr. Rodaro and to extend the maturity date on the loans to March 1992.

[28] In the early part of 1992, Mr. Rodaro and RBC had discussions pertaining to further loans and the extending of the deadline for repayment of those loans. Mr. Rodaro wanted to borrow an additional $4.6 million. During these negotiations, Mr. Rodaro gave RBC a detailed business plan relating to the project's long-term development. RBC was prepared to advance additional funds but on very strict terms. One of the terms would effectively allow RBC to take over the project if Mr. Rodaro defaulted on the loan. Mr. Rodaro was not prepared to agree to the terms proposed by RBC.

[29] The loans matured on March 1, 1992 and were in a default position from that time forward. Different bank officials pursued two different options. One group looked at the possibility of further financing for the project, while another looked at the possibility of selling the debt to a third party. In connection with the possibility of further financing, RBC arranged for Drivers Jonas to prepare an update of the earlier appraisal. RBC provided Drivers Jonas with a copy of the business plan Mr. Rodaro had given to RBC earlier in the year to assist Drivers Jonas in preparing its updated appraisal. Drivers Jonas provided that appraisal in early June 1992.

[30] The officials within RBC responsible for pursuing the option of selling the debt contacted Barbican in April 1992. Barbican had a successful track record in acquiring and working out distressed real estate for RBC. In the course of the negotiations with Barbican, RBC provided Barbican with a great deal of information concerning the project and the status of the debt. That information included both appraisals prepared by Drivers Jonas.

[31] By June 1992, RBC had decided that it would not make any additional advances to Mr. Rodaro. It had also decided to sell

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the debt to Barbican. In late June, RBC advised Mr. Rodaro that it would advance no further funds and that it was pursuing an opportunity to sell its loan position to another entity.

[32] RBC agreed to sell its debt and security in the project to Barbican effective July 31, 1992. In September, Barbican demanded repayment. There were two options at that point in time. Barbican could, if it got Mr. Rodaro's co-operation, foreclose and effectively take over the project, or Barbican could, if Mr. Rodaro would not co-operate, move under power of sale. Mr. Rodaro did not co-operate and Barbican moved under power of sale.

(ii) Analysis

[33] Aside from limitations imposed by statute, public policy or the terms of a specific contract, a party to an agreement may assign its rights, but not its obligations under that agreement, to a third party without the consent of the other party to the contract. A party will not, however, be allowed to assign its rights under a contract if that assignment increases the burden on the other party to the agreement, or if the agreement is based on confidences, skills or special personal characteristics such as to implicitly limit the agreement to the original parties: Tolhurst v. Associated Portland Cement Mfrs. (1900) Ltd., [1902] 2 K.B. 660 at p. 668, 71 L.J.K.B. 949 (C.A.), affd [1903] A.C. 414, [1900-3] All E.R. Rep. 386 (H.L.); Tru-Wall Group Ltd. v. Stadium Corp. of Ontario Ltd., [1995] O.J. No. 2610 at paras. 10-14 (Gen. Div.); and P.S. Atiyah, An Introduction to the Law of Contract, 4th ed. (Oxford: Clarendon Press, 1989) at pp. 378-79.

[34] RBC assigned only its rights to collect the debt and realize on the security to Barbican. It assigned no obligations. Indeed, it had no obligations at the time of the assignment as Mr. Rodaro was in default on the loan. The assignment had no adverse effects on the obligations owed by Mr. Rodaro and did not adversely affect his position as he was entitled to raise any defence applicable to RBC against any attempt by Barbican to collect on the debt or realize on the security. RBC assigned to Barbican the right to collect a debt

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and realize on the security. Those rights were in no way personal in nature.

[35] Mr. Rodaro does not suggest that the assignment contravenes any statutory provision or offends public policy. He maintains that RBC specifically agreed to limit its right to assign the debt by the terms of the November 1991 loan agreement between Mr. Rodaro and RBC. The relevant clause provides:

> This agreement shall be binding upon and enure to the benefit of the Bank and the Borrower and their respective successors, and permitted assigns. The Bank may assign or sell participations in or transfer all or any portion of its rights, benefits and obligations under this agreement to any other financial institution ("Assignee"). After any assignment or transfer, the term "Bank" as used in this agreement, shall be deemed to refer to the Assignee to the extent of its interest.
>
> In assigning, transferring or participating all or any part of its rights or obligations as aforesaid, the Bank may reveal to potential Assignees or participants all or any information regarding the Borrower and related corporations as the Bank deems necessary or desirable.
>
> The Borrower shall not assign all or any of its interest in this agreement without the prior written consent of the Bank.

(Emphasis added)

[36] The first sentence of the clause recognizes that the agreement is assignable. The second sentence, which is the crucial sentence, permits RBC to assign "its rights, benefits and obligations" to "any other financial institution". Barbican is not a financial institution. The final sentence in the clause prohibits Mr. Rodaro from assigning any interest in the agreement without RBC's permission.

[37] Like Spence J., I do not read the second sentence in the above clause as limiting RBC's right to assign its benefits

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under the agreement to Barbican without the consent of Mr. Rodaro. In my view, the sentence broadens the assignment rights RBC would otherwise have by permitting RBC to assign "rights, benefits and obligations" to a financial institution without Mr. Rodaro's consent. On a plain reading, the assignment clause expands rather than restricts RBC's assignment rights. RBC's entitlement to assign its benefits under the agreement to Barbican existed apart from any contractual terms and was not in any way limited by the contractual provisions referable to the assignment of interests in the agreement. The assignment was valid.

[38] RBC and Barbican advanced several alternative arguments in support of their claim that the assignment was valid. They also argued that the validity of the assignment was irrelevant to the substantive issues raised in the main action or in the counterclaim. In the light of my conclusion that there were no limitations on RBC's right to assign its benefits under its loan agreement with Mr. Rodaro, I need not address these submissions.

(b) Did RBC improperly disclose Mr. Rodaro's confidential information to Barbican?

[39] In late 1991 and early 1992, Mr. Rodaro and RBC were negotiating a possible extension and/or expansion of the loan facility RBC had made available to Mr. Rodaro. In the course of these negotiations, Mr. Rodaro provided RBC with his business plan for the project. That plan described Mr. Rodaro's development plan, marketing strategy and financial projections. That information was made available to Drivers Jonas by RBC in late 1991 and 1992 and is reflected in the reports prepared by Drivers Jonas. Mr. Rodaro agreed that Drivers Jonas could have access to the business information he had given to RBC. The reports were prepared to assist RBC in deciding whether to make a new loan to Mr. Rodaro.

[40] The Drivers Jonas reports were given to Barbican by RBC when Barbican was considering taking an assignment of Mr. Rodaro's debt. Mr. Rodaro was not asked if the reports could be supplied to Barbican. By virtue of receipt of the Drivers Jonas

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reports Barbican became privy to the business plan that Mr. Rodaro had provided to RBC.

[41] Spence J. found that the business plan provided to RBC by Mr. Rodaro was confidential information. He said [at para. 837]:

> The Business Plan is the kind of information that is typically and properly considered confidential. [Paul] Dinner [the RBC account manager for the Phase I loans] thought the Business Plan for the Project was confidential information. The Barbican submission admits that the Business Plan was confidential in nature, but claims that it ceased to have that status when the loans ceased to be in good standing. I do not accept this contention. The Business Plan was given to RBC for its consideration whether to provide support for the Project by making further loans. It is not different from providing information to a prospective investor. The information is provided for the purpose indicated. Whether the existing facility was in good standing is not relevant. The Business Plan information was confidential.

[42] Spence J. went on to hold that RBC's disclosure of this confidential information to Barbican was prima facie improper. He next considered whether RBC was entitled to disclose this information in the course of negotiating the assignment of the debt. RBC contended that since Mr. Rodaro was in default on the loans, it was entitled to disclose this information to potential purchasers of the debt. RBC relied on those authorities which hold that a bank can disclose otherwise confidential information of a debtor where necessary to "protect its own interests": Tournier v. National Provincial & Union Bank of England, [1924] 1 K.B. 461, [1923] All E.R. Rep. 550 (C.A.); and Canadian Imperial Bank of Commerce v. Sayani, [1994] 2 W.W.R. 260 at p. 264, 83 B.C.L.R. (2d) 167 (C.A.), leave to appeal refused, [1994] 1 S.C.R. vi.

[43] Spence J. accepted that RBC was entitled to disclose some but not all of the information that it disclosed to Barbican in order to protect its interests. He said [at para.

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912]:

> The distinction between the confidential business information and the confidential account information might be put this way. The confidential business information is provided by the customer and belongs to it, not the Bank. The account information pertains to the dealings between the Bank and the customer, and arises from those dealings. It does not belong to the customer but the implied term in the contract is that it will only be used by the Bank for the protection of its interest in the debt. If the Bank sold the debt when it was in default, as in the present case, and provided only the account information of the kind described above, it would be fair to consider that the Bank was in effect selling the collection right in respect of the debt, which is only one step removed from the Bank taking steps itself to collect directly. In such a case, it would probably be reasonable to imply a consent to the disclosure of that information. But that is not the case here: both confidential business information and account information were disclosed to Barbican via the Drivers Jonas reports.

[44] The distinction drawn by Spence J. between "business information" and "account information" is problematic. All of the information in question related to the fiscal viability of the project and was information any potential assignee of RBC's debt would want. In the context of a proposed assignment, it was very much in the interest of RBC to make full disclosure of all of this information to a potential assignee. Failure to disclose relevant information could leave the bank open to a subsequent action by the assignee.

[45] The distinction drawn by Spence J. also seems inconsistent with his finding that RBC had an unqualified right to assign its benefits under its agreement with Mr. Rodaro. If RBC could not disclose information relevant to the project to potential assignees without Mr. Rodaro's permission, then its assignment rights were far from unqualified. It is at least arguable that RBC's unqualified right to assign its benefits under the agreement with Mr. Rodaro implied the right to make such disclosures as are essential to the exercise of that

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right: Montgomery v. Ryan (1908), 16 O.L.R. 75, 11 O.W.R. 279 (C.A.); I.F.G. Baxter, The Law of Banking, 4th ed. (Toronto: Carswell, 1992) at p. 57.

[46] In addition, the assignment clause set out above in para. 35 authorized RBC to disclose to a "potential assignee" all or any information regarding the borrower and related corporations as the bank deemed necessary. Spence J. made no direct reference to this clause when considering whether the bank had improperly disclosed confidential information to Barbican. Again, it is at least arguable that under the terms of this agreement, Mr. Rodaro had agreed that the bank could disclose all information it had about him and the project if it deemed that disclosure necessary in the context of assigning its benefits under the agreement to a third party. Given the broad language of this provision, it may well be that the onus fell on Mr. Rodaro to seek the bank's agreement not to disclose any information which would otherwise be disclosable under this provision.

[47] Because of the conclusion I have reached with respect to the question of whether any detriment was caused to Mr. Rodaro even if the bank improperly disclosed confidential information to Barbican, I need not come to any final determination of whether the bank acted improperly in disclosing all of the information it had referable to the project to Barbican. For the purpose of determining whether the disclosure caused any detriment to Mr. Rodaro, I will assume that Spence J. correctly held that at least some of the information was improperly disclosed to Barbican by RBC.

(c) Did the disclosure cause detriment to Mr. Rodaro?

[48] Disclosure of confidential information is actionable if it results in detriment or damage to the confider or wrongful gain to the confidant: International Corona Resources Ltd. v. LAC Minerals Ltd., [1989] 2 S.C.R. 574 at pp. 638-39, 61 D.L.R. (4th) 14, per La Forest J.; and ICAM Technologies Corp. v. EBCO Industries Ltd. (1993), 52 C.P.R. (3d) 61 at p. 63, [1994] 3 W.W.R. 419 (B.C.C.A.), leave to appeal to S.C.C. abandoned, [1994] S.C.C.A. No. 23 (QL); P. Perell, "Breach of

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Confidence to the Rescue" (2002), 25 Advocates Q. 199 at p. 205.

[49] Having concluded that RBC and Barbican had misused Mr. Rodaro's confidential business information in coming to their agreement to assign Mr. Rodaro's debt to Barbican, the trial judge turned to the question of whether that misuse had caused any detriment to Mr. Rodaro. Mr. Rodaro made two arguments at trial. First, he argued that through the misuse of the confidential information, RBC and Barbican effectively took over the project which properly belonged to him. The trial judge rejected this argument, fundamentally because the assignment of the debt by RBC to Barbican did not deprive Mr. Rodaro of anything. On the trial judge's findings, it left him in exactly the same position, that is, in default on the debt and subject to the remedies available to the lender. It made no difference whether RBC or Barbican held the debt and security following default. The relevant passages from the trial judge's reasons are set out below [at paras. 1020-21, 1030-31]:

> The constituent elements in the argument are (i) the defendants took the property and (ii) the taking was wrongful. The conclusion reached in this decision is that there was wrongful conduct -- specifically, misuse of confidential information -- and that the conduct did cause a loss or deprivation to the plaintiffs. But it is going too far to say that the loss or deprivation was of the Project property itself. To reach that conclusion, it would be necessary to ignore the rights that the Bank held under its security, which after March 1, 1992 was enforceable. It would also be necessary to ignore the fact that what the Bank's transaction with Barbican was designed to do was not to appropriate and sell the property, but simply to sell the debt and the security, which the Bank had a right to do. Both of these considerations must be taken into account in determining what it was that the actions of the Bank deprived the plaintiffs of.
>
> Equally, it is important that the Bank proposed not to realize on the security, but to sell the debt and security. From the evidence, it is clear that the Bank wanted to get

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the Rodaro loan off its books. The debt was in default. The transaction with Barbican would result in RBC transferring the debt to Barbican and obtaining instead a new debt from a new borrower, Barbican. So the Bank wanted to sell the debt rather than take realization proceedings, and it did so. This is important to the view about damages that is set out below.

. . . . .

The key problem with the plaintiffs' hypothesis is that RBC could not, by the assignment to Barbican, obtain assurance of an equity interest in the Project.

The assignment to Barbican was of the debt and the security, not the property itself. Consequently, for any equity in the property to be acquired, there would have to be a foreclosure, which (it seems to be common ground) would require the consent or non-opposition of Rodaro. (If the matter were to be required to go to power of sale there was no suggestion that RBC would be in a better position if the security was being realized upon by Barbican than if it was being realized upon by the Bank itself). On this basis the assignment to Barbican could not and did not enhance RBC's prospects of obtaining an equity interest in the property. It still depended on what Mr. Rodaro would decide to do in respect of the rights he held. The plaintiffs do not overcome this objection to their hypothesis and it is not apparent how they could.

[50] Mr. Rodaro's second argument in support of his claim that his damages equalled the potential profits from the project proceeded along the following lines. RBC would not have been able to assign its debt to Barbican without divulging the confidential information. In the absence of an assignment to Barbican, RBC would have continued to fund the project and with that funding, Mr. Rodaro could have completed the project.

[51] The trial judge examined the evidence relating to the Bank's decision in the spring of 1992 not to fund the project any further in some detail. He concluded that there was "no basis" upon which to find that RBC would have funded the

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project if it had not been able to assign the debt to Barbican. He said [at para. 1097]:

> However, the sale of the debt was a different undertaking from the decision not to fund, and in principle, the decision not to fund could have been followed by a decision to accept the default and realize on the security rather than selling the debt. Accordingly, there is no basis to assert a legal presumption that, contrary to the fact of the decision of Mr. Grant and Mr. McDermid, RBC would have funded the project if it could not have sold the debt to Barbican in the manner it did. . . .

[52] Spence J.'s findings that RBC and Barbican did not "take" the project and that there was no connection between RBC's decision not to continue funding and the misuse of confidential information in the course of the assignment of the debt to Barbican are grounded in the evidence and cannot be reversed in this court.

[53] The trial judge went on, however, to find that Mr. Rodaro had suffered detriment in the form of a lost opportunity. This concept is best explained in the trial judge's own words [at paras. 1098, 1100-01, 1103, 1105-06]:

> This does not mean the plaintiffs suffered no loss as a result of the improper use of their confidential information. The plaintiffs suffered the deprivation of any opportunity to benefit from a sale of the debt and security carried out in a manner which used their information properly, i.e. with their permission. That opportunity may have had value. It must be taken that RBC considered it to be in its own best interest, once it decided not to fund, to sell the debt on terms it was prepared to accept to a satisfactory developer and that it wished to use the plaintiffs' information to do so. The plaintiffs, it is fair to assume, might well not want such a sale to happen. However, the alternative facing them was that the lender would resort to a realization procedure. On this basis, what the plaintiffs lost was the opportunity to choose between receiving the best possible sale terms they could have obtained for their interest as part of the package along

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with the sale of the debt and security to a developer acceptable to RBC, or alternatively, accepting the consequences of realization procedures.

. . . . .

If RBC had negotiated with the plaintiffs to develop an offer for the sale of the Project as a package consisting of (i) the debt held by RBC and (ii) the remaining equity interest of the plaintiffs, to an acceptable developer with loan terms like those RBC gave to Barbican at a price to be negotiated, and if a package with those elements had been exposed to the market, there might have been a different outcome.

By proceeding as it did to sell the debt to Barbican, using the confidential information of the plaintiffs, RBC deprived the plaintiffs of the opportunity to receive the benefit of any offer that might have been made in response to a package offer made on the basis outlined above and the opportunity to decide on their course of action in the light of the outcome of the offer process.

. . . . .

It is reasonable to suppose that if the matter had proceeded as hypothesized above, Barbican would have offered the $1 million amount contemplated in its discussions with RBC. RBC and Barbican had concluded such an offer would be satisfactory. Perhaps one or more other developers would have offered more. On the evidence, the purpose of such an offer by Barbican was to take over the equity position of the plaintiffs. It should be inferred that the intention was, in effect, to bring the equity and debt together in the new owner and to remove the involvement of the plaintiffs in the Project. On this basis, it should be taken that any such offer if accepted would have led to the elimination (through merger of the debt and the equity or otherwise) of the outstanding debt and guarantee owing by the plaintiffs to RBC. Thus the plaintiffs would have been left with $1 million (or a larger sum from another developer) and would no

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longer have had any obligations in respect of the debt and the guarantee.

. . . . .

Accepting foreclosure could not have been as beneficial to the plaintiffs as accepting an offer as described above. Therefore, the reasonable course for the plaintiffs would have been to accept the offer and not face realization proceedings. This would be so unless the plaintiffs expected that power of sale proceedings would provide a better result. However, in power of sale proceedings, RBC would have been entitled to receive repayment of its debt immediately whereas the package offer on the terms of the Barbican deal would have offered instead non-recourse financing to the purchaser. For this reason, it should be taken that a power of sale proceeding would not likely have been as beneficial to the plaintiffs as the package offer, and the plaintiffs would reasonably have understood this. On this basis, it would be reasonable to conclude that the plaintiffs would have accepted the package and would not have required power of sale proceedings.

The view expressed above takes into account that the decision the plaintiffs actually took was to resist foreclosure with the result that power of sale proceedings were initiated. The plaintiffs should not be prejudiced by that decision. In the circumstances, they were confronted with a transaction about which they had not been consulted and which lacked their consent and, whether or not they had reason at the time to know it, was flawed by the improper use of confidential information. If matters had instead proceeded in accordance with the package offer scenario developed above, the plaintiffs would have had good reason to consider that the matter was proceeding in accordance with all legal requirements and therefore to recognize and assess their options as set out above.

(Emphasis added)

[54] RBC and Barbican submit that Spence J.'s "lost

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opportunity" approach to establish that Mr. Rodaro suffered damages as a result of the disclosure of the confidential information is "legally flawed". They argue that damages for lost opportunity are available only if a plaintiff is deprived of a "legal entitlement or property interest".

[55] The authorities relied on by RBC and Barbican do not support the proposition advanced by them. If as a result of a defendant's breach of contract, or negligence, a plaintiff loses a reasonable probability of realizing some economic benefit, the plaintiff is entitled to be compensated for that lost opportunity. The quantification of that loss may have to take into account contingencies and variables personal to the plaintiff and will often prove difficult. Nevertheless, the plaintiff is entitled to compensation: Eastwalsh Homes Ltd. v. Anatal Developments Ltd. (1993), 12 O.R. (3d) 675 at pp. 689-90, 100 D.L.R. (4th) 469 (C.A.), leave to appeal refused, [1993] 3 S.C.R. vi; Domowicz v. Orsa Investments Ltd. (1993), 15 O.R. (3d) 661 at p. 678 (Gen. Div.); Ticketnet Corp. v. Air Canada (1997), 154 D.L.R. (4th) 271 (Ont. C.A.), leave to appeal refused, [1998] S.C.C.A. No. 4 (QL); and H. Pitch, Damages for Breach of Contract, (Toronto: Carswell, 1985) at pp. 29-46.

[56] Mr. Rodaro did not establish a breach of contract or negligence. He did, however, establish an improper disclosure by RBC to Barbican of his confidential information. If that disclosure resulted in detriment to Mr. Rodaro, he was entitled to be compensated. In some cases, the improper disclosure of confidential information will cause the loss of valuable economic opportunities. The loss of potential profits is perhaps the best example of an opportunity lost through the misuse of confidential information. In my view, a lost opportunity analysis can be used to determine whether the misuse of confidential information has caused detriment to the person whose information was improperly disclosed. Resort to a lost opportunity analysis to determine detriment and eventually to quantify that detriment is consistent with the law's command that confidences be respected.

[57] The lost opportunity approach was used to determine

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damages in Cadbury Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577, a case involving misuse of confidential information. Binnie J., after stressing at pp. 158-60 S.C.R. that courts must fashion remedies for breach of confidence and other misuses of confidential information that are sensitive to the circumstances of each case, opted for a lost opportunity quantification of the plaintiff's loss. He said at pp. 181-82 S.C.R.:

> The concept of the "lost opportunity" is particularly apt here. . . . The respondents' "lost opportunity" was that the appellants, using these confidential production techniques, entered the marketplace with Caesar Cocktail a year earlier than would otherwise have been the case. The respondents were not entitled to be free of competition from the appellants. Apart from the clam juice limitation, they were only entitled to be free of the appellant's competition which used the respondents' confidential information. . . . The respondents' entitlement is to no more than restoration of the full benefit of this lost but time-limited opportunity.

[58] The lost opportunity analysis adopted by Spence J. was theoretically sound. I am satisfied, however, that it could not be applied in this case. First, it was never pleaded or otherwise raised by Mr. Rodaro at any stage of the lengthy proceedings. Second, there was no evidence that the disclosure of the confidential information by RBC to Barbican caused Mr. Rodaro to lose the opportunity described by Spence J. To the contrary, to the extent that the evidence speaks to the loss of the opportunity at all, it demonstrates that Mr. Rodaro "lost" the opportunity to negotiate with Barbican for reasons that had nothing to do with the disclosure of the information to Barbican.

[59] Mr. Rodaro did not plead that RBC's improper disclosure to Barbican deprived him of the opportunity to negotiate a "package deal" involving the sale of the debt and his equity in the project. At no time during the months of trial or the course of lengthy argument did Mr. Rodaro suggest that the improper disclosure had caused him to lose the opportunity described by Spence J. That theory appeared for the first time

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in the reasons of Spence J.

[60] It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings. As Labrosse J.A. said in 460635 Ontario Limited v. 1002953 Ontario Inc., [1999] O.J. No. 4071 at para. 9 (C.A.) (QL):

> . . . The parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings. A finding of liability and resulting damages against the defendant on a basis that was not pleaded in the statement of claim cannot stand. It deprives the defendant of the opportunity to address that issue in the evidence at trial. . . .

[61] By stepping outside of the pleadings and the case as developed by the parties to find liability, Spence J. denied RBC and Barbican the right to know the case they had to meet and the right to a fair opportunity to meet that case. The injection of a novel theory of liability into the case via the reasons for judgment was fundamentally unfair to RBC and Barbican.

[62] In addition to fairness concerns which standing alone would warrant appellate intervention, the introduction of a new theory of liability in the reasons for judgment also raises concerns about the reliability of that theory. We rely on the adversarial process to get at the truth. That process assumes that the truth best emerges after a full and vigorous competition amongst the various opposing parties. A theory of liability that emerges for the first time in the reasons for judgment is never tested in the crucible of the adversarial process. We simply do not know how Spence J.'s lost opportunity theory would have held up had it been subject to the rigours of the adversarial process. We do know, however, that all arguments that were in fact advanced by Mr. Rodaro and were therefore subject to the adversarial process were found wanting by Spence J.

[63] Spence J. erred in finding liability on a theory never pleaded and with respect to which battle was never joined at

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trial. This error alone requires reversal. However, I am also satisfied that the lost opportunity analysis could not succeed on this evidence.

[64] Given that Mr. Rodaro did not plead or argue the lost opportunity approach adopted by Spence J., it is not surprising that he led no evidence in support of that approach. Counsel for Mr. Rodaro does not suggest that there was any direct evidence to support the lost opportunity analysis. He submits, however, that Spence J. was entitled to draw inferences from the evidence as to what likely would have happened had there not been improper disclosure of the confidential information: Cadbury Schweppes, supra, at p. 186 S.C.R.

[65] I accept that Spence J. was entitled to draw inferences from the evidence. I also accept that in doing so, he could consider what a reasonable person in the position of Mr. Rodaro would have done but for the improper disclosure of the confidential information. However, where, as here, the lost opportunity identified by Spence J. was never identified by Mr. Rodaro at any stage in the proceedings, and was not touched on at all in the evidence, I think Spence J.'s findings that the opportunity existed and was lost as a result of the improper disclosure of confidential information amount to speculation and not inference.

[66] Had Mr. Rodaro chosen to advance the lost opportunity theory eventually devised by Spence J., he would have had to lead evidence to show that the opportunity existed and that he would have taken advantage of that opportunity. The first inquiry is objective, but the second is directed to what Mr. Rodaro would have done. Had Mr. Rodaro led such evidence, Spence J. would have had to evaluate it and determine the likelihood of Mr. Rodaro taking the opportunity to negotiate had RBC not improperly disclosed the confidential information. The likelihood of Mr. Rodaro taking that opportunity would have been reflected eventually in the quantification of the damages. However, if on the evidence there was no chance that Mr. Rodaro would have pursued the negotiation, then it cannot be said that the disclosure of the confidential information caused any detriment to Mr. Rodaro. Because lost opportunity was no part

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of Mr. Rodaro's case, there is no evidence as to what Mr. Rodaro would have done but for the improper disclosure of the information and there is no evidence that the disclosure in any way caused him not to pursue the opportunity to negotiate with Barbican.

[67] Not only does the record offer no support for the claim that Mr. Rodaro would likely have negotiated had the bank presented him with the opportunity described by Spence J., there is strong evidence that he would not have negotiated with RBC or Barbican. After RBC assigned the debt, Barbican was prepared to negotiate with Mr. Rodaro. Barbican wanted to proceed by way of foreclosure and take over the development of the project. It could do so only with Mr. Rodaro's consent and was prepared to pay $1 million to secure that co-operation.

[68] Mr. Rodaro wanted no part of any negotiation with Barbican. Instead, he immediately commenced this litigation seeking $100 million in damages. He also caused the property to be encumbered by a construction lien that was later ordered removed by the court and described as fraudulent. Mr. Rodaro clearly wanted a fight and not a negotiated settlement. He firmly believed that RBC was trying to cheat him out of a project that was worth many millions of dollars. He was not prepared to negotiate his departure from the project.

[69] Spence J. was alive to Mr. Rodaro's reaction to Barbican's attempt to negotiate once Barbican had taken over the debt. Spence J. regarded the situation faced by Mr. Rodaro after the assignment as entirely different from the situation contemplated by his lost opportunity theory. I do not agree. On both scenarios, the bargains proposed were essentially the same. In exchange for stepping aside and allowing someone else to develop the project, Mr. Rodaro's debt to RBC would be eliminated and he would have received an additional cash payment. Mr. Rodaro had no knowledge at the time that Barbican had been given confidential information when he summarily rejected Barbican's attempts to negotiate with him. I see no connection between Barbican's possession of that information and the perceived bargaining positions of Mr. Rodaro and Barbican either before or after the assignment. All Mr. Rodaro

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had to offer to Barbican was his consent to foreclosure so Barbican could take over the project. There is no evidence that the potential value of that consent to Barbican was somehow diminished or otherwise affected by RBC's disclosure of Mr. Rodaro's business information to Barbican.

[70] Mr. Rodaro's refusal to bargain with Barbican after the assignment was made is cogent evidence that he never would have entered into the kind of bargaining contemplated by Spence J. Even if it could be said that a reasonable person would have entered into such bargaining, that opportunity had no value to Mr. Rodaro since his actions demonstrate that he would not have taken advantage of it.

[71] For the reasons set out above, Spence J. erred in holding that the misuse of the confidential information caused detriment to Mr. Rodaro in the form of a lost opportunity. As this was the only basis upon which Mr. Rodaro succeeded at trial, it follows that the appeal should be allowed and Mr. Rodaro's action against RBC and Barbican dismissed in its entirety. It follows, therefore, that the order of Spence J., declaring the payment obligations under the debt and guarantee to be unenforceable against the respondents, also must be set aside.

[72] I would allow the appeal, set aside the judgment of Spence J. and in its place render judgment dismissing all claims against RBC and Barbican. Barbican's counterclaim remains outstanding.

[73] RBC and Barbican are entitled to their costs at trial and on appeal.

Order accordingly.

Notes

Note 1: Mr. Rodaro acted through various corporate entities in the course of the transactions at issue in this action. For convenience, we will refer to Mr. Rodaro personally rather than to the various corporate actors, some of whom are parties to

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this action.

Note 2: Although Mr. Shulman was Mr. Rodaro's lawyer at the time of the meeting, by the time he testified at trial his firm had been sued by Mr. Rodaro.

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were the effect, then any allegation of bad faith that was challenged by a party would have the effect of constituting an implied waiver of that party's privilege. That would not be a sensible or fair result...."[263] Responding to an allegation of bad faith with a defence of good faith should result in waiver of the privilege only if the privilege holder relies on legal advice to support its good faith argument,[264] as the RCMP did in *R. v. Campbell*.[265]

§7.127 *Livent Inc. v. Drabinsky*[266] demonstrates the line between merely mentioning that one received legal advice and relying on it. In this case, the third party revealed in an interview that she contacted her lawyer when she heard about potential litigation. The lawyer who interviewed her cautioned that she should not disclose what she told her lawyer in order to preserve the privilege. The Court found that had the third party stopped here, there would have been no waiver of the privilege. The Court stated that privilege is not waived by disclosing that a solicitor's advice was obtained, but rather it is waived when the evidence shows that the client by her words or actions held a view or followed a course because of advice given to her by her counsel and that she relied on this act for resolution of an issue at trial.[267]

§7.128 The third party proceeded and answered that she had told her lawyer what was going on at Livent. She explained that her lawyer's advice to her was that she should draft a letter to Drabinsky and she did so.[268] The Court decided that the third party here had either expressly waived the privilege by proceeding on after the lawyer's caution or at the very least had impliedly waived such privilege. The Court found that in the interests of fairness and consistency the privilege was waived.[269]

§7.129 Thus, where a party pleads reliance either on: (1) the legal advice itself; or (2) the fact of having obtained legal advice as the basis for explaining why she pursued or did not pursue a certain course of conduct, the privilege will be waived.[270]

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[263] *Angus Partnership Inc. v. Salvation Army (Canada)*, [2011] A.J. No. 915 at para. 15, 340 D.L.R. (4th) 522 (Alta. Q.B.). See also *Husky Oil Operation Ltd. v. MacKimmie Matthews*, [1999] A.J. No. 604 at paras. 4-5, 241 A.R. 115 (Alta. Q.B.); *1318910 Ontario Ltd. v. Montgomery*, [2010] O.J. No. 5857, 2010 ONSC 6476 (Ont. S.C.J.); *1318910 Ontario Ltd. v. Montgomery*, [2010] O.J. No. 5858 (Ont. S.C.J.); *Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm, LP*, [2011] A.J. No. 574 at para. 61, 48 Alta. L.R. (5th) 372 (Alta. Q.B.).

[264] *Sovereign General Insurance Co. v. Tanor Industries*, [2002] A.J. No. 107, 98 Alta. L.R. (3d) 88 (Alta. Q.B.); *Davies v. American Home Assurance Co.*, [2002] O.J. No. 2696, 60 O.R. (3d) 512 (Ont. Div. Ct.).

[265] [1999] S.C.J. No. 16, [1999] 1 S.C.R. 565 (S.C.C.).

[266] *Livent Inc. v. Drabinsky*, [2003] O.J. No. 1618, 33 C.P.C. (5th) 246 (Ont. S.C.J.).

[267] *Ibid.*, at para. 11.

[268] *Ibid.*, at para. 1.

[269] *Ibid.*, at para. 12.

[270] See *e.g.*, *Teltscher v. PTC Accounting and Finance*, [2006] O.J. No. 3415, 150 A.C.W.S. (3d) 718 (Ont. S.C.J.) (client explaining that he did not co-operate with an Institute of Chartered Accountants

§7.130 For example, in *Payne v. Windsor (City)*,[271] the applicant swore an affidavit in which he referred to a legal opinion that he received. The opinion was regarding the legality of certain action by the City of Windsor that he was challenging on the application. The Court found that the applicant was relying on the opinion provided by his counsel as being the very grounds for his action and therefore the City was entitled to the production of the opinion and any supporting material.[272]

6.4 Implied Waiver by Placing State of Mind at Issue

§7.131 When a party places its state of mind in issue[273] and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice.[274] To displace the privilege there must be an affirmative allegation that puts the party's state of mind in issue by the privilege-holder.[275] Simply putting state of mind at issue without reliance on legal advice does not suffice for waiver.[276] "State of mind" is the most confusing area of implied waiver jurisprudence.

§7.132 Two of the leading cases on this subject are *Toronto Dominion Bank v. Leigh Instruments Ltd.)*[277] and *Bank Leu AG v. Gaming Lottery Corp.*[278]

§7.133 *Toronto Dominion Bank v. Leigh Instruments Ltd.*[279] concerned the strength and enforceability of a series of "comfort letters" provided to the

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investigation on the advice of counsel and that he knew that his failure to comply would likely result in his expulsion from the institute).

271 *Payne v. Windsor (City)*, [2011] O.J. No. 5425, 2011 ONSC 1606 (Ont. S.C.J.).

272 *Ibid.*, at para. 10.

273 For cases where courts have found that the privilege-holder's state of mind was not put at issue see *Vancouver Hockey Club Ltd. v. National Hockey League*, [1987] B.C.J. No. 1854, 18 B.C.L.R. (2d) 91 (B.C.S.C.); *Pax Management Ltd. v. Canadian Imperial Bank of Commerce*, [1987] B.C.J. No. 1134, 14 B.C.L.R. (2d) 257 (B.C.C.A.) (mere denial of allegations of fraudulent misrepresentation had not put the Bank's state of mind so as to constitute a waiver of the privilege); *Markson v. MBNA Canada Bank*, [2011] O.J. No. 533, 16 C.P.C. (7th) 332 (Ont. S.C.J.) (pleading that cardholders' voluntary actions resulted in criminal rate of interest did not constitute waiver of privilege); *Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm, LP*, [2011] A.J. No. 574 at paras. 52-63, 48 Alta. L.R. (5th) 372 (Alta. Q.B.).

274 *Bank Leu AG v. Gaming Lottery Corp.*, [1999] O.J. No. 3949, 43 C.P.C. (4th) 73 (Ont. S.C.J.) from *Piche v. TD Securities Inc.*, [2012] O.J. No. 1840, 2012 ONSC 2252 (Ont. S.C.J.).

275 Robert Hubbard *et al.*, *The Law of Privilege in Canada*, vol. 2 (Toronto: Thomson Reuters, 2012) at 11- 70.2e.

276 *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, [2011] S.J. No. 326, 374 Sask.R. 301 (Sask. Q.B.).

277 *Toronto Dominion Bank v. Leigh Instruments Ltd.*, [1997] O.J. No. 1177 at para. 1, 32 O.R. (3d) 575 (Ont. Gen. Div.).

278 *Bank Leu AG v. Gaming Lottery Corp.*, [1999] O.J. No. 3949, 43 C.P.C. (4th) 73 (Ont S.C.J.).

279 *Toronto Dominion Bank v. Leigh Instruments Ltd.*, [1997] O.J. No. 1177 at para. 1, 32 O.R. (3d) 575 (Ont. Gen. Div.).

plaintiff TD Bank by the defendant Plessey, in support of a $40.5 million loan extended by the Bank to a Plessey subsidiary, Leigh Instruments Limited.[280] The plaintiff pleaded that it relied on representations from the defendant. The defendants denied these obligations. The Bank placed its corporate state of mind in issue through its pleadings, evidence and opening statements. In the critical portion of the judgment regarding waiver, the Court found that the Bank led evidence both that it consulted the legal department before obtaining the comfort letter, and that it believed the comfort letter to be strong. The Court found that a "significant legal decision" had been rendered during the material time period and,

> ... it would be fundamentally unfair to permit the plaintiff to shield behind a claim of solicitor-client privilege, evidence of the knowledge and advice of the legal department in respect of the strength and enforceability of comfort letters. In the interest of fairness and consistency, any solicitor-client privilege in this respect must be deemed to have been waived.[281]

§7.134 In short, the Court held that since the legal advice formed the Bank's state of mind and the Bank alleged detrimental reliance on the defendant's representations on matters on which legal advice had been received, privilege was deemed waived with respect to such legal advice.[282]

§7.135 In *Bank Leu AG v. Gaming Lottery Corp.*,[283] the bank brought an action against the issuer of unpaid and unissued share certificates used to secure a loan. The issuer brought a third party claim against its solicitors alleging that its solicitors breached the duty to warn with respect to the share program. The solicitors brought a motion for production of documents over which the issuer claimed solicitor-client and litigation privilege. The motion was granted in part. The court decided that privilege protected communications between the issuer and in-house counsel in relation to the share program and that documents obtained or gathered by solicitors or in-house counsel were subject to litigation privilege. The issuer, however, was found to have waived privilege with respect to all documents relating to advice or information provided with respect to the risks of the program, by claiming breach of solicitors' duty to warn of risks. Waiver applied to documents on the issuer's state of mind and documents establishing that the issuer would have proceeded notwithstanding solicitors' advice.[284]

§7.136 Implied waiver will only be found where legal advice is received at the time that the privilege holder's state of mind is at issue. Thus, in *Suhl v. LaRose* there was no evidence indicating that the defendant sought or

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[280] *Ibid.*

[281] *Ibid.*, at para. 1.

[282] *Ibid.*, at para. 52.

[283] *Bank Leu AG v. Gaming Lottery Corp.*, [1999] O.J. No. 3949, 43 C.P.C. (4th) 73 (Ont. S.C.J.).

[284] *Ibid.*

received legal advice from counsel prior to, or concurrent with, his execution of the alleged promissory notes or the payments exchanged as a result of such execution. The judge held that his state of mind *at that time* was not dependent upon legal advice had or received or at least there was no such assertion based upon the evidence presented.[285] The court concluded that the communications were simply in the form of instructions from a client to his solicitor. They were and remained privileged.[286]

§7.137 The opposing party cannot put the privilege-holder's state of mind at issue in order to force a waiver of the other party's privilege. For example, plaintiff cannot force waiver of the opposite party's privilege by alleging bad faith.[287] The privilege will not be waived merely by the defendant responding that it acted in good faith. This would allow "waiver by compulsion" or "waiver by stealth" and generally will not or should not be condoned by courts.

§7.138 In *Pax Management v. CIBC*, the British Columbia Court of Appeal found that state of mind was not put in issue and thus no waiver was found.[288] The plaintiffs alleged fraudulent misrepresentations by the bank's officials. The bank denied making the representations and, in the alternative, pleaded that they were true. On appeal from an order to disclose communications with its solicitors relating to the meeting in which the representations were allegedly made, the bank argued that it had merely placed the truth of the representations in issue, not its belief in their truth. The B.C. Court of Appeal held that by denying the plaintiffs' allegations of fraudulent misrepresentation or by pleading that representations made by the bank's officials were true, the bank had not waived the privilege respecting communications between it and its solicitors expressly or by implication. The Court concluded that the bank had no alternative but to deny the allegations and such denial does not alter in any respect the plaintiffs' position in the litigation.[289]

§7.139 In order for implied waiver to occur, there must be a deliberate injection of the state of mind to elicit an implied waiver.[290] A mere allegation

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285 *Suhl v. LaRose*, [2006] B.C.J. No. 847 at para. 12, 2006 BCSC 585 (B.C.S.C.).

286 *Ibid.*, at para. 14.

287 Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada*, 3d ed. (Markham, ON: LexisNexis Canada, 2009) at § 14.134.

288 *Pax Management Ltd. v. Canadian Imperial Bank of Commerce (CIBC)*, [1987] B.C.J. No. 1134, [1987] 5 W.W.R. 252 (B.C.C.A.).

289 *Ibid.*, at para. 25.

290 *R. v. Creswell*, [2000] B.C.J. No. 2171, 146 B.C.A.C. 7 (B.C.C.A.), *Gower v. Tolko Manitoba Inc.*, [1999] M.J. No. 476, 181 D.L.R. (4th) 353 (Man. Q.B.); *Strong v. General Motors of Canada Ltd.*, [1996] O.J. No. 3592, 23 C.C.E.L. (2d) 207 (Ont. C.J.).

as to a state of affairs on which a party may have received legal advice does not warrant setting aside the privilege.[291]

§7.140 A pleading by a plaintiff that alleged it would not have entered a settlement agreement had it known about certain fraudulent conduct did not give rise to an implied waiver of solicitor-client privilege in communications related to the settlement.[292] On the basis of the statement of claim alone, the defendants were not entitled to examine the plaintiffs with respect to the legal advice received regarding the Release and Settlement Agreement.[293] The Court therefore dismissed the relief sought which included a request for waiver of privilege. The Court stressed that a mere allegation as to a state of affairs on which a party may have received legal advice does not warrant setting aside solicitor-client privilege.[294] This distinguishes this case from *TD Bank* where the Bank had admitted that it had received legal advice on the very issue on which it was suing.

6.5 The Need to Consider all Aspects of the Implied Waiver Test

§7.141 At times courts have not considered each component of the implied waiver requirements. As a result, there has been a tendency to find implied waiver of the privilege hastily. For example, in *Alberta Wheat Pool v. Estrin*,[295] the Court found that the defendant had implicitly waived privilege when he put in issue his intention, the state of his knowledge and the information he had at the time he prepared a letter. The plaintiffs alleged that the defendant Estrin negligently or fraudulently wrote the letter. In his statement of defence, the defendant denied these allegations and made no mention of legal advice. On examination for discovery, the defendant revealed that he had received legal advice before writing the letter but refused to answer any further questions on the grounds of privilege. The Court found that this was sufficient to waive the privilege. There was no consideration of whether the defendant Estrin was relying on that legal advice or intended to do so. For this reason, we believe that *Estrin* and cases like it that find that the mere denial of allegations of bad faith, fraud or negligence is sufficient to waive the privilege are wrongly decided and

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[291] Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada*, 3d ed. (Markham, ON: LexisNexis Canada, 2009) at § 14.131, note 230 citing *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. of Canada*, [2004] B.C.J. No. 2045, 36 B.C.L.R. (4th) 70 (B.C.C.A.); *Bank Leu AG v. Gaming Lottery Corp.*, [1999] O.J. No. 3949 at para. 5, 43 C.P.C. (4th) 73 (Ont. S.C.J.); *Homalco Indian Bank v. British Columbia*, [2002] B.C.J. No. 2303 at paras. 14, 17, 6 B.C.L.R. (4th) 89 (B.C.C.A.).

[292] *Procon Mining and Tunnelling Ltd. v. McNeil*, [2008] B.C.J. No. 2496 at para. 17, 2008 BCSC 1754 (B.C.S.C.).

[293] *Ibid.*, at para. 21.

[294] *Ibid.*, at para. 20.

[295] [1986] A.J. No. 1165, [1987] 2 W.W.R. 532 (Alta. Q.B.).

should not be followed.[296] They do not follow the letter or the spirit of the waiver analysis set out by McLachlin J. in *S. & K. Processors* and developed in subsequent cases. Consequently, they are not sufficiently respectful of the privilege and are too quick to find that it has been waived.

§7.142 The better view is reflected in the British Columbia Court of Appeal's decision in *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.*[297] As in *Estrin*, on examinations for discovery Doman revealed that it had received legal advice on whether a default on a financing agreement had occurred and what its options were. GMAC sought disclosure of the legal advice on the grounds that Doman had waived its privilege. The B.C. Court of Appeal held that the mere allegation of a state of affairs on which Doman might have received legal advice did not warrant setting aside the privilege.[298] Doman had not voluntarily injected the fact that it had received legal advice into the action for its own benefit.[299] As Smith J.A. explained:

> ... it is not enough to constitute a waiver that Doman's pleading puts its state of mind in issue and that its state of mind might have been influenced by legal advice, as the chambers judge concluded. There must be the further element that the state of mind involves Doman's understanding of its legal position in a way that is material to the lawsuit. In other words, it must appear from the pleading that legal advice would be relevant to the particular state of mind put in issue. Otherwise, it cannot be said that Doman has put its knowledge of the law in issue and that enforcing the privilege will deprive GMAC of information necessary to defend against Doman's allegation that it acted reasonably.[300]

Whether or not Doman had received legal advice was not relevant to the question of whether the pleading amounted to a waiver of privilege. Doman may have made its state of mind relevant to the question of postponement of its election to accept GMAC's repudiation, but it had not indicated that its state of mind involved Doman's understanding of its legal position in any way that was material to the action. As a result, it could not be said that Doman put its knowledge of the law in issue and that enforcing the privilege would deprive GMAC of information necessary to defend against Doman's allegation that it acted reasonably.

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296 See *e.g.*, *Apotex Inc. v. Canada (Minister of Health)*, [2003] F.C.J. No. 1921 at para. 39, [2004] 2 F.C.R. 137 (F.C.).

297 *Doman Forest Producers Ltd. v. GMAC Commercial Credit Corp.*, [2004] B.C.J. No. 2045, 245 D.L.R. (4th) 443 (B.C.C.A.). See also *Dexter Estate v. Economical Mutual Insurance Co.*, [2007] N.B.J. No. 133, 314 N.B.R. (2d) 12 (N.B.Q.B.).

298 *Doman Forest Producers Ltd. v. GMAC Commercial Credit Corp.*, [2004] B.C.J. No. 2045 at para. 27, 245 D.L.R. (4th) 443 (B.C.C.A.).

299 *Ibid.*, at para. 26.

300 *Doman Forest Producers Ltd. v. GMAC Commercial Credit Corp.*, [2004] B.C.J. No. 2045, 245 D.L.R. (4th) 443 at para. 28 (B.C.C.A.).

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OF ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC. and 3339611 CANADA INC.

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